Doc
CC 1.12/3:
6/26-7/1

Minneapolis Public Library
and Information Center

AUG 1 2 1992

Government Documents Dept.

Volume 6, No. 26, Pages 7346 to 7842,
December 16 - December 27, 1991

FCC Record

(Cumulative index to Volume 6 included.)

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

Digitized by the Internet Archive
in 2025

https://archive.org/details/bwb_S0-DSE-572_6

FEDERAL COMMUNICATIONS COMMISSION

ALFRED C. SIKES, CHAIRMAN

James H. Quello
Sherrie P. Marshall
Andrew C. Barrett
Ervin S. Duggan

Minneapolis Public Library
and Information Center
MAR 30 1992
Government Documents Dept.
Depository 302

The contents of this document are subject to correction by means of an erratum appearing at a future date in the FCC Record. Users should notify the Secretary of errors so that an erratum can be inserted in a later publication.

The appropriate citation for documents printed in the FCC Record should include the volume number, page number, and year. See 47 C.F.R. §1.14. Earlier Commission documents may continue to be cited to the FCC Reports.

Citation Form: 6 FCC Rcd 1 (1991)

United States Government Printing Office • Washington, D.C.

For Sale by the Superintendent of Documents, U.S. Government Printing Office on a subscription basis

Case Name	**Page**
Open Network Architecture Plans	7355
Open Network Architecture Plans	7646
Pacific Bell	7467
Pacific Telecom, Inc.	7384
Person, Carl E., Esq.	7477
Procom Towers	7438
Rates for Dominant Carriers	7482
Raystay Company	7559
Resale/Shared Use - International Communications Services	7386
Rio Grande Broadcasting Co.	7464
Scottsdale Talking Machine and Wireless Co., Inc.	7539
Showem, Inc.	7364
Southwestern Bell	7560
Susquehanna Radio Corp.	7528
TVX Broadcast Group, Inc.	7494
Table of Allotments, FM, Bald Knob and Clarendon, AR	7435
Table of Allotments, FM, Belle Plaine, KS	7432
Table of Allotments, FM, Callahan, FL and St. Marys, GA	7564
Table of Allotments, FM, Cusseta, GA	7437
Table of Allotments, FM, Electra, TX	7563
Table of Allotments, FM, Gilchrist and Crystal Beach, TX	7434
Table of Allotments, FM, LaFayette, GA	7427
Table of Allotments, FM, Minneapolis, KS	7433
Table of Allotments, FM, New Sharon and Albia, IA	7429
Technical Improvement in Emergency Broadcast System	7545
Telesphere Network, Inc.	7535
The Offshore Telephone Company	7481
Transport Rate Structure and Pricing	7546
Virgin Islands Telephone Corporation	7350
Virginia Public Safety Plan	7475
WXBM-FM, Inc.	7356
Whale Communications of Colorado, Inc.	7548

Federal Communications Commission Record

Table of Cases by Delegated Authority and FCC Number
Volume 6
Issue 26

Delegated Authority or FCC Number	Page
DA 91 -1453	7384
DA 91 -1477	7370
DA 91 -1478	7362
DA 91 -1479	7364
DA 91 -1480	7367
DA 91 -1517	7461
DA 91 -1519	7471
DA 91 -1520	7462
DA 91 -1530	7463
DA 91 -1531	7427
DA 91 -1532	7385
DA 91 -1533	7474
DA 91 -1534	7472
DA 91 -1535	7475
DA 91 -1536	7429
DA 91 -1537	7432
DA 91 -1538	7433
DA 91 -1539	7386
DA 91 -1540	7529
DA 91 -1541	7466
DA 91 -1542	7473
DA 91 -1543	7434
DA 91 -1544	7435
DA 91 -1545	7437
DA 91 -1546	7488
DA 91 -1547	7526
DA 91 -1548	7527
DA 91 -1549	7476
DA 91 -1559	7563
DA 91 -1560	7477
DA 91 -1561	7528
DA 91 -1562	7483
DA 91 -1563	7481
DA 91 -1564	7538
DA 91 -1565	7564
DA 91 -1566	7484
DA 91 -1567	7545
DA 91 -1568	7546
DA 91 -1569	7535
DA 91 -1570	7536
DA 91 -1571	7558
DA 91 -1572	7559
DA 91 -1573	7548
DA 91 -1582	7560
FCC 91 - 343	7438
FCC 91 - 344	7482
FCC 91 - 350	7353
FCC 91 - 351	7350
FCC 91 - 381	7571
FCC 91 - 382	7646
FCC 91 - 385	7346
FCC 91 - 388	7372
FCC 91 - 390	7569
FCC 91 - 394	7355
FCC 91 - 395	7479
FCC 91 - 396	7467
FCC 91 - 397	7551
FCC 91 - 404	7511
FCC 91 - 406	7491
FCC 91 - 407	7494
FCC 91 - 408	7522
FCC 91 - 409	7497
FCC 91 - 410	7507
FCC 91 - 411	7524
FCC 91 - 412	7565
FCC 91 - 414	7561
FCC 91D - 62	7387
FCC 91D - 63	7356
FCC 91D - 64	7453
FCC 91D - 65	7419
FCC 91R - 109	7464
FCC 91R - 110	7377
FCC 91R - 112	7440
FCC 91R - 114	7539

Federal Communications Commission Record

Table of Cases by Docket Number
Volume 6
Issue 26

Docket Number				Page
CC	Dkt.No.80	-	176	7386
CC	Dkt.No.86	-	111	7536
CC	Dkt.No.87	-	313	7482
CC	Dkt.No.88	-	2	7355
CC	Dkt.No.88	-	2	7646
CC	Dkt.No.88	-	95	7353
CC	Dkt.No.90	-	124	7350
CC	Dkt.No.90	-	132	7569
CC	Dkt.No.90	-	219	7372
CC	Dkt.No.90	-	623	7571
CC	Dkt.No.91	-	213	7546
CC	Dkt.No.91	-	324	7527
CC	Dkt.No.91	-	325	7526
FO	Dkt.No.91	-	171	7545
GEN	Dkt.No.90	-	312	7551
GEN	Dkt.No.90	-	314	7471
MM	Dkt.No.85	-	269	7419
MM	Dkt.No.85	-	331	7440
MM	Dkt.No.88	-	401	7377
MM	Dkt.No.88	-	410	7539
MM	Dkt.No.89	-	508	7434
MM	Dkt.No.89	-	567	7563
MM	Dkt.No.89	-	625	7387
MM	Dkt.No.89	-	629	7427
MM	Dkt.No.90	-	168	7453
MM	Dkt.No.90	-	284	7429
MM	Dkt.No.90	-	373	7437
MM	Dkt.No.90	-	380	7464
MM	Dkt.No.90	-	651	7435
MM	Dkt.No.91	-	236	7356
MM	Dkt.No.91	-	261	7564
MM	Dkt.No.91	-	278	7433
MM	Dkt.No.91	-	279	7432
MM	Dkt.No.91	-	348	7346
MM	Dkt.No.91	-	354	7370
MM	Dkt.No.91	-	355	7362
MM	Dkt.No.91	-	356	7367
MM	Dkt.No.91	-	357	7364
PR	Dkt.No.91	-	300	7475

Federal Communications Commission Record

Table of Cases by Rulemaking Number
Volume 6
Issue 26

Rulemaking Number	Page
RM - 6975	7434
RM - 7028	7563
RM - 7031	7427
RM - 7140	7471
RM - 7175	7471
RM - 7224	7429
RM - 7268	7434
RM - 7287	7437
RM - 7301	7429
RM - 7487	7429
RM - 7544	7435
RM - 7618	7471
RM - 7789	7564
RM - 7808	7432
RM - 7809	7433
RM - 7823	7466

Federal Communications Commission Record

Table of Cases by City
Volume 6
Issue 26

City/State	Page
Albia, IA	7429
Arlington, TX	7494
Ashtabula, OH	7367
Bald Knob, AR	7435
Belle Plaine, KS	7432
Blanco, TX	7419
Callahan, FL	7564
Casper, WY	7529
Cincinnati, OH	7522
Conroe, TX	7440
Crystal Beach, TX	7434
Cusseta, GA	7437
Dallas, TX	7524
Dallas, TX	7491
East Lansing, MI	7484
Electra, TX	7563
Gilchrist, TX	7434
Hartford, CT	7387
LaFayette, GA	7427
Manchester, TN	7438
Memphis, MO	7429
Milton, FL	7370
Milton, FL	7356
Minneapolis, KS	7433
Monterey, TN	7385
Muncie, IN	7488
New Port Richey, FL	7364
New Sharon, IA	7429
New York, NY	7477
Nolanville, TX	7377
Paradise Valley, AR	7539
Port Saint Lucie, FL	7483
Pueblo, CO	7548
Rochester, NY	7479
San Francisco, CA	7497
San Francisco, CA	7507
Shawnee, OK	7453
South Bend, IN	7362
St. Marys, GA	7564
Washington, DC	7462
York, PA	7528
Yuma, AZ	7476

Federal Communications Commission Record

Subject Index
Volume 6
Issue 26

Subject **Page**

- Adjudication
  - Administrative Law Judge Decision
    - Integration of ownership into management, 7377, 7377, 7440, 7539
    - Misrepresentation and lack of candor 7440
  - Orders or Notices
    - Lottery to select licensee 7362, 7364, 7367, 7387
    - Pleadings, parties requested to file 7356
  - Review Board or Commission Decision
    - Abuse of process 7453, 7419
    - Misrepresentation and lack of candor 7419
    - Reopening of record 7453, 7387, 7356, 7419

- Broadcast Radio Services - General Rules
  - Applications for authorization
    - Grant of an application can be made without a hearing 7548
  - Licenses and permits
    - Multiple ownership of broadcast stations in the same service 7479
  - Program contents
    - Candidates for public office 7522, 7524, 7528, 7491, 7494, 7497
    - Contests 7385
    - Sponsorship identification 7548
    - Telephone conversations for broadcasting, recording of 7548

- Broadcasting - FM Stations
  - Allotments and assignments
    - Allotments, table of 7427, 7429, 7432, 7433, 7434, 7435, 7437, 7563, 7564
    - Distance separation requirements,reference points to determine 7346

- Commission Organization
  - Delegations of authority - Chief, Common Carrier Bureau
    - Limitations on delegated authority 7353, 7472, 7526, 7527

- Common Carriers: Miscellaneous Rules
    - Allocation of costs to regulated or non-regulated costs 7536

Subject **Page**

- Communications Act of 1934
  - Common Carriers
    - Accounts, records, memoranda,forms of; depreciation charges 7467
    - Discrimination and preferences 7481
    - Pole attachments, regulation of 7558, 7559
    - Service and charges 7386
  - Penal provisions; forfeitures
    - Rebates and offsets, forfeitures in cases of 7484
  - Radio, provisions for
    - Candidates for public office, facilities for 7511, 7522, 7524, 7528
  - Radio, provisions relating to
    - Sanctions, administrative 7507

- Practice and Procedure
  - Common carriers: complaints
    - Formal or informal 7535
  - Pleadings, briefs
    - Extension of time, motions for 7466
  - Proceedings, miscellaneous
    - Forfeiture proceedings 7483
  - Reconsideration/review of Commission action
    - Actions by delegated authority, application for review of 7565
    - Reconsideration of a final FCC action, petition for 7482

- Public Mobile Service
  - Applications and licenses-filing requirements
    - Forms and permissive changes or minor modifications 7483
  - Domestic public cellular radio telecommunications service
    - Service areas 7488

- Statutory Citations Other than Communications
  - Administrative Procedure
    - Information,public; agency rules, opinions, orders 7561
  - Obscenity
    - Obscene language, broadcasting 7484

- Telecommunications Companies: Classes A and B
    - Nonregulated activities 7536
    - Regulated accounts 7536

TABLE OF STATUTORY AND RULE PROVISIONS

Page

001.080 Forfeiture proceedings . . . 7483

001.115 Application for review of action taken pursu . . . 7565

001.2001-1.2004 Implementation of the Anti-Drug Abuse Act . . . 7551

001.300, Waiver of Rule . . . 7474

001.301 Appeal, Dismissed . . . 7464

001.460(b) Motions for extension of time . . . 7466

001.711 /Formal or informal complaints . . . 7535

022.009 Standard App. Forms and Permis. Change . . . 7483

022.903 CGSAs . . . 7488

032.014 Regulated Accounts . . . 7536

032.016 Changes in accounting standards . . . 7560

032.023 Nonregulated Activities . . . 7536

032.4999 General . . . 7467

032.5082 Switched access revenue . . . 7467

032.7360 Other nonoperating income . . . 7467

064.711, Preamble Required . . . 7474

064.901 Allocation of Costs . . . 7536

073.1206 Broadcast of Telephone Conversations . . . 7548

073.1212 Sponsorship Identification . . . 7548

073.1216 Licensee-conducted contest . . . 7385

073.1940 Broadcasts by candidates for public office . . . 7477

073.1940 Broadcasts by candidates for public office . . . 7491

073.1940 Broadcasts by candidates for public office . . . 7494

073.1940 Broadcasts by candidates for public office . . . 7497

073.1940 Broadcasts by candidates for public office . . . 7507

073.1940 Broadcasts by candidates for public office . . . 7528

073.202 FM Table of Allotments . . . 7427

073.202 FM Table of Allotments . . . 7429

073.202 FM Table of Allotments . . . 7432

073.202 FM Table of Allotments . . . 7433

073.202 FM Table of Allotments . . . 7434

073.202 FM Table of Allotments . . . 7435

073.202 FM Table of Allotments . . . 7437

073.202 FM Table of Allotments . . . 7563

073.202 FM Table of Allotments . . . 7564

073.208 Reference points and distance computations . . . 7346

073.3555 Multiple Ownership . . . 7479

073.3591 Grants without hearing . . . 7548

073.4280 Character Evaluation of Broadcast Applicants . . . 7529

300.201 Service and Charges . . . 7386

300.202 Discrimination and Preferences . . . 7481

300.220 Accounts, Records, and Memoranda; Depreciation Charg . . . 7467

300.224 Regulation of pole attachments . . . 7558

300.224 Regulation of pole attachments . . . 7559

300.310 Limitation on Holding and Transfer of Licenses . . . 7529

300.312(a)(7) Administrative sanctions . . . 7507

300.315 Facilities for candidates for public office . . . 7477

300.315 Facilities for candidates for public office . . . 7491

300.315 Facilities for candidates for public office . . . 7494

300.315 Facilities for candidates for public office . . . 7497

300.315 Facilities for candidates for public office 7507
300.315 Facilities For Candidates For Public Office 7511
300.315 Facilities for candidates for public office 7522
300.315 Facilities for candidates for public office 7524
300.315 Facilities for candidates for public office 7528
300.503(b) Forfeiture 7385
300.503(b) Forfeitures 7484
303(q), Dismantle Radio Tower 7438
400.05552 Public Information; agency rules, opinions, order, 7561
400.181464 Broadcasting Obscene or Indecent Language 7484
44 U.S.C. Section 3506 et seq. Paperwork Reduction Act 7463
47 C.F.R. 1.106 petitions for reconsideration 7482
47 C.F.R. Section 0.291 delegated authority 7353
47 C.F.R. Section 0.291 delegated authority 7461
47 C.F.R. Section 0.291 delegated authority 7472
47 C.F.R. Section 0.291 delegated authority 7473
47 C.F.R. Section 0.291 delegated authority 7526
47 C.F.R. Section 0.291 delegated authority 7527
47 C.F.R. Section 0.291 delegated authority 7538
47 C.F.R. Section 61.44(a) exogenous reductions 7350
47 CFR Part 69 7546
5 U.S.C. § 410, Use of Joint Boards, Cooperation w/State Co 7355
500.100 HDO 7362
500.100 HDO 7364
500.100 HDO 7367
500.100 HDO 7370
500.100, abuse of process 7387
500.128 Misrepresentation 7356
500.135, real-party-in-interest 7387
500.2095 Character qualifications 7453
500.2100 Abuse of process 7419
500.2100 Abuse of process 7453
500.2125 Misrepresentation and lack of candor 7419
500.2125 Misrepresentation and lack of candor 7453
500.3005 Integration, Qualitative Aspect 7377
500.3035 Integration of Ownership Into Management, Quantitat 7440
500.3035 Integration, Quantitative Aspect 7377
500.3040 Integration, Effectuation 7539
500.3125 Misrepresentation and Lack of Candor 7440
500.3145 Air Hazard 7440
500.3170 Financial Qualifications 7440
73.1940 Broadcasts by candidates for public office 7522
73.1940 Broadcasts by candidates for public office 7524
94.93 Provisions for Private Operational Fixed use of 12, 20 7476
jurisdictional separations 7384
Part 25 Satellite Communications 7372
Part 36 7384
Sec. 25.134, Licensing provisions of (VSAT) networks 7372

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-348

In the Matter of

Conflicts Between Applications
and Petitions for Rulemaking to
Amend the FM Table of Allotments

NOTICE OF PROPOSED RULEMAKING

Adopted: November 21, 1991; Released: December 16, 1991

Comment Date: January 22, 1992
Reply Comment Date: February 6, 1992

By the Commission:

I. INTRODUCTION

1. We initiate this proceeding on our own motion to explore changes in our procedures governing conflicts between rulemaking petitions to amend the FM Table of Allotments and applications for new or modified FM facilities. Currently, there are policies and rules specifying "cut-off" dates with respect to mutually exclusive petitions for rulemaking and with respect to mutually exclusive applications, but none with respect to conflicts between petitions and applications. This approach has often permitted subsequently-filed rulemaking petitions to delay the processing of pending applications. While this policy may have led to the provision of more new allotments and ultimately more new stations on the air than if different procedures were followed, given the current widespread availability of FM service throughout the country, we seek comment on whether it now imposes undue expense to applicants and costs to the public in delay of service.

II. EXISTING PROCESSES

2. *New station.* To secure a new allotment, a petitioner must file a Petition for Rulemaking to amend the FM Table of Allotments. Upon receipt of the petition, Commission engineering staff first analyze the proposal to ascertain whether the channel requested can be allotted in compliance with minimum distance separation and other technical requirements. If the channel can be allotted, the Commission issues a *Notice of Proposed Rulemaking (NPRM)* proposing the allotment. During the comment period, any counterproposals requesting a conflicting allotment or upgrade must be filed. If no counterproposals are filed and the petitioner files comments reaffirming its interest in applying for the channel, the Commission adopts a *Report and Order* allotting the channel as requested [1] and opening a 30-day filing window during which applications for the new channel may be filed. 47 C.F.R. § 73.3564(d)(1).

3. Any such application for a new station license may be amended at will during the Commission-specified window filing period. 47 C.F.R. § 73.3522(a)(6). Upon close of the window, the staff first performs a "tender review" to determine whether applications filed are "substantially complete." [2] Applications free of tender defects are placed on a "Notice of Tenderability," which triggers a 30-day period during which applicants may amend their applications as a matter of right. [3] After this 30-day period, applications are listed on a "Notice of Acceptance," which triggers the right of parties to file Petitions to Deny pursuant to Section 309 of the Communications Act. 47 C.F.R. § 73.3564(c). During this time, applications are studied for "acceptability," *i.e.* compliance with our core technical and legal requirements, including citizenship, adherence to international treaties and to Commission rules involving power, height, and spacing. An application found to be technically defective will be dismissed. 47 C.F.R. § 73.3566(a). If only one satisfactory application has been submitted, that application is granted. 47 C.F.R. § 73.3573(g)(2). If more than one satisfactory application has been submitted for the channel, the applications are. designated for hearing. Final selection of an applicant through the hearing process can be a lengthy endeavor.

4. *Upgrades.* The Commission's Table of FM Allotments contains the channels (other than noncommercial educational channels) designated for use in the United States, its territories and possessions. 47 C.F.R. § 73.202(a). Each channel is listed to reflect the class of station authorized to use that channel. 47 C.F.R. § 73.202(a)(2); *see also* 47 C.F.R. §§ 73.210, 73.211. A licensee who wishes to up-

---

[1] If counterproposals are filed and Commission staff cannot find suitable channels to satisfy each proposal, the Petition and counterproposals are compared in terms of our allotment priorities, which are (1) first fulltime aural service, (2) second fulltime aural service, (3) first local service, and (4) other public interest matters. Equal weight is given to priorities (2) and (3). *See Second Report and Order* in BC Docket No. 80-130, 90 FCC 2d 88 (1982) (*Revision of FM Assignment Policies and Procedures).*

[2] 47 C.F.R. § 73.3564. To be "substantially complete," an application must contain approximately two dozen items deemed necessary to begin processing. These items, which are set forth in Appendix D of the *Report and Order* in MM Docket No. 84-750, 50 FR 19936 (May 13, 1985), 58 RR 2d 166 (1985) (*Hard Look Order*), include the applicant's name and address; certifications of compliance with alien ownership restrictions, local public notice provisions, financial ability to construct, and site availability; listing of other interests in broadcast facilities; and engineering data such as geographic coordinates, transmitter site map, channel number and community of license, power levels, and antenna height. (The text of the *Hard Look Order* is reprinted at 58 RR 2d 776 (1985)). In a related *Notice of Proposed Rulemaking* adopted today, the Commission is proposing to liberalize the strict "hard look" approach currently used to process commercial FM applications by giving applicants a limited opportunity to file corrective amendments to defective applications. *See Notice of Proposed Rulemaking* in MM Docket No. 91-347, FCC 91-384, adopted November 21, 1991.

[3] 47 C.F.R. § 73.3522 (a)(6). These amendments may not, however, correct deficiencies in the tenderability of the underlying application. *Id.*

grade its facilities to a higher-class channel must also file an allotment rulemaking petition. [4] If the upgrade meets minimum distance separation requirements, an *NPRM* proposing the upgrade is issued. If the upgrade sought is to a nonadjacent channel, competing expressions of interest and counterproposals, which seek a mutually exclusive allotment to another community, may be filed during the comment period. 47 C.F.R. § 1.420(g). If the upgrade sought is on the same channel or an adjacent channel, only counterproposals may be filed during the comment period. [5] If no counterproposals [6] or competing expressions of interest [7] are filed, the channel is upgraded and the licensee is given 90 days to file a minor change application. Processing routine minor change applications currently takes approximately 120 days.

III. SOURCE OF CONFLICT

5. The goal of the Commission's allotment rulemaking process is the rapid authorization of new or modified service in the public interest. Our current rules, however, leave applicants for new or upgraded stations open to considerable risks and delays resulting from the subsequent filing of conflicting rulemaking petitions. Thus, we question whether the process best advances our goal. Specifically, for example, at any time during the pendency of an application, a rulemaking petition proposing an allotment or upgrade that conflicts with the transmitter site proposed in that application may be filed. [8] In the event the proposed allotment cannot be site restricted so as to avoid the conflict, the site specified by the applicant would be considered a "mere" site preference, unless the applicant makes a showing to the contrary. Because a "mere" site preference represents primarily a private benefit to the applicant, the service that would be provided to the public by a new allotment would be preferred. Therefore, the applicant would be required to amend its application to specify a different transmitter site. [9] This basic policy in theory allows us to weigh fully the public interest benefits of competing proposals. In practice, however, it often has further delayed applications that have been pending for a substantial period of time and that may have been ready for grant. The delay that results can, in fact, frustrate the purposes underlying our allotment rulemaking processes. For example, we have adopted procedures designed to facilitate expeditious station upgrades.[10] There have been some instances, however, in which, after a long and complicated rulemaking proceeding, we have authorized a station upgrade, and the station has diligently prosecuted an application to implement that upgrade, only to find, after substantial expenditures of time and resources, that a newly-filed petition for rulemaking may further delay its almost completed efforts to upgrade. Similar disruptions have occurred with respect to applications for new stations. These types of disruptions frustrate our goals both directly and indirectly, by increasing the cost and risk involved in seeking station authorizations, and thereby creating significant disincentives for pursuing new or modified station facilities that would provide public interest benefits.

6. While there is some risk to applicants inherent in any process that considers potentially competing claims to the spectrum, the risks imposed by our present system of resolving application/petition conflicts may be particularly significant to applicants. Those risks persist late in the application process, when substantially larger amounts of funds may have been expended in order to prosecute the application. The uncertainty inherent in this open-ended exposure to conflicting petitions is also a substantial deterrent to applicants seeking to establish or improve service to the public. Therefore, we tentatively conclude that all applications for new and modified facilities should be protected from conflicting subsequently-filed rulemaking petitions at some point in the application process. [11] Applicants incur substantial expense to pursue applications, and there are increasing constraints on the availability of transmitter sites such as local land use ordinances, FAA requirements, and environmental regulations. We believe that service to the public could be provided more quickly and with less burden on Commission resources with the rule changes proposed in this *Notice*. We recognize that adoption of a cut-off rule may foreclose consideration of some rulemaking petitions that we might otherwise find preferable to the grant of a mutually exclusive application, but we believe the marginally greater public interest benefits we obtain in specific cases may well be outweighed by the negative effects of existing procedures on the process of service authorization as a whole. We seek comment on this tentative conclusion, and particularly on whether such a change will result in improved service to the public. [12] We detail below our specific processing proposals.

---

[4] A licensee or permittee may also request a change in community of license, or a channel substitution for an authorized facility or vacant channel, in conjunction with an upgrade request or in a separate rulemaking petition.

[5] Adjacent channels include the three channels above and the three channels below the specified channel. Adjacent and co-channel upgrades are not subject to competing expressions of interest, *i.e.* another petitioner requesting the use of that channel in that particular community, because the channel sought is mutually exclusive with the licensee's current channel. *See* 47 C.F.R. § 1.420(g)(i).

[6] If a counterproposal is filed, the Commission compares the proposals based on allotment priorities. *See* note 1, *supra*.

[7] If a competing expression of interest is filed and there is an equivalent class channel available for allotment to that community, the petitioner's upgrade will be granted and a filing window will be opened for the new channel. 47 C.F.R. § 1.420(g).

[8] In contrast, a conflicting petition filed during the comment period of the *NPRM* would be treated as a counterproposal in the rulemaking proceeding. A conflicting petition filed after the close of the comment period would be returned as untimely filed. *See Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments*, 5 FCC Rcd 931 at n. 4 (1990).

[9] *See Andalusia, Alabama*, MM Docket No. 83-999, 49 FR 32201 (August 13, 1984).

[10] *See Amendment of the Commission's Rules Regarding Modification of FM Broadcast Licenses to Higher Class Co-Channel or Adjacent Channels*, MM Docket No. 85-313, 51 FR 20290 (June 4, 1986), 60 RR 2d 114 (1986); and *Amendment of the Commission's Rules Regarding the Modification of FM and Television Station Licenses*, MM Docket No. 83-1148, 98 FCC 2d 916 (1984), *recon. denied*, 59 RR 2d 1466 (1986).

[11] For conflicting rulemaking petitions filed before any cutoff we might adopt, we intend to retain the substantive comparison applied in *Andalusia, supra* note 9.

[12] As a threshold matter, we note that we have authority to adopt cut-off procedures. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333 n. 9 (1945).

IV. SPECIFIC PROPOSALS

7. *Cut-off for conflicting petitions.* We propose to use the deadline for filing Petitions to Deny against new and major change FM applications as the cut-off point for rulemaking petitions that conflict with those applications. This date is well after applications have been accepted for tender and 30 days after they have been placed on a publicly-released Notice of Acceptance. The petition to deny period is triggered by an explicit public notice and represents the last period in applications processing where challenges to the underlying applications are permitted. We therefore believe that it is appropriate to cut off rulemaking petitions that conflict with the applications at this point. We seek comment on this proposal and on whether an earlier cut-off point, such as the close of the filing window or the end of the period in which to amend as of right, would be preferable. We also propose to retain cut-off protection for applications that are dismissed until the dismissal is no longer subject to Commission review.

8. Applications to implement upgrades ("minor modifications") are generally granted within 120 days of filing. We propose to use as the cut-off point for the filing of conflicting petitions a date 30 days after acceptance of the application, unless the application is earlier granted. We seek comment on whether this period should be lengthened or shortened.

9. *Distinction based on type of petition and application.* Finally, we seek comment on whether the criteria developed in *Revision of FM Assignment Policies and Procedures*[13] should be applicable in determining whether an application receives cut-off protection. For example, should we decline to extend cut-off protection to an application for an upgrade against a petition that would provide a first local aural transmission service for a community? Or should we do so if the proposal would result in the provision of a first or second aural reception service? Our initial conclusion is that no distinction should be made among various types of applications or petitions. The equities appear to be the same on the applicant's side, *i.e.* investment of time and money in pursuing the application, whether the applicant is seeking a new allotment or an upgrade. In addition, under the approach described above, proponents of potentially conflicting proposals would have ample notice of the time in which to initiate an allotment proceeding, and any such competing plan would receive the same public interest consideration as presently given. We also tentatively conclude that adjudication of whether a particular petition falls within any exception we might adopt would so complicate the administration of a cut-off rule as to obviate the benefits of adopting any such rule. Commenters who disagree should indicate what distinctions we should make and the justifications therefor.[14]

10. *Effective date.* We propose to make any procedural change effective 30 days after publication in the *Federal Register*. Rulemaking petitions already filed, or filed within 30 days after publication in the *Federal Register* of any rule changes in this proceeding, would be handled under the current procedure. We believe that this 30-day period would provide adequate notice to potential petitioners for new allotments or upgrades while expediting the benefits to the public of any new procedure. We seek comment on this tentative conclusion.

V. CONCLUSION

11. We believe that Commission procedures governing the processing of rulemaking petitions that conflict with pending applications result in additional expense to applicants and delay of service to the public, and that these burdens are not outweighed by countervailing benefits to the public. We propose a cut-off point for later-filed conflicting petitions, whether the petitions are for new allotments or upgrades and whether the applications are for new stations or modifications to existing facilities. We seek comment on whether this procedural change is warranted and on the specific changes we propose. We also invite comments on alternative proposals. Finally, we seek comment on the proposed rule change to effectuate the procedural change proposed in this *Notice*. The proposed rule is contained in Appendix A.

VI. PROCEDURAL MATTERS

12. *Ex parte rules - non-restricted proceeding.* This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

13. *Comment dates.* Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **January 22, 1992,** and reply comments on or before **February 6, 1992.** To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for pubic inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

14. *Regulatory Flexibility Act.* An Initial Regulatory Flexibility Analysis is contained in Appendix B.

15. Authority for this action is contained in 47 U.S.C. §§ 154 and 303.

16. For further information on this proceeding, contact Beverly McKittrick, Policy and Rules Division, Mass Media Bureau, (202) 632-5414.

---

[13] *See* note 1, *supra*.

[14] We note that, with respect to petitions for rulemaking, the cut-off rules applied in routine allotment proceedings do not provide an exception for untimely filed petitions that, if adopted, would provide a first or second aural reception service or a first local transmission service. *See* note 8, *supra*.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Part 73 of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. Sections 154 and 303.

2. Section 73.208 is amended by revising paragraph (a)(1) and adding a new paragraph (a)(3) to read as follows:

Section 73.208 Reference points and distance computations.

(a)(1) The following reference points must be used to determine distance separation requirements when petitions to amend the Table of Allotments (§73.202(b)) are considered:

(i) First, transmitter sites if authorized, or if proposed in applications with cut-off protection pursuant to paragraph (a)(3) of this section;

(ii) Second, reference coordinates designated by the FCC; (iii) Third, coordinates listed in the United States Department of Interior publication entitled *Index to the National Atlas of the United States of America;* or

(iv) Last, coordinates of the main post office.

(The community's reference points for which the petition is submitted will normally be the coordinates listed in the above publication.)

* * * * *

(3) Petitions to amend the Table of Allotments that do not meet minimum distance separation requirements to transmitter sites specified in applications will not be considered unless they are filed before:

(i) The deadline for filing Petitions to Deny the application, if the application is for a new facility or major change; or

(ii) 30 days after acceptance or grant of the application, whichever occurs earlier, if the application is for a minor modification.

* * * * *

APPENDIX B

I. Reason for the Action This review is initiated to consider whether it is advisable to adopt new procedures governing conflicts between rulemaking petitions to amend the FM Table of Allotments and applications for new or changed FM facilities.

II. Objectives of the Action:

The objective of this proceeding is to ensure that such conflicts are settled with minimal expense for applicants and minimal delay in new or improved service to the public.

III. Legal Basis:

Authority for this action may be found in 47 U.S.C. §§ 154 and 303.

IV. Reporting, recordkeeping and other compliance requirements:

Such requirements will vary according to the actions that are adopted as a result of the record established in response to this *Notice of Proposed Rulemaking.*

V. Federal rules which overlap, duplicate or conflict with these rules:

There are no rules which would overlap, duplicate or conflict with these rules.

VI. Description, potential impact and number of small entities involved:

There are a number of radio licensees and potential applicants who would be affected by this proceeding.

VII. Any significant alternatives minimizing the impact on small entities consistent with stated objectives:

In initiating this review of our procedures for settling FM application/petitions for rulemaking disputes, it is intended to reduce the expense and delay that FM applicants now face when conflicting petitions for rulemaking are filed. We seek to minimize the possibility for such conflicts through our proposal to adopt a cut-off point for later-filed conflicting petitions and to retain cut-off protection for applications that are dismissed until the dismissal is final. Although the Commission tentatively finds that the current procedures are no longer the best procedures, the *Notice of Proposed Rulemaking* invites comments on the validity of this conclusion and on alternative methods for resolving such disputes.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-124

In the Matter of

Virgin Islands Telephone Corporation — Transmittal No. 6

Tariff F.C.C. No. 1

Switched and Special Access
Rate Adjustments

MEMORANDUM OPINION AND ORDER

Adopted: Nov. 5, 1991; Released: December 16, 1991

By the Commission:

I. INTRODUCTION

1. This investigation of the switched and special access rates of Virgin Islands Telephone Corporation (Vitelco) began in January 1990, and covers rate increases in effect during the first half of 1990. This Order finds that those rates were unreasonable, and that Vitelco overearned $958,812 during the six-month investigation period. We therefore require Vitelco to refund the rate increases, with interest, to its access customers during that period.

II. BACKGROUND

2. Vitelco filed Transmittal No. 6 on December 15, 1989, to increase its switched and special access rates on an interim basis. These revisions were scheduled to be in effect from January 1, 1990 to June 30, 1990, when the rates would be replaced by rates filed in Vitelco's 1990 annual access tariff. Vitelco argued in its transmittal that its then current rates did not reflect the level of demand in the Virgin Islands following the damage caused by Hurricane Hugo in September 1989. Therefore, the transmittal increased Vitelco's interstate access rates in direct proportion to the projected decrease in demand.[1] Transmittal No. 6 increased Vitelco's switched access rates an average of 28.5 percent and its special access rates approximately 2 percent.[2] Vitelco explained that the revised increases did not include any increase to cover losses due to premature plant retirement and extraordinary maintenance expenses attributable to the hurricane.[3]

3. In an Order released December 29, 1989, the Common Carrier Bureau (Bureau) concluded that the interim rate increase would allow Vitelco to preserve its pre-hurricane revenue stream, enabling the company to provide access service while it sought to repair the hurricane damage. However, because Vitelco might accumulate earnings above its authorized rate of return as a result of these rate increases, the Bureau suspended the revisions for one day, imposed an accounting order, and initiated an investigation into the reasonableness of the rate increases. Those increases became effective on January 2, 1990.[4]

4. On March 6, 1990, the Bureau issued an Order designating issues for investigation.[5] The Bureau stated that the purpose of the investigation was to determine whether the Transmittal 6 rate increases were excessive, *i.e.,* whether the increases produced revenues that exceeded a revenue requirement computed in accordance with Part 69 of the Commission's Rules, 47 C.F.R. Part 69. The Bureau therefore directed Vitelco to submit a direct case demonstrating that the Transmittal 6 rate increases were not excessive. The Bureau also requested certain cost and demand data relating to revenue, as well as information concerning extraordinary losses, expenses, and insurance claims.[6]

5. Vitelco submitted its direct case and the supplement to its direct case on April 6, 1990, and May 15, 1990, respectively. Vitelco argues that the revenue data are preliminary and incomplete, and that the appropriate monitoring period for purposes of the investigation is greater than six months. Vitelco also argues that insurance payouts covering losses related to premature retirements and extraordinary maintenance are not settled, and may result in a depreciation reserve deficiency.[7]

6. AT&T's opposition, filed on June 14, 1990, alleges that Vitelco does not carry its burden of proving the rate increases were justified, and argues that a direct refund to customers is appropriate under Section 204(a) of the Communications Act, 47 U.S.C. § 204(a).[8] After repeating its previous arguments in its June 28, 1990 rebuttal, Vitelco argues that the Commission may refuse to order a refund, even if overearnings exist.[9] Vitelco's further direct case, submitted December 21, 1990, does not contain

---

[1] Vitelco Tr. 6, Section II, Reason for Filing at 1, 4.

[2] Vitelco Tr. 6, Section I, Explanation of Changed Matter at 1.

[3] Vitelco Tr. 6, Section II, Reason for Filing at 4-5.

[4] Virgin Islands Telephone Corporation, 5 FCC Rcd 112 (Com. Car. Bur. 1989) (*Investigation Order*).

[5] Virgin Islands Telephone Corporation, 5 FCC Rcd 1622 (Com. Car. Bur. 1990) (*Designation Order*), *modified* 5 FCC Rcd 2525 (Com. Car. Bur. 1990)(granting Vitelco's request to report earnings and rate of return information by reporting period and extending the deadline for submission of 1990 data until May 15).

[6] The *Designation Order* directed Vitelco to submit cost and demand data, including (1) accounting and ratemaking treatment of premature plant retirement, extraordinary maintenance expense, and insurance claims; (2) impact of these items on interstate access elements for the last four months of 1989 and through the most recent period available for 1990; (3) earnings, investment, expenses, taxes, and revenues, by access element and on a monthly basis for the periods of January 1, 1989, through August 1, 1989, September 1, 1989 through January 1, 1990, and January 2, 1990 through the most recent period for which figures were available. Finally, the Bureau directed Vitelco to submit actual and estimated demand and revenue data on a monthly basis for the period beginning September 1, 1989 and ending January 1, 1990, and for the period beginning January 2, 1990 and ending with the most recent period for which data were available.

[7] Vitelco Direct Case at 11-12.

[8] AT&T Opposition at 3-7.

[9] Vitelco Rebuttal at 4-5, *citing* Investigation of Special Access

updated data; it merely re-asserts that Vitelco's rate increases were justified, as they were based on forecast assumptions that appeared reasonable at the time of filing.[10] Vitelco also argues that the identified overearnings from the instant investigation should be applied to offset a $1.73 million depreciation reserve deficiency it alleges to be the result of its insurance settlement. [11]

III. DISCUSSION

7. Section 204(a)(1) of the Communications Act, 47 U.S.C. § 204 (a)(1), provides in pertinent part that "[a]t any hearing involving a charge increased, or sought to be increased, the burden of proof to show that the increased charge, or proposed charge, is just and reasonable shall be upon the carrier, ..." Vitelco has failed to meet that burden. To determine whether the rate increases for Vitelco's switched and special access elements produced excess revenue, the Bureau directed Vitelco to submit data to be used in computing the amount of any excess earnings. Additionally, the Bureau required Vitelco to submit information regarding the numerical and accounting treatment of losses pertaining to premature plant retirements and extraordinary maintenance to determine whether losses from the hurricane were treated separately. Based on data supplied by Vitelco in its direct case and supplement relating to net revenue, gross receipts tax, average rate base, and annualized rate of return, we conclude that the increase in Vitelco's switched and special access rates was unjustified and the resulting rates were unreasonable.

8. Vitelco clearly overearned on its switched and special access categories during the January 2, 1990 through June 30, 1990 period for which Transmittal 6 rates were in effect. Vitelco's supplement to its direct case contains data from the first three months of 1990 that indicate Vitelco earned a rate of return of approximately 35 percent for the total switched access traffic sensitive elements resulting in excess earnings over its prior rates of $472,894. The data further indicate that Vitelco's rate of return for the special access category was approximately 32 percent, resulting in excess earnings over its prior rates of $6,512. Vitelco has given no indication that those earnings levels did not continue for the remaining three months for which Transmittal 6 was in effect, nor has it indicated that demand during the second quarter of 1990 dropped so substantially as to bring earnings for the entire time period below authorized levels. The rate increases were not required to enable Vitelco to earn its authorized return during the January-June 1990 period. The prior rates would have produced a return that equaled or exceeded the authorized return. Therefore, the increased rates are unjust and unreasonable.

9. Vitelco argues the data it submitted were preliminary and that costs related to the rebuilding efforts were still being processed. [12] However, as noted *supra*, Vitelco had the opportunity in December to provide supplementary data to reflect activity for the entire six month period, but did not choose to do so. Further, Vitelco mistakenly asserts that the monitoring period for this investigation should include time periods for which it made less than the authorized rate of return. [13] Vitelco argues that its Transmittal No. 8 rates, filed to be effective July 2, 1990, posted significant rate reductions. [14] However, Vitelco filed the Transmittal 6 rate increases to preserve the company's revenue stream during the last six months of the tariff year; its assertion that another monitoring period is proper is incorrect.

10. Vitelco's alternative argument, that it has no refund liability despite its acknowledged overearnings during the first half of 1990, is incorrect. Vitelco alleges that its December 1989 forecast was based on justifiable assumptions about demand during the post-Hurricane Hugo time period. [15] However, Vitelco's own statements show that its excessive earnings are simply the result of poor forecasting. Vitelco acknowledges that its demand forecasts were overly pessimistic, stating that even had Hurricane Hugo not occurred, its annualized rates of return in the local switching and transport elements are greater than the company would have anticipated. [16] Vitelco also states that its local switching and transport forecasts were based on inaccurate projections of message volume. [17]

11. Vitelco has not cited any cases in support of its argument that "good faith" forecasting excuses overearnings. Vitelco compares its situation to that of US West during the period of April to September 1985, during which the Commission observed that US West's special access rates were interim in nature and refused to order a refund. [18] We find that the Commission's decision to refrain from exercising its discretion to order a refund in the US West case is readily distinguishable from the instant case. The rates involved in the US West decision constituted the Commission's first attempt to evaluate special access rates under the revised Part 69, 47 C.F.R. Part 69, subsequent to the divestiture of the Bell Operating Companies from AT&T. Those US West rates had also been revised three months into the access period. Based on these "unique circumstances," the Commission declined to order a refund of what it characterised as "interim" rates. In making this decision, however, the Commission specifically stated that it was "not decid[ing] here whether a six month period could ever establish an adequate basis to establish compliance with a rate of return prescription." [19] We therefore do not find the US West case controlling. The unique circumstances governing the US West case are not present here. Vitelco increased rates during the access year for the sole purpose of avoiding underearnings that did not occur. It did so subject to an investigation and an accounting order put in place specifically to protect ratepayers should the decline

---

Tariffs of Local Exchange Carriers, CC Docket No. 85-166, 5 FCC Rcd 1717 (1990)(Commission declined to order a refund for interim special access rates filed by US West).

[10] Vitelco Further Direct Case at 1-3.

[11] *Id.* at 3-8.

[12] Vitelco Supplement to Direct Case at 2.

[13] *Id.*

[14] Vitelco Rebuttal at 4.

[15] Vitelco Supplement to Direct Case at 2.

[16] *Id.* at 3; Rebuttal at 4.

[17] Supplement to Direct Case at 3; Rebuttal at 3; Further Direct Case at 7.

[18] Vitelco Rebuttal at 5. *See* note 9, *supra*.

[19] 5 FCC Rcd at 1718-19 (para. 18) ("the record... provides adequate justification for refraining to exercise our discretion under Section 204 to order US West to refund special access overearnings realized in the context of the unique circumstances that existed during the six months in question").

in demand predicted by Vitelco not materialize in the wake of Hurricane Hugo. In these circumstances, a refund is warranted.

12. In its further direct case, submitted December 21, 1990, Vitelco notes that it received a ruling from the Insurance Commissioner of the Virgin Islands allowing Vitelco to recover $16 million for property damage rather than the $20 million it had anticipated at the beginning of this investigation. Vitelco states that a depreciation reserve deficiency now exists, since, anticipating full reimbursement, it had simply logged the entire $20 million into its depreciation reserve account as actually having been received in the final quarter of 1989. Vitelco estimates that the interstate portion of the $4 million depreciation reserve deficiency plus its revised estimate of extraordinary maintenance costs is approximately $1.73 million. Vitelco requested that, based only on the figures asserted in its pleadings, the Commission grant Vitelco permission to offset any excess earnings identified in this investigation against the interstate portion -- approximately $1.73 million -- of a $5.3 million deficiency the company now claims exists.[20]

13. We conclude that to do as Vitelco requests would amount to retroactive ratemaking. The period under investigation in this proceeding is the January through June 1990 time period. An amortization to recover the deficiency, if granted, applies to prospective rates. If Vitelco seeks amortization treatment of what it now asserts is a $1.73 million depreciation reserve deficiency, it should present its case to the Commission in accordance with Part 32 of the Commission's Rules. 47 C.F.R. Part 32.

14. On the basis of the record in this proceeding, we believe a direct refund to Vitelco's customers is warranted. Vitelco's Transmittal 6 was limited to the effects of expected reductions in demand during the first six months of 1990, and its purpose was to maintain Vitelco's revenue stream in the face of anticipated drastic reductions in demand. In fact, the record demonstrates that the rate increases were unreasonable. As AT&T observes, a refund to the customers who purchased access services from Vitelco during the first six months of 1990 is possible to implement, since Vitelco was ordered to keep an accounting during that period.[21] Therefore, we order Vitelco to refund to its record customers during the period in question all amounts charged by Vitelco in excess of revenue that would have been produced by its prior interstate traffic sensitive switched and special access rates, plus interest as provided in Section 204(a)(1) of the Communications Act.[22]

15. We direct Vitelco to file with the Commission within 30 days of the release of this Order a report describing in detail its efforts to effectuate these refunds. Specifically, the report must identify the recipients of refunds, the method of payment, and Vitelco's documented narrative explaining its use of actual billings in determining the recipients, amounts, and payment method. We also direct Vitelco to make the required refunds to its customers within 60 days of the release of this Order.

IV. ORDERING CLAUSES

16. Accordingly, WE FIND that the traffic sensitive switched access and special access rates charged by the Virgin Islands Telephone Company between January 2, 1990 and June 30, 1990 ARE UNLAWFUL to the extent these rates exceed rates in effect prior to January 2, 1990.

17. IT IS ORDERED, pursuant to Sections 4(i), 204(a), 213, 218, 220, and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), 213, 218, 220, 403, that the Virgin Islands Telephone Company SHALL REFUND, with interest, increased rates for traffic sensitive switched access and special access in effect from January 2, 1990, to June 30, 1990, to the extent these rates exceeded the rates that had previously been in effect. Interest shall be computed on the basis of interest rates specified by the United States Internal Revenue Service.

18. IT IS FURTHER ORDERED that American Telephone and Telegraph (AT&T) shall treat its refund an an exogenous reduction to its price cap indices. This exogenous reduction shall occur no later than the date AT&T is next required to make adjustments to its price cap indices pursuant to Section 61.44(a) of the Commission's Rules, 47 C.F.R. §61.44(a).

19. IT IS FURTHER ORDERED that authority is delegated to the Chief, Common Carrier Bureau, as specified herein, to effect the decisions set forth above.

20. IT IS FURTHER ORDERED that the investigation and accounting order imposed by the Common Carrier Bureau in CC Docket 90-124 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

---

[20] Vitelco Further Direct Case at 7-8.

[21] AT&T Opposition at 4 n. *.

[22] With respect to AT&T's portion of the refund, we must address AT&T's treatment of the refund it will receive from Vitelco. We have determined that AT&T should generally flow through Commission-ordered refunds from common carriers to its customers. Comsat Clarification Order, FCC 91-350, released__________, 1991. In this Order, we follow this approach and require AT&T to flow through the full amount of its share of the refund to its affected price cap indices in the form of an exogenous adjustment. Because the amounts involved are *de minimis* in relation to the overall revenues generated by AT&T's baskets, we further decide to permit AT&T to make this flowthrough filing the next time it changes its PCI levels.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-95

In the Matter of

Communications Satellite Corporation

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: November 5, 1991; Released: December 16, 1991

By the Commission:

1. AT&T Communications (AT&T) requests that the Commission clarify or reconsider our *Comsat Flow-Through Order,* [1] to the extent the Order construes the *AT&T Price Cap Order* [2] to require that in all instances refunds to AT&T of past excessive charges paid to another carrier must be distributed in their entirety to AT&T's end user customers, and treated for price cap purposes as exogenous cost decreases. [3] AT&T does not, however, challenge the requirement that it flow through refunds from Communications Satellite Corporation (Comsat) to end users in this particular instance. [4]

2. In the *Comsat Flow-Through Order* we interpreted the *AT&T Price Cap Order,* specifically paragraph 413, to require adjustments to AT&T's price cap index (PCI) and actual price index (API) that would reflect the results of the Commission's decision to order Comsat to make refunds. [5] Paragraph 413 of the *AT&T Price Cap Order* required AT&T to make adjustments to its various indexes to "reflect the results of investigations or complaints into the lawfulness of capped rates." [6] AT&T contends in its petition that the language in paragraph 413 was directed at investigations or complaints into the lawfulness of capped rates, reflecting cost changes essentially under AT&T's control, and should not be applied to cost changes, arising from behavior of other parties, largely outside AT&T's control. AT&T Petition at 4-6. In addition, AT&T asserts that refunds or damages resulting from complaints or investigations of AT&T suppliers may not be exogenous cost changes as defined in paragraph 253 of the *AT&T Price Cap Order. Id.* In that paragraph the Commission defines "exogenous costs" as costs which change due to changes in laws, regulations, or rules, or due to other administrative, legislative, or judicial changes beyond a carrier's control. [7] AT&T further notes that in paragraph 299 of the *AT&T Price Cap Order,* the Commission declined to make a categorical decision respecting how our future decisions about carrier practices ought to be flowed through to ratepayers as exogenous cost adjustments to price caps. AT&T Petition at 4-5.

3. Upon further reconsideration, we agree that paragraph 413 of the *AT&T Price Cap Order* does not address the treatment of refunds that AT&T may receive from other carriers. That paragraph, as well as other references to the treatment of refunds, is restricted to a discussion of possible events that would flow from a determination that AT&T itself overcharged customers and therefore owed a refund. [8] The situation presented in the instant case, however, concerns AT&T's obligations when AT&T is the recipient of a Commission-ordered refund from a third party supplier of common carrier services. We find the *AT&T Price Cap Order* to be silent on this particular issue. [9]

4. AT&T, citing the Commission's decision to decide on a case-by-case basis what additional cost changes should be flowed through to the cap, [10] argues that we should here adopt a case-by-case approach to refunds from third party suppliers. The same language AT&T cites also states that the Commission expects to render "many future decisions" on whether a particular cost change should be reflected in AT&T's price cap index. In the present case, we exercise our option to make such a determination, and conclude that Commission-ordered refunds from common carriers to AT&T generally should be flowed through to the price cap index in the form of a downward adjustment in the price cap index. Once the amount of the refund to AT&T has been flowed through to AT&T's ratepayers, AT&T may reverse the adjustment to reflect completion of the flow-through.

5. Our decision is consistent with price cap theory and practice. By treating Commission-ordered refunds due to AT&T exogenously, we recognize that, like other exogenous costs, the Commission's decision whether to order Comsat or a local exchange carrier to refund money is one that is for all practical purposes outside of AT&T's control. Similar to a change in access charges, a Commission-ordered change in AT&T's input costs should be reflected in AT&T's price cap.

6. In reaching this decision, we have considered whether, by treating these refunds endogenously, we would create an environment in which AT&T would have strong incentives to pursue possible overcharges by its common

---

[1] Communications Satellite Corporation, CC Docket No. 88-95, Memorandum Opinion and Order (Flow-Through), 4 FCC Rcd 8514, 8516 (para. 19)(1989) (*Comsat Flow-Through Order).*

[2] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873 (1989), Erratum, 4 FCC Rcd 3379 (together, *AT&T Price Cap Order*); Memorandum Opinion and Order on Reconsideration, CC Docket No. 87-313, 6 FCC Rcd 665 (1991); appeal docketed sub nom. AT&T v. FCC & USA, D.C. Cir. Case No. 91-1178, Apr. 16, 1991.

[3] AT&T Petition for Clarification or, in the Alternative, Reconsideration, filed Jan. 10, 1990 (AT&T Petition). No subsequent pleadings addressed to the AT&T petition were received.

[4] The Common Carrier Bureau has already ordered the disbursement of Comsat refunds to AT&T as that action is not dependent upon the resolution of the AT&T petition. Communications Satellite Corporation, CC Docket No. 88-95, DA 91-726, Jun. 14, 1991.

[5] *Comsat Flow-Through Order,* 4 FCC Rcd at 8516 (para. 19).

[6] *AT&T Price Cap Order,* 4 FCC Rcd at 3077 (para. 413).

[7] *AT&T Price Cap Order,* 4 FCC Rcd at 3002 (para. 253).

[8] *See also* 4 FCC Rcd at 3089 (para. 430).

[9] *But see* 4 FCC Rcd at 3002 (LEC overcharges flowed through to interexchange ratepayers in the form of lower access rates would be treated exogenously, thereby lowering the price cap index, since access rate changes are exogenous).

[10] 4 FCC Rcd at 3019 (para. 299).

carrier suppliers to the benefit of other ratepayers. As a practical matter, AT&T has strong incentives to reduce its costs, even when AT&T must flow-through third party supplier refunds. For example, to the extent AT&T is pricing its services at levels below the price cap maximums, a decrease in the price cap will not necessarily require a reduction in charges. AT&T's business services, formerly included in the price cap system, are also largely outside of price cap constraints now. Moreover, the increasingly competitive nature of the interexchange marketplace compels AT&T to reduce input costs to the maximum extent possible.

7. Accordingly, IT IS ORDERED that AT&T's petition for clarification or reconsideration of the *Comsat Flow-Through Order* is GRANTED TO THE EXTENT PROVIDED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-2
Phase I

In the Matter of

Filing and Review
of Open Network
Architecture Plans

ORDER

Adopted: December 3, 1991; Released: December 16, 1991

By the Commission:

1. The *BOC ONA Order* [1] announced the establishment of a Federal-State Joint Conference (Joint Conference) pursuant to Section 410(b) of the Communications Act, [2] as an ongoing forum for state and federal cooperation to facilitate the development and implementation of Open Network Architecture (ONA). The Order stated that the Joint Conference members would include the Chairman of this Commission, who will serve as Joint Conference chairman, one additional member of this Commission, and seven state commissioners, one from each Bell Operating Company region. On May 4, 1989, the Joint Conference was expanded to include one additional federal Commissioner and six additional state Commissioners. [3] The Order also provided that we would appoint members from the state commissions in consultation with the National Association of Regulatory Utility Commissioners (NARUC).

2. A vacancy on the Joint Conference has occurred as a result of the departure of the Honorable William E. Long of the Michigan Public Service Commission. NARUC has nominated the Honorable Jolynn Barry Butler, Commissioner, Ohio Public Utilities Commission, to fill the vacancy created by the departure of the Honorable William E. Long. We hereby appoint the Honorable Jolynn Barry Butler to serve as a member of the Joint Conference. Henceforth a copy of all filings in these proceedings shall be served on the Honorable Jolynn Barry Butler at the following address:

The Honorable Jolynn Barry Butler
Commissioner
Ohio Public Utilities Commission
180 East Broad Street
Columbus, Ohio 43266-0573
(614) 466-3101

3. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j) and 410(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 410(b), that the Honorable Jolynn Barry Butler, Commissioner of the Ohio Public Utilities Commission, IS APPOINTED as a member of the Federal-State Joint Conference convened in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

---

[1] Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 4 FCC Rcd 1, 110, paras. 214-223 (1989) (*BOC ONA Order*), *BOC ONA Reconsideration*, 5 FCC Rcd 3084, *pets. for review pending*, California v. FCC, (9th Cir. No. 90-70336, filed July 5, 1990).

[2] 47 U.S.C. § 410(b).

[3] Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 4 FCC Rcd 4017 (1989) (*May 4 Joint Conference Order*). The Commission increased state membership on the Joint Conference from seven to thirteen members at the request of NARUC.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-236

In re Application of

WXBM-FM, INC. File No. BRH-881003UT

For Renewal of License
of Station WXBM-FM
Milton, Florida

Appearances

Gerald Stevens - Kittner, Esq. and *Howard M. Liberman*, Esq. on behalf of WXBM-FM, Inc.; *James W. Shook*, Esq. and *Norman Goldstein*, Esq., on behalf of the Mass Media Bureau, Federal Communications Commission.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: December 9, 1991; Released: December 16, 1991

1. Under consideration are the following:

Joint Request for Approval of Settlement Agreement, filed August 21, 1991, by the Florida State Conference of Branches of the NAACP and WXBM, Inc.;

Motion for Summary Decision, filed August 29, 1991, by WXBM, Inc. ("WXBM"):

Opposition to Joint Request for Approval of Settlement Agreement, filed September 5, 1991, by the Mass Media Bureau ("MMB");

Comments on Motion for Summary Decision, filed September 12, 1991, by the Florida State Conference of Branches of the NAACP and its Santa Rosa, County, Florida Branch ("NAACP");

Supplement to Request for Approval of Settlement Agreement, filed October 23, 1991, by the NAACP;

Comments on Motion for Summary Decision, filed December 2, 1991, by MMB; and

WXBM's Comments on Mass Media Bureau's Comments on Motion for Summary Decision, filed December 3, 1991.

2. Florida State Conference of Branches of the NAACP and WXBM-FM, Inc., licensee of station WXBM-FM, Milton, Florida ("the Station") request that the Settlement Agreement dated July 12, 1991 be approved. The Agreement attempts to resolve allegations raised in a Petition to Deny, filed January 3, 1989 by NAACP, to the effect that the Station had not complied with the Commission's EEO Rule. The NAACP and WXBM here request approval of the Agreement and a grant of WXBM's license renewal application.

3. In effect, NAACP proposes to withdraw its petition to deny the renewal of application of WXBM in exchange for a payment of $17,344 from WXBM. NAACP and WXBM represent that the promised payment constitutes a reimbursement of most of NAACP's legitimate and prudent expenses. In addition, NAACP and WXBM have agreed that WXBM will notify various named organizations when job vacancies occur at WXBM; and that, after the Commission's grants WXBM's renewal application, WXBM will begin a minority student internship program at the station and will provide an endowment of $90,000 to a college scholarship fund. In conjunction with the financial commitments specified in the Agreement, WXBM has put $55,000 in escrow. Finally, WXBM promises to meet twice annually with the NAACP to discuss WXBM's equal employment opportunity efforts, non-entertainment programming and purchasing requirements.

4. The proposed $90,000 payment to the Harry T. Moore Fund ("Fund") is not inconsistent with the Commission's rules governing citizen agreements. None of the monies to be distributed to the fund under this Agreement are to be retained by the Fund. All of the $90,000 will be distributed to college students, primarily to broadcasting students. The recipients need not be NAACP Youth Council members or NAACP members. The scholarship recipients will be chosen on the basis of merit and need. Everald Thompson, Esq., Assistant General Counsel of the NAACP with responsibility for the Association's communications docket, confirms that while the Fund is an "organization related to the petitioner," it will only serve as a pass-through for the funds and will not itself "receive any money or other consideration" for its own use.

5. The Agreement expresses the totality of the understandings among the parties, and no other funds are to flow from WXBM-FM, Inc. to any party under the Agreement. Appended as Exhibits 3 and 4 to the Agreement are the declarations of no consideration of principals of both parties to the Agreement. These declarations comply with the Commission's requirements applicable to citizen-broadcaster agreements. To the extent the Agreement contemplates the reimbursement of the NAACP's reasonable and prudent expenses, reimbursement of these expenses comports both with the FCC's policies on petitions to deny and with federal policy regarding reimbursement of fees of litigants serving as private attorneys-general. Cf. *Sullivan v. Hudson*, 109 S.Ct. 2248, 2248, 2257 (1989).

6. WXBM-FM also moves for summary decision on each of the issues designated against WXBM by the *Hearing Designation Order*, FCC 91-256, released August 2, 1991 ("*HDO*").[1]

7. The issues for summary decision are the following:

To determine the extent to which the licensee of Station WXBM-FM complied with the affirmative action provisions specified in Section 73.2080(b) of the Commission's Rules, 47 C.F.R. Section 73.2080(b);

To determine whether the licensee of Station WXBM-FM made misrepresentations of fact or was lacking in candor or violated Section 73.1015 of the Commission's Rules, 47 C.F.R. Section 73.1015 with regard to the station's 1988 renewal application's EEO program and documents submitted in support thereof;

To determine whether the licensee of Station WXBM-FM discriminated in its employment practices against Blacks in violation of Section 73.2080(a) of the Commission's Rules, 47 C.F.R. Section 73.2080(a); and

To determine whether, in light of evidence adduced pursuant to the foregoing issues, a grant of the subject license renewal application would serve the public interest, convenience and necessity.

Preliminary Statements Made By WXBM-FM, Inc.

8. In its motion for summary decision ("MSD"), the licensee, WXBM-FM, Inc., initially admits that it failed to comply fully with the affirmative action provisions of Section 73.2080(b) of the Commission's Rules. In this regard, the licensee concedes that it hired no Blacks for 61 vacancies filled between October 1, 1984 and October 1, 1988; it primarily used general recruitment sources, and not enough specifically minority-oriented recruitment sources; it did not always use all of its recruitment sources to fill each vacancy; it had few minority referrals; and it did not compile complete information regarding the race and gender of each job candidate. MSD at 6-7. As for alleged misrepresentations, the licensee acknowledges there were inconsistencies between representations in the station's 1988 renewal application EEO program and subsequent responses to the Commission. However, the licensee submits the inconsistencies arose not because it sought to deceive the Commission but because the persons filling out the EEO program report misread it. In addition, the licensee explained that it subsequently revised the number of female referrals received from employees only because it could not verify through documentation the figure originally reported in its EEO program. Further, the licensee submits that it used labor force data for Santa Rosa County rather than the Pensacola Metropolitan Statistical Area ("MSA") because it believed in good faith that such reference was appropriate and not because it attempted to disguise the inadequacies of its EEO program. Finally, the licensee denies that it discriminated against Blacks. It submits that consideration of race did not affect any employment decision and that no direct evidence of discrimination against minorities exists.

Findings of Facts

9. The facts as gleaned from the licensee's records and from deposition testimony[2] and interrogatory answers generally support the licensee's contentions. Between July 25, 1984, when the licensee acquired WXBM-FM, and January 3, 1984, when the petition to deny the station's renewal application was filed, the station filled 80 full-time jobs, on which 72 were in the upper-four job categories.[3] The general recruitment sources most often used by the licensee for sales positions included the *Pensacola New Journal*, the University of West Florida and Pensacola Junior College. For clerical positions, the station announced job openings on WXBM-FM and used Locklin Vocational-Technical College. In addition, the station sought applicants from the Florida State Employment Service. For on-air positions, the station solicited applications through informal contacts with local radio and television stations. Finally, on at least one occasion each, the licensee used *Radio and Records*, the University of Florida, Pace High School, and the West Florida Advertising Association. The only minority-specific source used was the Creek Indian Council, which Mahacek, the station's general manager, contacted once a year. The recruitment sources used by the station and cited in the station's 1988 renewal application EEO program included those listed in the 1984 assignment application EEO program submitted by WXBM when it sought the station's license.[4] (MMB Ex. 1; MMB Ex. 2; MSD. Ex. 3; Mahacek Dep. Tr. 23-24, 37, 43, 86, 119; Mahacek Dep. Ex. 1; WXBM-FM, Inc. September 13, 1991, Answer 5 to Interrogatories)

10. Employment applications retained by the licensee suggest that few referrals resulted from recruitment contacts. More than one-half of the applications fail to note the applicant's referral source, while the next largest group indicates that applicants were referred by present or former employees of the station. (MMB Ex. 2) In this regard, Mahacek acknowledged that there were a lot of walk-in job candidates. (Mahacek Dep. Tr. 122) The station received applications from no more than four minorities, two Hispanics and, possibly, two American Indians. There is no evidence that the station received an application from, much less interviewed, a Black job candidate. The applications also show that job applicants resided throughout the station's listening area. The communities most often named were Pensacola, Milton, Pace and Jay, the latter three being in Santa Rosa County. (MMB Ex. 2)

11. Of the 80 persons hired for full-time work during the relevant period, two may have been American Indians. Both were hired in 1988, and at the time of their hire the licensee did not know they were American Indians. None of the other persons hired was a minority. The station's Annual Employment Reports for the years 1985 through 1988 show that none of the station's employees were minorities. (MMB Ex. 3) By comparison, the Pensacola MSA has 17.5 percent minorities in its labor force (14.3 percent Blacks). *See HDO, supra*, 6 FCC Rcd 4786, n.12. Santa Rosa County, where Milton is situated, has 6.6 percent minorities in its labor force (3.9 percent Blacks). (MSD Ex. 1).

12. The hiring, promotion, and labor force sections (Sections IV, V and VI) of the draft 1988 renewal application EEO program were prepared by WXBM employee Lawania Salter.[5] Salter, a high school graduate, had worked at the station in clerical jobs since 1979. Under the supervision of the prior and present licensees of the station, she had filled out the station's Annual Employment Reports. However, she had no involvement in the preparation of the station's 1981 renewal application EEO program. The first time she worked on a renewal application EEO program was in 1988. Nonetheless, Louis Mahacek, the station's general manager and 50 percent

owner, asked her to prepare the draft because he believed she knew more about doing FCC EEO reports than he did in view of her experience with Annual Employment Reports.[6] (Salter Dep. Tr. 9-14, 58-59; Mahacek Dep. Tr. 80, 87-88)

13. Salter inserted in her draft the number six for Section IV's question about the total number of station hires for the twelve month period preceding the preparation of the renewal application EEO program. The six were all women. None was a minority. Of the six, three were hired for jobs in the upper-four job categories. In the margin of the draft, Salter wrote the names, as well as the starting and termination dates, of all women then employed by the station, and specifically indicated those who had been hired during the relevant period by inserting a dash (-) before their names. She obtained these names from Coleman. Salter received no instructions from Mahacek as to how to complete the section. (Salter Dep. Ex. 1, p. 4, Tr. 65-66, 68-70) She "tried to figure it out for [her]self the best [she] could." (Salter Dep. Tr. 65-66) At the time she filled out the section, Salter understood that the information requested was only about women and minorities. She discussed the section with Mahacek, whose understanding was the same as hers. (Salter Dep. Tr. 73-76; Mahacek Dep. Tr. 81, 86, 185-86) After briefly reviewing the section with Salter, Mahacek had the section typed in final. He then signed the report and submitted it to the Commission. Had Mahacek realized that the section sought the total number of persons hired, including males and part-time employees, he would have known that the number listed was incorrect and he would have taken steps to provide the correct information.[7] (Mahacek Dep. Tr. 81, 185-86, 189) With respect to Section V of the EEO program, Salter and Mahacek agreed that no promotions had occurred, and the report was accurate. (Salter Dep. Tr. 77-78)

14. Mahacek told Salter to obtain statistical information about the station's available labor force by calling the Florida State Employment Service and asking for figures for Santa Rosa County. Mahacek understood that Section VI of the EEO program report gave him a choice between the MSA and the county, and he believed the county data were more appropriate since the station was licensed to serve the county. Because he knew that Santa Rosa County had few minorities, Mahacek was not concerned about the absence of minorities in the station's Annual Employment Reports or EEO program. Mahacek did not understand that he was supposed to analyze the station's EEO program in light of the availability of minorities in the MSA. Finally, Mahacek did not use the Santa Rose County figures in an attempt to disguise or minimize the significance of the absence of minorities at the station. (Mahacek Dep. Tr. 58-62, 65, 67-68, 95-96; Salter Dep. Tr. 79-80).

15. The MMB did not locate any Black person who alleged was denied employment at the station, nor did it locate any Black person who allegedly was a prospective employee but did not complete an employment application because such an act was discouraged by the licensee.

CONCLUSIONS

Issue 1 - Affirmative Action

16. Section 73.2080(b) of the Commission's Rules requires each broadcast licensee with five or more full-time employees to establish and maintain an equal employment opportunity program. The evidence establishes that WXBM did not fully comply with the requirements specified in Section 73.2080(b). Indeed, its compliance can only be characterized as minimal. The licensee did not consistently communicate its employment needs to sources of qualified applicants as required by Section 73.2080(b)(3). Instead, it relied heavily on walk-in applicants and applicants referred by present or former station employees. Such practices, as well as the licensee's method of informally seeking applicants from local radio and television stations, were clearly insufficient considering the station's all white staff and its experience that its recruitment methods resulted in virtually no minority referrals. *See* Rust *Communications Group, Inc.*, 73 FCC 2d 39, 48 (1979), *aff'd sub nom. Metro - Act of Rochester, Inc. v. FCC*, 670 F.2d 202 (D.C. Cir. 1981). *See also Black Broadcasting Coalition of Richmond v. FCC*, 556 F.2d 59, 62 (D.C. Cir. 1977).

17. In addition, the licensee did not conduct a continuing review of the station's employment practices nor it adopt positive recruitment measures to ensure that Black job candidates were apprised of openings at the station as required by Section 73.2080(b)(5).[8] Indeed, the licensee concedes that it never reviewed its recruitment efforts, did not maintain records which would have permitted such review, and had no idea it might not have complied with the Commission's EEO rules until the filing of the petition to deny. Such practices are clearly insufficient and cannot be excused even if they are based on mistaken beliefs concerning the legality of maintaining adequate records or the appropriate labor force. *See Amendment of Part 73 - EEO Rule*, 4 FCC Rcd 1715, 1716 (1989); *National Capital Christian Broadcasting, Inc.*, 3 FCC Rcd 1919 (1988); *Delaware Broadcasting Co.*, 102 FCC 2d 133 (1985); *Broadcast Renewals (Indiana, Kentucky and Tennessee)*, 54 RR 2d 1473, 1484 (1983); *Northwest Community Broadcasting, Inc.*, 85 FCC 2d 1012, 1014 (1981); *Renewals of Certain Suburban D. C. Broadcast Stations*, 77 FCC 2d 911, 912-13, *recon. denied*, 83 FCC 2d 207 (1980). Accordingly, it is ruled that the licensee failed to comply with Section 73.2080(b) of the Commission's Rules.

Issue 2 - Misrepresentation/Lack of Candor

18. The MMB submits that there is no fundamental dispute concerning the core facts and circumstances regarding the licensee's submissions to the Commission. The disparity between the number of total hires originally reported in Section IV of the station's 1988 renewal application EEO program and the number actually hired resulted from a misreading of the form by Lawania Salter, the clerical employee who prepared a draft of the section, and by Louis Mahacek, the station's general manager. Both were unfamiliar with the form, and neither realized that an error had been made. When the Commission's staff asked for an explanation, the licensee provided one. The explanation given -- that both mistakenly thought the section sought to ascertain the total number of minority and female hires during the relevant period -- has been repeatedly confirmed by both Salter and Mahacek and supported with a copy of the draft EEO program pre-

pared by Salter. In view of the foregoing, it is ruled that the incorrect information reported in Section IV of the EEO program resulted from carelessness and faulty reasoning instead of an intent to deceive. *Letter to Dennis H., Curley, President (WCXU - FM)*, DA 91-1160, released September 19, 1991. *Cf. Metrogeneral Communications of Nashville, Inc.*, 99 FCC 2d 256 (1984); *Northern Television, Inc.*, 55 RR 2d 1680, 1692-94 (1983).

19. Similarly, with respect to the licensee's repeated failures to provide the names of all recruitment sources used, as well as the licensee's amendment as to the number of referrals received from station employees, the MMB submits that there was no intent to deceive. Review of the licensee's records indicates that it would be difficult at best to make any correlation between a particular recruitment contact and an application or set of applications. Many of the licensee's recruitment contacts were informal;[9] the licensee did not retain all applications received;[10] many applicants did not state their referral source; and the licensee relied on inexperienced personnel to prepare the renewal application EEO program report. Thus, when the licensee was asked to name the recruitment sources used for each job filled, it could not respond without some guesswork. nor could it subsequently verify with documentation the numbers of referrals originally reported in the 1988 renewal application EEO program report. However, considering that the licensee believed that its EEO record as to women was adequate and that its record as to minorities would be judged in light of the data for Santa Rosa County, it is ruled that the licensee's shortcomings resulted from carelessness and not an intent to deceive. *E.g.*, *Northern Television, Inc.*

Issue 3 - Intentional Discrimination

20. Section 73.2080(a) proscribes discrimination against any person in employment, *inter alia*, because of race. *E.g., Catoctin Broadcasting Corporation of New York*. 4 FCC Rcd 2553, 2558 (1989). However, the Commission distinguishes between discrimination which is intentional and that which results from inadvertence. *HDO*, 4 FCC Rcd 4785, *citing Bilingual - Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 630 (D.C. Cir. 1978) ("Bilingual"). Thus, to violate Section 73.2080(a) discrimination must be purposeful. *Bilingual*, 595 F.2d 628-30. *See also*, *Black Broadcasting Coalition of Richmond v. FCC*, 556 F.2d 59, 61-62, 64 (D.C. Cir. 1977).

21. The evidence establishes that the licensee's failure to hire and employ Blacks during the period preceding the filing of the petition to deny stemmed from its failure to apprise sources of Black applicants in the Pensacola MSA about job opportunities at the station. The failure to apprise Black sources, in turn, arose from the licensee's mistaken view as to the relevant labor force for assessing its EEO efforts. Thus, the licensee gave little thought to the absence of Blacks from the station's applicant pool and staff because there were few (less than 4 percent) Blacks in Santa Rose County. While the licensee's employment practices violated the Commission's affirmative action policies, they did not constitute intentional discrimination against Blacks. *E.g., WBBE / WMGB*, (*supra*).

Witness Demeanor

22. The MMB recognizes that findings are within the province of the trier of fact and should be accorded substantial weight. Here, however, the MMB believes that the totality of the evidence renders unnecessary any observation of the demeanor of the witnesses by the Presiding Judge.

23. The MMB submits that analysis of the relevant documents, the licensee's Answers to Interrogatories and the deposition testimony of Salter, Mahacek and Smith establishes that the basic facts are undisputed. Further, comparison of the licensee's motion with the MMB's comments shows that the parties are not in disagreement regarding material factual inferences that may properly be drawn from such facts. Thus, no useful purpose would be served by conducting a hearing on the specified issues.

Ultimate Conclusions

24. In view of the foregoing, the only matter to be decided is the appropriate sanction for the licensee's admitted failures to comply with Section 73.2080(b) of the Commission's Rules.[11] The MMB submits that the licensee's shortcomings are more serious than those of the licensees in *WBBE / WMGB* and *Broadcast Stations Serving the Miami, Florida Area*, 5 FCC Rcd 4893, 4897-98 (1990) (" *WLVU / WLVU - FM* "). Like those stations, WXBM-FM had an unproductive EEO program, failed to maintain adequate applicant flow information, and failed to engage in meaningful self-assessment of its EEO program. WXBM-FM's contacts with minority-specific recruitment sources were equal to or less than those cited in *WBBE / WMGB* and *WLVU / WLVU - FM* since the licensee of WXBM-FM did not seek out applicants from the dominant minority group in the area. Moreover, the licensee of WBBE hired one Black out of 53 full-time hiring opportunities in an area with a 9.2 percent Black labor force, while the licensee of WLVU hired no minorities despite having 54 hiring opportunities during the license term in an area with 15.2 percent minorities. By comparison, WXBM-FM hired no Blacks for any of its 80 full-time job opportunities in an area with 14.3 percent Blacks. The Commission granted WBBE renewal of license, subject to reporting conditions, and a forfeiture of $18,000. For WLVU, the Commission granted renewal for less than a full-term subject to reporting conditions, and imposed a forfeiture of $18,000. Since WXBM-FM's EEO record is more egregious than the records of WBBE and WLVU, the MMB recommends the grant of renewal of license for less than a full-term, subject to standard EEO reporting conditions, and a forfeiture of $20,000.

25. The MMB also submits that the EEO reports should be submitted on October 1, 1992 and on October 1, 1993 (with the renewal application) and should include the following:

> (a) For each report, a list of all job vacancies during the twelve months preceding the respective reporting dates, indicating the job title and full or part-time status of the position, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;
>
> (b) A list of employees as of the October 1, 1992, payroll period for the first report and as of the October 1, 1993, payroll period for the second re-

> port, by job title, indicating part-time or full-time status (ranked from the highest paid classification), date of hire, sex and race or national origin; and
>
> (c) Details concerning the station's efforts to recruit minorities for each position filled during the period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any relevant information with regard to the station's EEO performance and efforts thereunder.

26. In its Comments on Mass Media Bureau's Comments, filed December 3, 1991, WXBM-FM, Inc. represents that it concurs with and will accept without appeal the conditions on the renewal of WXBM's license as specified to MMB's comments.

RULINGS

Accordingly, IT IS ORDERED that the Joint Request for Approval of Settlement Agreement, filed August 21, 1991, by the Florida State Conference of Branches of the NAACP and WXBM, Inc. IS GRANTED, and the Agreement IS APPROVED; the Motion for Summary Decision, filed August 29, 1991, by WXBM, Inc. IS GRANTED; the application of WXBM-FM, Inc. for the renewal of license of Station WXBM-FM, Milton, Florida, IS GRANTED, SUBJECT TO THE FOLLOWING CONDITIONS:

> The renewal is for a term to end February 1, 1994 subject to the submission of standard EEO reports and a forfeiture of $20,000. The EEO reports are to be submitted on October 1, 1992, and on October 1, 1993 (with the renewal application) and are to include the following:
>
> (a) For each report, a list of all job vacancies during the twelve months preceding the respective reporting dates, indicating the job title and full or part-time status of the position, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;
>
> (b) A list of employees as of the October 1, 1992, payroll period for the first report and as of the October 1, 1993, payroll period for the second report, by job title, indicating part-time or full-time status (ranked from the highest paid classification), date of hire, sex and race or national origin; and
>
> (c) Details concerning the station's efforts to recruit minorities for each position filled during the period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any relevant information with regard to the station's EEO performance and efforts thereunder.

IT IS FURTHER ORDERED that this proceeding IS TERMINATED.[12]

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

FOOTNOTES

[1] In its Comments filed September 12, 1991, the NAACP states that in light of the proposed Settlement Agreement noted above, it believes that no useful purpose would be served by a hearing or denial of the renewal application.

[2] Depositions were taken of the licensee's two owners, Lloyd Smith and Louis Mahacek, and a former employee of the station, Lawania Salter.

[3] The differences between the numbers set forth on page 6 of the licensee's motion and the numbers noted above are attributable to different time periods and the Bureau's more comprehensive analysis of the station's documents, including those provided in discovery.

[4] The recruitment sources listed by the licensee in 1988 also tracked the sources listed in the prior licensee's 1981 renewal application EEO program for station WXBM-FM. Compare MSD Ex. 1 with Mahacek Dep. Ex. 1.

[5] Salter had no role in the preparation of Section III of the EEO program report. (Salter Dep. Tr. 61-63) That section, which reported the number of referrals received from each listed recruitment source, was prepared by WXBM employee Helen Coleman. Coleman, a clerical employee hired less than a month before the renewal application EEO program was prepared, obtained referral information by reviewing employment applications maintained in the station's files. Coleman avers that she was well aware of the need for accuracy, that any errors by her were inadvertent and that Mahacek did not ask her to falsify any information. (MSD Ex. 13) The only reason Mahacek changed the number of female referrals received from employees from 20 to zero was because he could not verify Coleman's figure from the applications maintained by the station. (Mahacek Dep. Tr. 102-04)

[6] Like Salter, Mahacek had never before attempted to prepare a renewal application EEO program report. (Mahacek Dep. Tr. 87)

[7] Similarly, Mahacek did not fully respond to the Commission's inquiries as to which recruitment sources were used for each job filled because the station did not keep records. (WXBM-FM, Inc. September 13, 1991, Answer #4 to Interrogatories)

[8] Even assuming, *arguendo*, that the licensee contacted the Creek Indian Council for referrals and hired two American Indians in 1988, the licensee did not fulfill its affirmative action obligations. As noted in the *HDO*, 6 FCC Rcd 4786 n.12, the licensee's efforts as to American Indians are of minimal significance since the Commission focuses primarily on the station's efforts regarding the dominant minority in the labor force. In both the Pensacola MSA and Santa Rosa County, the dominant minority is Black. *See also*, *Renewal License of Stations WBBE (AM)/WMGB(FM)*, 4 FCC Rcd 8255, 8256 (1989) ("*WBBE/WMGB*").

[9] For example, the licensee itself had no documentation showing that it had solicited applications from students at Pensacola Junior College. However, the licensee ultimately obtained verification from Pensacola Junior College that a job notice for sales positions at WXBM-FM had been continuously posted since 1985.

[10] As noted, the licensee hired 80 persons hired for full-time work during the period July 25, 1984 through January 3, 1989. However, the licensee was able to produce the actual applications of less than 40 of those persons.

[11] Resolution of the issues by summary decision, coupled with the NAACP's supplement to request for approval of settlement agreement filed October 23, 1991, eliminates the concerns expressed by the MMB in its opposition to the settlement agreement. *See*, "Mass Media Bureau's Opposition to Joint Request for Approval of Settlement agreement," filed September 5, 1991.

[12] In the event exceptions are not filed within 30 days after the release of this Summary Decision, and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public release, pursuant to 47 C.F.R. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-355

In re Applications of

INTERFAITH CHRISTIAN UNION, INC. (hereafter "Interfaith")	File No. BPED-890919MD
CROSS COUNTRY BROADCASTING, INC. (hereafter "Cross Country")	File No. BPED-900717MG

For Construction Permit for
a New Noncommercial, Educational FM
Station on Channel 209A in South Bend,
Indiana

HEARING DESIGNATION ORDER

Adopted: November 25, 1991; Released: December 17, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned, mutually exclusive applications for a new, noncommercial, educational FM station.

2. *Interfaith.* The Federal Aviation Administration (FAA) has determined Interfaith's site to be a hazard to air navigation. Accordingly, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

3. *Share-time Arrangement.* Neither applicant has indicated whether an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement.

4. Since there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial, educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available noncommercial, educational FM signals within the respective service areas.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine whether there is a reasonable possibility that the tower height and location proposed by Interfaith would constitute a hazard to air navigation.
>
> 2. To determine: (a) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest, and if so, the terms and conditions thereof; (b) the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and (c) whether other factors in the record demonstrate that one applicant will provide a superior FM, educational broadcast service.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications would be granted, if any.

7. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

8. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

9. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-357

In re Applications of

SHOWEM, INC. File No. BPED-881130ID
(hereafter: "Showem")

For Construction Permit for a
Major Modification for Noncommercial
Educational Station WLPJ(FM)
New Port Richey, Florida
Req. 91.5 MHz Channel 218C2
25 kW (H&V) ERP; 119.3 meters HAAT

CHRISTIAN File No. BPED-890410MD
FAMILY CINEMA, INC.
(hereafter: "Cinema")

For Construction Permit for a New
Noncommercial Educational FM Station
Crystal River, Florida
Req. 91.9 MHz Channel 220A
3.0 kW (H&V) ERP; 100 meters HAAT

SONLIGHT PUBLIC File No. BPED-890531ME
BROADCASTING
NETWORK, INC.
(hereafter: "Sonlight")

For Construction Permit for a New
Noncommercial Educational FM Station
Homosassa Springs, Florida
Req. 91.9 MHz Channel 220A
3.0 kW (H&V) ERP; 100 meters HAAT

HEARING DESIGNATION ORDER

Adopted: November 25, 1991; Released: December 17, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications.[1]

2. *Showem.* Our engineering study of Showem's March 27, 1991 amendment, which it filed in an effort to eliminate mutual exclusivity with the other two applicants, reveals that the amendment violates 47 C.F.R. § 73.316(b)(2). Showem's proposed directional antenna pattern exceeds the 2 dB/10 rate-of-change limit, imposed by that section, at numerous azimuths. The maximum rate-of-change is 3.97 dB/10°, which occurs between the azimuths of 85°T to 90°T. Recognizing this deficiency, Showem has requested a waiver of § 73.316(b)(2) in order to permit acceptance of this amendment. In support of this waiver request, Showem argues that the proposed directional antenna pattern is based on actual measured patterns from the manufacturer which have been demonstrated to be stable. Further, the actual rate of change is said to only "minimally" exceed the regulatory limit.

3. However, our review indicates that waiver of the rate-of-change limit in 47 C.F.R. § 73.316(b) is not justified in the present situation. Waiver of the 2 dB/10° rate-of-change and the 15 dB maximum-to-minimum limitations of § 73.316 is generally granted only to stations attempting to protect a non-broadcast facility (such as Table Mountain, the NRAO facility at Green Bank, WV, or a Commission monitoring station; *see* 47 C.F.R. § 73.1030) or to avoid wasting a signal over water. In the present case, neither situation applies. Instead, Showem proposes a directional antenna in order to protect the broadcast facilities proposed by Cinema and Sonlight. Waivers of 47 C.F.R. § 73.316 are generally not granted to stations seeking to avoid prohibited contour overlap, even in situations similar to the present where a directional antenna waiver is proposed to eliminate mutual exclusivity. Indeed, in re-examining the directional antenna rules, the Commission recently reaffirmed the § 73.316 limits. *See Report and Order*, MM Docket No. 87-121, 50 Fed. Reg. 09800, 4 FCC Rcd 1681 (1989), especially paragraphs 20, 37, and 39 therein. Consequently, Showem's request for waiver of 47 C.F.R. § 73.316(b)(2) will be denied, its March 27, 1991 amendment will be dismissed, and Showem's application as it existed prior to the March 27, 1991 amendment will be designated for consolidated hearing with the other two mutually exclusive applicants.

4. *Cinema.* Section 73.503(a) of the Commission's Rules mandates that an educational broadcast license may only be issued to a nonprofit educational organization and only upon a showing that the facilities will be used for the advancement of an educational program. Cinema states its purpose, in part, is to "work closely with the leaders of the community in the area of religion, civics and education, " and has set forth in its application a comprehensive proposed programming schedule. However, the programming schedule appears to be devoid of any educational programming. We find the submitted material insufficient to make a determination that Cinema is a qualified educational organization proposing an acceptable educational format in compliance with 47 C.F.R. § 73.503. Accordingly, an appropriate issue will be specified.

5. Our engineering review of the Cinema application reveals that, for the existing tower on which Cinema intends to sidemount its antenna, Commission and FAA records list the overall tower height above ground level

---

[1] Our review indicates that while the respective protected and interfering contours of the Showem and Cinema applications do not overlap, these applications are linked in a "daisy chain" due to prohibited overlap with the Sonlight application (which constitutes the center "link"). Since all the applications were timely filed and the grant of one would effectively preclude the grant of at least one other, they are mutually exclusive and must be consolidated for hearing. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

(OHAGL) and overall tower height above mean sea level (OHAMSL) as 159.1 meters and 162.2 meters, respectively. Cinema, however, has specified these values in its application as 153 meters OHAGL and 156 meters OHAMSL. This discrepancy does not affect the acceptability for filing of the application. However, Cinema will be required to file an amendment either correcting the tower height data specified in its application to conform with FCC and FAA records or, if the heights specified in its application are the actual heights, reporting that it has filed an FAA Form 7460-1 with the FAA to correct the tower height discrepancy. Accordingly, an air hazard issue will be specified.

6. *Time-Sharing.* None of the applicants have indicated that an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (October 24, 1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement between themselves.

7. *Areas and Populations.* Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

8. *Conclusion.* Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine whether there is a reasonable possibility that the tower height and location proposed by Cinema would constitute a hazard to air navigation.
>
> 2. To determine whether Cinema is a qualified educational organization as required by 47 C.F.R. § 73.503(a).
>
> 3. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.
>
> 4. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.
>
> 5. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That Showem's request for waiver of 47 C.F.R. § 73.316(b)(2) IS DENIED and its March 27, 1991 amendment IS DISMISSED.

11. IT IS FURTHER ORDERED, That Cinema shall, within 30 days of the release of this Order, file the amendment required in paragraph 5, above, with the presiding Administrative Law Judge.

12. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

13. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-356

In re Applications of

ANDREA L. JOHNSON (hereafter "Johnson")	File No. BPH-891207MF
JAMES T. EMBRESCIA (hereafter "Embrescia")	File No. BPH-891207MG
LAKELAND COMMUNICATIONS (hereafter "Lakeland")	File No. BPH-891207ME (Dismissed Herein)
ASHTABULA FM RADIO, INC. (hereafter "Ashtabula FM")	File No. BPH-891207MJ (Dismissed Herein)
ASHTABULA-CONNEAUT COMMUNICATIONS COMPANY (hereafter "Conneaut")	File No. BPH-891207MK (Dismissed Herein)

For Construction Permit
for a New FM Station on Channel 252A (98.5 MHz)
in Ashtabula, Ohio

HEARING DESIGNATION ORDER

Adopted: November 25, 1991; Released: December 17, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* Lakeland, Ashtabula FM and Conneaut [1] have not paid the required hearing fee by July 15, 1991, the date set forth in *Public Notice,* Mimeo No. 13110, released May 15, 1991. Their applications will therefore be dismissed. *See* revised Section 73.3573(g)(2) of the Commission's Rules and *Report and Order* in Gen. Doc. 90-264 ("Proposals to Reform the Commission's Comparative Hearing Process"), 6 FCC Rcd 157, 157-158 and 170 (1990); *Erratum,* 6 FCC Rcd 3472 (1991); *recon. granted* 6 FCC Rcd 3403 (1991).

3. *Other Matters.* An engineering study of the applications filed by Johnson and Embrescia reveals that they are short spaced to the licensed facilities of Station WNCX-FM, Cleveland, Ohio and to the licensed facilities of WRJS-FM, Oil City, Pennsylvania.

4. By way of background, in the *Second Report and Order* in MM Docket No. 88-375, 4 FCC Rcd 6375 (1985), the Commission revised § 73.207 to allow licensees of Class A FM stations an opportunity to increase effective radiated power up to a maximum of 6 kilowatts at an antenna height above average terrain of 100 meters or its equivalent. This increase in power required the adoption of increased separation distances for Class A stations to prevent interference. Existing stations at locations that did not meet the new separation distances that became short spaced as a result of the rule change were "grandfathered." The new rules became effective on October 2, 1989. Therefore, "applications and petitions filed prior to October 2, 1989 must comply with, and will be processed in accordance with, the current [old] rules." *Second Report,* at 6382.

5. However, recognizing the need to clarify the new rules adopted in the *Second Report,* the Commission released a *Memorandum Opinion and Order* in MM Docket 88-375, 6 FCC Rcd 3417 (1991). Among other things, this *Order* amended 47 C.F.R. § 73.213(c) [Grandfathered short-spacing stations] to read, in part:

> If the reference coordinates of an allotment are short-spaced to an authorized facility or another allotment (as a result of the revision of Section 73.207 in the *Second Report and Order* in MM Docket No. 88-375), an application for the allotment may be authorized, and subsequently modified after grant, in accordance with paragraph (c)(1) or (c)(2) of this Section *only with respect to such short spacing.* (emphasis added).

6. As a result of a petition for rule making filed with the Commission in 1988 and adopted on August 22, 1989, the FM Table of Allotments was amended and Channel 252A was allotted to Ashtabula as that community's second local FM service. *See Notice of Proposed Rule Making* in MM Docket No. 88-607, 4 FCC Rcd 1236 (1989), *Report and Order* in MM Docket No. 88-607, 4 FCC Rcd 6912 (1989). Since this rule making was initiated and granted before the October 2, 1989 effective date of the new § 73.207 rules, the Ashtabula allocation came under the "old" § 73.207 rules. Likewise, any applications filed for the allotment would be processed using the "old" rules. Under these rules, the Ashtabula allocation met the distance separation requirements with respect to the licensed facilities of WNCX-FM. Under the new rules, the allotment was short spaced by 8 km to WNCX-FM. Because the Ashtabula allocation became short spaced as a result of the rule change, the allocation was "grandfathered" and was *permitted to be short spaced to the licensed facilities of WNCX-FM only.* The short spacing of Johnson and Embrescia with the licensed facilities of WRJS-FM is not permitted.

7. The Commission acknowledges that prior to the release of the *Memorandum Opinion and Order* in MM Docket No. 88-375 the policy discussed above regarding "grandfathered" stations or allotments may have been somewhat unclear. Accordingly, return of the Johnson and Embrescia applications with no opportunity to cor-

---

[1] Although Conneaut paid the required hearing fee, its check was returned by the bank because Conneaut's account contained insufficient funds to cover the check.

rect the defect would be inappropriate. *See Salzer* v. *FCC*, 778 F.2d 869 (D.C. Cir. 1985). (Fundamental fairness requires that the more exacting the application standard, the greater the Commission's obligation to be explicit about any prerequisites for consideration.) As a result, Johnson and Embrescia will be given *one opportunity* to amend the application to eliminate the short spacing with WRJS-FM and to bring the application into compliance with 47 C.F.R. § 73.213(c). Accordingly, Johnson and Embrescia will be required to file an amendment with the presiding Administrative Law Judge within 30 days of release of this Order which eliminates the short spacing with WRJS-FM.

8. *Embrescia.* An engineering study of Embrescia's application reveals that it is short spaced by 0.9 km to the Edinboro, Pennsylvania allotment and by the same amount of short spacing to a pending construction permit (BPH-910114IA) granted to Station WXTA-FM [formerly WMYJ], Edinboro, Pennsylvania to modify its facilities.

9. By way of background, when Embrescia filed his application on December 7, 1989, it was short spaced to a pending proposed rule making. This rule making was a request by Wincapp Broadcasting, Inc., licensee of WXTA-FM, to substitute channel 250B1 for Channel 250A at Edinboro, Pennsylvania and to modify WXTA's license to specify operation on the higher powered channel. *See Notice of Proposed Rule Making* in MM Docket No. 89-484, 4 FCC Rcd 8080 (1989). Because the rule making was still under consideration and no final determination had been made by the Commission when Embrescia filed his application for Ashtabula, the application was technically acceptable for processing subject to the outcome of the proposed rule making proceeding. Subsequently, in its *Report and Order* in MM Docket No. 89-484, 5 FCC Rcd 6285 (1990), the Commission adopted the Edinboro proposal and amended the Table of FM Allotments, effective December 10, 1990, to substitute Channel 250B1 for Channel 250A at Edinboro, Pennsylvania. Accordingly, Embrescia will be required to file with the presiding Administrative Law Judge within 30 days of the release of this Order an amendment which eliminates the short spacing with WXTA-FM.

10. Section II, Item 6 of FCC Form 301 (1989) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Johnson has not completed Item 6 correctly. Johnson's application does not give her residence address. Accordingly, Johnson must submit an amendment which gives all the information required by Section II, Item 6 to the presiding Administrative Law Judge within 30 days of the release of this Order.

11. Embrescia petitioned for leave to amend his application on June 29, 1990. The accompanying amendment was filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

12. Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

13. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

14. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.
2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

15. IT IS FURTHER ORDERED, That the applications of Lakeland, Ashtabula FM and Conneaut ARE DISMISSED pursuant to 47 C.F.R. § 73.3573(g)(2).

16. IT IS FURTHER ORDERED, That Johnson and Embrescia shall each submit an amendment in accordance with paragraphs 3-7 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

17. IT IS FURTHER ORDERED, That Embrescia shall submit an amendment in accordance with paragraphs 8 and 9 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

18. IT IS FURTHER ORDERED, That Johnson shall submit an amendment which contains the information required by Section II, Item 6 of FCC Form 301 to the presiding Administrative Law Judge within 30 days of the release of the Order.

19. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Embrescia IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

20. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

21. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by

attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant of Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (*see* Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (*see* Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (*Report and Order* in Gen. Doc. 90264), 6 FCC Rcd 157, 160-1, 166, 168 (1990) (*Erratum*, DA 91-654, released June 6, 1991), *on reconsideration*, FCC 91-154, paras. 7-8 & n. 3, Appendix paras. 3 & 5, released May 15, 1991.

22. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-354

In re Applications of

FAITH BIBLE COLLEGE File No. BPED-910402MC
(hereafter "Faith")

For Construction Permit for a
New, Noncommercial, Educational FM
Station on Channel 213A (90.5) in
Milton, Florida

and

OKALOOSA INC. File No. BPED-901016MK
PUBLIC RADIO,
(hereafter "Okaloosa")

For Modification of Facilities for
Station WTJT-FM
Baker, Florida

HEARING DESIGNATION ORDER

Adopted: November 25, 1991; Released: December 17, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new, non-commercial, educational FM station.

2. *Faith.* Faith petitioned for leave to amend its application on September 11 and 12, 1991. The accompanying amendments were filed after September 5, 1991 , the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

3. *Okaloosa.* The Commission, in a letter dated February 26, 1991, informed Okaloosa that both the Federal Aviation Administration (FAA) and the Antenna Survey Branch indicate that there are two towers listed at the coordinates given for the site proposed in the Okaloosa application. Tower number one is listed as being 61.9 meters overall tower height above ground level (AGL) and 128.9 meters overall tower height above mean sea level (AMSL). Tower number two is listed as being 92.4 meters overall tower height AGL and 159.4 meters overall tower height AMSL. In a March 26, 1991 amendment, Okaloosa clarified that there is only one existing tower at the listed coordinates and that its authorized AGL tower height is 61.9 meters. However, the Commission's letter also pointed out that in Section V-B, Item 7 of the application, Okaloosa has recorded an AGL value of 68 meters and an AMSL value of 135 meters. The applicant did not eliminate this discrepancy in the March 26, 1991 amendment. Accordingly, Okaloosa will be required to submit an amendment eliminating this discrepancy.

4. Our engineering study indicates that Okaloosa failed to address the matter of how it proposes to resolve any RF exposure to workers on its tower. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that Okaloosa may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). *See also, Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311.47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since Okaloosa's proposal failed to indicate how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, it will be required to submit the environmental information described in 47 C.F.R. § 1.1311. *See generally*, OST Bulletin No 65 (October 1985) entitled "Evaluating Compliance With FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation" at 28. Accordingly, Okaloosa will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

5. *Share-time Arrangement.* Neither applicant has indicated whether an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement.

6. *307(b).* The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining pursuant to 47 U.S.C. § 307(b) which of the proposals would better

provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

7. *Areas and Populations.* Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial, educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University,* FCC 67-673, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available noncommercial, educational FM signals within the respective service areas.

8. Except as indicated above, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. If a final environmental impact statement is issued with respect to Okaloosa in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.
>
> 2. To determine: (a) the number of other reserved channel noncommercial, educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.
>
> 3. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.
>
> 4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That pursuant to paragraph 3 hereinabove, Okaloosa shall submit an amendment clarifying its tower height discrepancy, to the presiding Administrative Law Judge within 30 days of the release of this Order.

11. IT IS FURTHER ORDERED, That pursuant to paragraph 4 hereinabove, Okaloosa shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

12. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Faith ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

13. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-219

In the Matter of

Routine Licensing of Large
Networks of Small Antenna
Earth Stations Operating in
the 12/14 GHz Frequency Bands

REPORT AND ORDER

Adopted: November 21, 1991; Released: December 17, 1991

By the Commission:

I. INTRODUCTION

1. By a Notice of Proposed Rule Making (*VSAT Notice)* in the above-referenced docket, we proposed to revise Part 25 of the Commission's rules governing the construction, licensing and operation of certain domestic fixed-satellite radio facilities. Specifically, we proposed to codify our policies governing the power limitations on very small aperture terminals (VSATs).[1] A VSAT network consists of a large number of technically identical small fixed-satellite earth stations that operate in the 12/14 GHz band, meet specified technical requirements and communicate only with other earth stations in that network. [2] By proposing to codify our policies governing VSATs, we intended to make our VSAT licensing procedures as efficient as possible for operators and the Commission staff. Further, we intended to remove any ambiguity from the licensing process by instituting a standardized VSAT application format.

2. In the *VSAT Notice* we proposed, among other things, to classify all VSAT station authorization applications in two categories. The first category (Category 1) contained applications for VSATs which are compliant with our current policies as enunciated in the *VSAT Order* [3] and the *Declaratory Order.* [4] The second category (Category 2) contained all other VSAT applications. We proposed that Category 2 applicants be required to conduct the Sharp, Adjacent Satellite Interference Analysis (ASIA) or its equivalent to determine whether and to what degree their non-compliant operations would affect compliant Category 1 operations. [5] As a further safeguard, we proposed that Category 2 applicants be required to provide proof that all potentially affected parties consent to the use of the applicant's higher power density. Also, Category 2 licensees would bear the burden of obtaining operational agreements with *future* Category 1 potentially affected parties as those parties brought their compliant systems into operation.

3. Eleven parties filed comments in response to the *VSAT Notice* and eight parties filed replies. [6] Although we have reviewed all of the commenters' suggestions carefully, in this *Report and Order* we discuss only the major arguments made by the parties. Many of the minor suggestions are incorporated directly into the final rules without textual discussion. In sum, we adopt the rules proposed in the *VSAT Notice* with some minor modifications.

II. BACKGROUND

4. In 1986, the Common Carrier Bureau (Bureau) adopted licensing procedures and technical standards for VSAT networks in the *VSAT Order.* By analyzing the VSAT applications then on file and using the Sharp ASIA program, the Bureau established a maximum inbound digital uplink transmitter power density of -14.0 dBW/4

---

[1] Routine Licensing of Large Networks of Small Antenna Earth Stations Operating in the 12/14 GHz Frequency Bands, 5 FCC Rcd 2778 (1990) (hereinafter *"VSAT Notice"*).

[2] The Commission has approved the operation of many VSAT networks in various network configurations. The most commonly used is the star network configuration in which small remote earth stations communicate among themselves and their central headquarters through a large hub earth station.

[3] Declaratory Order in the Matter of Routine Licensing of Large Networks of Small Antenna Earth Stations Operating in the 12/14 GHz Frequency Bands, 51 Fed. Reg. 15067 (April 22, 1986) (hereinafter *"VSAT Order"*).

[4] Declaratory Order in the Matter of Routine Licensing of Earth Stations in the 6 GHz and 14 GHz Bands Using Antennas Less than 9 Meters and 5 Meters in Diameter, Respectively, for Both Full Transponder and Narrowband Transmissions, 2 FCC Rcd 2149 (April 13, 1987) (hereinafter *"Declaratory Order"*).

[5] The Sharp ASIA program is an updated version of the analysis used in Appendix C of Licensing of Space Stations in the Domestic Fixed-Satellite Service, 54 Rad. Reg. 2d 577 (1983), *recon. in part,* Licensing of Space Stations in the Domestic Fixed-Satellite Service and Related Revisions of Part 25 of the Rules and Regulations, 99 FCC 2d 737 (1985) (Reduced Orbital Spacing). This analysis identifies over 200 baseline radio frequency (r.f.) carriers and calculates the interference-causing potential of each carrier vis-a-vis all other carriers included in the analysis. The core baseline carriers span the range of services provided over both authorized and pending 12/14 GHz domestic satellite systems. Thus, the worst-case potential interference conflicts are included in this analysis. To conduct the analysis, the Category 2 applicant adds its carrier's parameters to the baseline carrier matrix. Carrier-to-noise (C/N) and other associated single-entry interference objectives for each of the carriers are calculated. For each of the r.f. carrier pairs, a carrier-to-interference (C/I) ratio is calculated using the methodology of CCIR Report No. 455-4. The margin shortfall values denoted in the Sharp ASIA matrix summary sheets is the amount, in dB, by which the calculated interference caused by the interfering r.f. carrier exceeds the single-entry objective for the wanted carrier.

[6] Comments were filed by American Satellite Company d/b/a Contel ASC (Contel ASC), American Telephone and Telegraph Company (AT&T), Andrew VSAT Systems, Inc. (Andrew), General Communications, Inc. (GCI), General Electric Information Services (GE), GTE Spacenet Corporation (GTE), Hughes Communications, Inc. and Hughes Network Systems, Inc. (Hughes), J. F. Lockett and Associates now known as JFL Communications, Inc. (Lockett), Mobil Oil Corporation (Mobil), Qualcomm, Inc. (Qualcomm) and Walgreen Co. (Walgreen).

Reply comments were filed by AT&T, Andrew, GCI, GE, GTE, Hughes, Lockett and Mobil. Supplemental comments were filed by GTE.

kHz into a typical 1.2 meter parabolic earth station antenna with a gross bit rate of 512 kbps, and a maximum outbound transmitted satellite carrier equivalent isotropically radiated power (e.i.r.p.) density of +6.0 dBW/4 kHz.[7] In 1987, the Bureau established an inbound analog uplink transmitter power density limit of -8.0 dBW/4 kHz with a bandwidth of 200 kHz into a 1.2 meter earth station antenna and a maximum outbound transmitted satellite carrier power density of +13.0 dBW/4 kHz.[8] Subsequently, several applicants requested authority to exceed outbound satellite carrier power limits.[9] These applicants stated that they needed to operate at higher power density levels in order for their networks to communicate with smaller antennas (typically 1.2 meter), particularly in those regions where precipitation attenuation is a problem, *i.e.*, the Southeast and Gulf of Mexico regions. The Commission noted in the *VSAT Notice* that existing VSAT licensees have overcome the precipitation attenuation problem by using larger antennas in those high precipitation regions. However, these applicants argued that cost and competitive considerations precluded them from using larger antennas.

5. In considering these types of requests in the *VSAT Notice,* we surmised that the best method of allowing increases beyond our VSAT power limits was through a mechanism that would also safeguard operations not exceeding our VSAT power limits. We also believed that codifying a VSAT power limitation would help to eliminate any confusion regarding the licensing of non-compliant stations and would increase Commission staff efficiency in processing these applications. The *VSAT Notice* solicited comments on the use of our proposed protective procedural mechanism and other issues that would impact on its use, *e.g.*, a general increase in the VSAT power levels.

III. DISCUSSION

A. General Power Increase

6. In the *VSAT Notice*, we made no specific proposal to increase VSAT routine licensing power density limits. Rather we sought industry comment on whether the assumptions which formed the basis of the Bureau's *VSAT Order* are still valid.[10] Contel ASC and GTE support a general increase in the VSAT routine licensing power density limits. They argue that such an increase would allow for the routine processing of currently non-compliant VSAT networks, depending on the power density limit decided on. Contel ASC does not suggest a specific amount by which the limit should be raised. Instead, Contel ASC recommends the Commission allow for a "modest" increase in the power density limits proportional to the difference in gain between the new 1.2 meter and the standard 1.8 meter antennas. GTE, mistakenly believing that we proposed to increase the 14 GHz digital power density to -12 dBW/4 kHz, supports an increase to these levels provided that the maximum outbound transmitted satellite carrier power density is limited to 9 dBW/4 kHz. Neither ASC nor GTE supplied a technical analysis that would support a power increase.

7. Others support an increase under certain limited conditions. Lockett proposes a 3 dB increase in current power density limits in both the downlink and uplink bands to compensate for poor e.i.r.p. and saturation flux density coverage to the Gulf of Mexico and Alaska. Mobil supports Lockett's position with regard to the Gulf of Mexico. Both Lockett and Mobil agree that current VSAT power density limits are adequate for service to the contiguous United States.

8. In contrast, Andrew, AT&T, GE, Hughes and Walgreen oppose any general routine licensing power density increase, stating that an increase will greatly increase the number of potential and actual interference incidents among VSAT networks and satellite operations. However, if the Commission does adopt power density limit increases, Walgreen also urges the Commission to impose stringent reporting and monitoring requirements on Category 2 operations in order to protect Category 1 operations.

9. In the 4 1/2 years since the release of the *VSAT Order*, the VSAT industry has flourished in part because compliant networks were given wide latitude to design networks that suited their own needs and the needs of their customers. The fundamental assumptions in the *VSAT Order* were that the digital power density limits of -14.0 dBW/4 kHz maximum inbound uplink power and +6.0 dBW/4 kHz maximum outbound downlink transmitted satellite carrier power are flexible enough to allow the vast majority of services to operate in a non-interference environment. With the exception of a few cases,[11] these assumptions have been confirmed.

10. Those supporting a general power density increase fail to discuss or provide any technical analysis of what impact such an increase would have on VSAT networks operating at current power density levels. Although an increase in the maximum outbound transmitted satellite carrier power density will, as the proponents contend,

---

[7] Typically, inbound transmissions entail the use of small remote earth stations transmitting into a larger earth station. Outbound transmissions typically entail the use of a larger hub station transmitting to smaller remote earth stations.

[8] *See* Declaratory Order, *supra* note 4.

[9] The applicants were J. F. Lockett & Associates, File Nos. 2922-2925-DSE-P/L-87; Mobil Oil Corporation, File Nos. 4530-4532-DSE-P/L-87; and VSAT Systems, Inc. (now Andrew), File Nos. 1373/2567/2905-DSE-P/L-88. Lockett and Mobil later requested and now operate under permanent authority pursuant to the *VSAT Order* under current VSAT power limits. Andrew operates under special temporary authority under current VSAT power limits pursuant to the *VSAT Order*.

[10] GTE incorrectly characterizes our description of interim proposals in the Part 25 Rulemaking as a current proposal to increase VSAT power density limits. For a full description of interim proposals made during the Part 25 Rulemaking proceeding, see Phase II Final Report of Advisory Committee on Implementation of Reduced Orbital Spacing Between Domestic Fixed-Satellites (June 30, 1986). No consensus was reached on these interim proposals and thus no formal committee recommendation regarding the power limit increase was made. For a full description of what was considered in the Part 25 rulemaking proceeding, see Notice of Proposed Rulemaking in the Matter of Amendment of Part 25 of the Commission's Rules and Regulations to Reduce Alien Carrier Interference Between Fixed-Satellites at Reduced Orbital Spacings and to Revise Application Processing Procedures for Satellite Communication Services, 2 FCC Rcd 762 (1987) (Part 25 Rulemaking); First Report and Order, FCC 91-136 (released May 21, 1991) (disposed of procedural matters only).

[11] *See* comments of Walgreen and GE.

allow the use of small VSATs in "edge of coverage" locations such as the Gulf of Mexico or Alaska, it will also adversely affect the vast majority of VSATs operating in compliance with power levels specified by the Commission within the satellite coverage locations within the contiguous United States. Those commenters favoring a power increase have made no demonstrations that contradict the basic conclusions reached in the *VSAT Order* where the Common Carrier Bureau determined that in order to be compatible with uniform two degree orbital spacings, VSAT networks would have to operate within the prescribed limits of the *VSAT Order*. In addition, a preponderance of commenters oppose any general increase, arguing that it would interfere with existing compliant VSAT operations. Absent a convincing technical showing to the contrary, we agree, and conclude that an increase in the routine licensing power density limits, both digital and analog, is unwarranted at this time.

B. VSAT Categorization

11. As stated earlier, in the *VSAT Notice* we surmised that the best method of safeguarding compliant VSAT networks from those networks exceeding our prescribed power limits was by categorizing VSAT networks -- compliant and non-compliant -- and requiring non-compliant networks to adhere to technical coordination and operating guidelines designed to protect compliant networks. Several commenters agree that a categorization approach for VSAT applications is advisable, stressing that procedural safeguards are needed to ensure the integrity of compliant operations. However, they disagree as to how this approach should be implemented. AT&T agrees with our proposed approach, arguing that without the safeguards the principal objectives of routine licensing of VSAT systems -- blanket authorizations for VSATs and assurance that VSATs can perform satisfactorily without coordination with other VSATs -- would be defeated. That operational assurance would be lost, AT&T continues, if prospective non-compliant Category 2 systems are not subordinated to current compliant Category 1 operators and if in-place Category 2 systems are not subordinated to future Category 1 operators. AT&T argues that without placing the burden on non-compliant Category 2 applicants/operators, compliant Category 1 operators, present and future, would have to concern themselves with an additional interference source. Andrew does not agree that blanket protection should be afforded to Category 1 operations. Rather, Category 1 and Category 2 operators should bear equal burden in coordinating interference conflicts. It asserts that Category 2 operations represent new and innovative services whose growth may be slowed or stopped completely by the imposition of unnecessary procedural safeguards. On the other hand, GTE suggests that the Commission replace its categorization proposal with a notification and coordination process which GTE claims would be less burdensome on higher power density applicants. Under the GTE plan, applicants for higher power networks (Category 2 applicants under the Commission proposal) would be required to submit to adjacent satellite operators a copy of a link budget and proposed network frequencies at the same time that the network application is filed with the Commission.

12. In sum, most commenters agree that higher powers can be permitted, but disagree on what status these systems should be afforded. Most commenting unfavorably on the bifurcation process either were concerned that Category 2 operations would be burdened by coordinating with potentially affected parties or expressed concern about the burden of resolving coordination problems with future applicants. In the *VSAT Order* the Bureau held open the possibility for accommodating non-compliant operations if those operations could be accommodated without jeopardizing compliant VSAT operations.[12] Based on the record in this proceeding, we agree with the Bureau's position and conclude that, although we will allow higher power VSATs, those facilities must operate without interfering with existing and future compliant VSAT systems. After careful study we believe the best way to accomplish this is to adopt the approach outlined in the *VSAT Notice*. That is, the vast majority of VSAT applications that continue to involve facilities currently compliant with the *VSAT Order* will be placed in Category 1. Those applications for non-compliant VSAT facilities will be placed in Category 2. In order to protect Category 1 operations, we adopt the mechanism proposed in the *VSAT Notice* with a few minor modifications derived from some of the relevant comments.

13. Under our new rules, applicants with Category 2 networks will have to coordinate with licensed potentially affected parties before we grant them regular authority to operate. To this end, Category 2 applicants are required to provide proof by affidavit that all potentially affected licensed parties acknowledge and do not object to the use of the applicants' higher power density. In addition, we require Category 2 applicants to furnish a complete description of the baseline parameters they use in conducting their analysis. These applicants must also submit tabular summaries of the ASIA program's output detailing potential interference shortfalls and a narrative summary indicating whether there are margin shortfalls in any of the current baseline services as a result of the addition of the new applicant's high power service, and if so, how the applicant intends to resolve those shortfalls. We will also require that link budget analyses be included in each Category 2 application with a detailed written explanation of how each uplink and each satellite carrier density figure is derived.

14. Requiring these Category 2 applicants to bear the burden of obtaining operational agreements with licensed potentially affected parties is no different from our licensing policies for any new earth stations applicant. It is common practice for space station and uplink earth stations applicants to oordinate directly with existing licensees in order to resolve concerns raised by currently licensed, compliant operators. In fact, we have relied on operators resolving their technical and operational conflicts through the coordination process since satellites began providing communications services. We are simply reiterating this procedure here. There is no evidence that Category 1 licensees will act unreasonably, as some commenters allege. We also encourage earth station applicants and operators to enlist the assistance of the relevant satellite operators to help resolve any coordination disputes.

---

[12] *See* VSAT Order, note 3, *supra*, at note 32.

15. Further, under our adopted rules, existing Category 2 licensees will not be able to preclude subsequent Category 1 applicants from obtaining routine VSAT blanket authorizations and protection or otherwise stifle the continued growth of the largest portion of the VSAT industry. This will require existing Category 2 licensees to bear the burden of coordinating with future Category 1 applicants. [13] Coordination with future Category 1 operations should be no more burdensome on Category 2 licensees than coordination with current compliant operations. Generally, any potential Category 2 harmful interference threat can be identified when a Category 1 applicant initially contracts with a satellite operator to arrange access to their satellite. Typically, the satellite operator will maintain records on any transmissions that may pose a threat to any of its actual or potential customers. Those Category 1 applicants discovering potential interference conflicts (with the assistance of the satellite operator) with operating Category 2 licensees can notify the Category 2 licensee and engage in coordination negotiations to resolve any potential conflicts. Non-compliant Category 2 licensees will bear the burden of successfully coordinating with the Category 1 applicant. If no agreement can be reached, the Category 2 licensee will be required to reduce its power density levels to those compliant with the *VSAT Order* or the *Declaratory Order*. [14] We expect the parties to negotiate in good faith and enlist the assistance of the relevant satellite operators to resolve any potential interference disputes. The Commission, of course, reserves the right to address any abuses of this process from any party.

16. In establishing a procedural framework for licensing non-compliant Category 2 operations, we recognize that Category 1 applicants and licensees are involved only to the extent that they are "potentially affected" by Category 2 operations. To define this, GTE recommends that only satellite operators two degrees away from the high power density VSAT applicant be considered as potentially affected parties and thus entitled to notification of non-compliant operation. AT&T disagrees, stating that it is possible that operations four, and even six, degrees away will be affected by non-compliant operations.

17. We require that all Category 2 applicants use the ASIA coordination program as the standard analysis for comparing Category 1 and Category 2 operations. Thus, we will not artificially limit potentially affected parties to those operators with operations two degrees away. Instead, potentially affected parties will be defined by the results of the technical analysis. We presume that, at minimum, a potentially affected party will be one that is operating on a co-channel, co-polarized basis two degrees away.

18. We believe that these procedures will allow higher power VSAT networks to be operated whenever those operations will not compromise compliant networks. If an interference-free environment is not possible, Category 2 operators always have the option of installing more sophisticated antennas. Our goal in adopting these rules is to streamline our application processing procedures. A standardized format for analyzing non-compliant VSAT operations will help speed engineering review of those applications and allow these services to be made available to the public in a timely fashion.

C. Miscellaneous Issues

19. Finally, AT&T proposes, and Andrew supports, the adoption of a single uplink off-axis e.i.r.p. restriction of 15 - 25 log -0 dBW/4 kHz. [15] Walgreen and AT&T support the Commission using live antenna range control testing in order to fully evaluate the potential for interference stemming from increases in power density limits. The parties urge the Commission to conduct these tests before adopting any rules regarding higher power density limits. AT&T's recommendation of a single off-axis e. i. r. p. restriction is already Commission policy with regard to VSAT services. *See VSAT Order, supra* note 4, at note 35. However, because such a general restriction impacts on services other than VSAT services, we defer action on AT&T's proposal here and will address any codification of this policy in the Part 25 Rulemaking proceeding. Because we adopt no power density limit increases, there is no need for the Commission to conduct live antenna range testing or to impose stringent reporting and monitoring requirements on Category 2 operations.

IV. CONCLUSION AND ORDERING CLAUSES

20. We take this action today to streamline further our VSAT application processing procedures and to make these procedures more efficient while maintaining adequate safeguards for established compliant operations.

21. Accordingly, pursuant to Sections 151, 303 and 403 of the Communications Act, IT IS ORDERED THAT Part 25 of Chapter I of Title 47 of the Code of Federal Regulations IS AMENDED as set forth in the Appendix, effective **February 3, 1992.**

22. IT IS FURTHER ORDERED that the Secretary shall cause this *Report and Order* to be published in the Federal Register.

23. IT IS FURTHER ORDERED that the proceedings in CC Docket No. 90-219 ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

---

[13] This requirement is not without precedent. We imposed similar requirements in Qualcomm, Inc., 4 FCC Rcd 1543 (1989) (operational agreements required before particular operational modes can be used) and in National Exchange Satellite, Inc., 5 FCC Rcd 179 (1990) (operational agreements required with both present and future compliant operators).

[14] This, of course, also includes those incidents where actual interference occurs in the absence of an operational agreement (e.g. operational agreement still to be negotiated).

[15] This single uplink figure is derived from the algebraic combination of our current antenna performance requirement 29 - 25 log -0, and our current VSAT uplink routine licensing power density limit, -14 dBW/4 kHz.

APPENDIX

Part 25 of the Commission's Rules and Regulations (Chapter I of Title 47 of the Code of Federal Regulations) is amended as follows:

Part 25 - Satellite Communications

1. The authority citation for Part 25 continues to read as follows:

AUTHORITY: §§ 25.101 - 25.531 issued under Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply Secs. 101-404, 76 Stat. 419-427; 47 U.S.C. 701-744.

2. A new Section 25.134 is added to read as follows:

§ 25.134 Licensing provisions of very small aperture terminal (VSAT) networks.

(a) All applications for digital VSAT networks with maximum outbound downlink power densities of +6.0 dBW/4 kHz per carrier and maximum antenna input power densities of -14 dBW/4 kHz will be processed routinely pursuant to Declaratory Order in the Matter of Routine Licensing of Large Networks of Small Antenna Earth Stations Operating in the 12/14 GHz Frequency Bands, 51 FR 15067 (April 22, 1986) (*VSAT Order*). All applications for analog VSAT networks with maximum outbound downlink power densities of +13.0 dBW/4 kHz per carrier and maximum antenna input power densities of -8.0 dBW/4 kHz shall be processed routinely in accordance with Declaratory Order in the Matter of Routine Licensing of Earth Stations in the 6 GHz and 14 GHz Bands Using Antennas Less than 9 Meters and 5 Meters in Diameter, Respectively, for Both Full Transponder and Narrowband Transmissions, 2 FCC Rcd 2149 (1987) (*Declaratory Order*).

(b) Each applicant for digital and/or analog VSAT network authorization proposing to use transmitted satellite carrier power densities in excess of +6.0 dBW/4 kHz per carrier and +13.0 dBW/4 kHz, respectively, and/or maximum antenna input power densities of -14.0 dBW/4 kHz and -8.0 dBW/4 kHz, respectively, shall conduct an engineering analysis using the Sharp, Adjacent Satellite Interference Analysis (ASIA) program. Applicants shall submit a complete description of those baseline parameters they use in conducting their analysis and tabular summaries of the ASIA program's output detailing potential interference shortfalls. Applicants shall also submit a narrative summary which must indicate whether there are margin shortfalls in any of the current baseline services as a result of the addition of the new applicant's high power service, and if so, how the applicant intends to resolve those margin shortfalls. Applicants shall submit link budget analyses of the operations proposed along with a detailed written explanation of how each uplink and each transmitted satellite carrier density figure is derived. Applicants shall provide proof by affidavit that all potentially affected parties acknowledge and do not object to the use of the applicant's higher power density.

(c) Licensees authorized pursuant to (b) of this section shall bear the burden of coordinating with any future applicants or licensees whose proposed compliant VSAT operations, as defined by (a) of this section, is potentially or actually adversely affected by the operation of the non-compliant licensee. If no good faith agreement can be reached, however, the non-compliant licensee shall reduce its power density levels to those compliant with the *VSAT Order* or the *Declaratory Order*, whichever is applicable.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-401

In re Applications of

OLIVER KELLEY AND MARY ANN KELLEY, Joint Tenants with the Right of Survivorship	File No. BPH-870821MB
VAL-JO COMMUNICATIONS, INC.	File No. BPH-870827MD
MARTHA JEAN SULLIVAN	File No. BPH-870827MM

For Construction Permit for a
New FM Station on Channel 297A,
Nolanville, Texas

Appearances

Harry C. Martin and *Andrew S. Kersting* on behalf of Oliver Kelley and Mary Ann Kelley; *Herbert D. Miller, Jr.*, on behalf of Val-Jo Communications, Inc.; *Stephen Diaz Gavin* on behalf of Martha Jean Sullivan.

DECISION

Adopted: November 26, 1991; Released: December 16, 1991

By the Review Board: MARINO (Chairman), ESBENSEN, and GREENE. Board Member ESBENSEN issuing a statement.

Board Member GREENE:

1. Before the Review Board is the *Initial Decision of Administrative Law Judge Joseph P. Gonzalez*, 6 FCC Rcd 2513 (1991), which granted the construction permit application of Capricorn Broadcasting Company, Inc., for a new FM station in Nolanville, Texas. Oliver Kelley and Mary Ann Kelley (the Kelleys), Val-Jo Communications, Inc. (Val-Jo), and Martha Jean Sullivan (Mrs. Sullivan), the only applicants remaining in this proceeding,[1] have each filed exceptions to the *Initial Decision*. Each alleges that it is the superior applicant and should receive the grant. For the reasons set forth below, we are granting the application of Val-Jo and upholding the ALJ's denial of the applications of the Kelleys and Mrs. Sullivan.

2. The *Hearing Designation Order*, 3 FCC Rcd 5361 (Mass Media Bur. 1988) (*HDO*), released in this proceeding originally designated the three applicants before us and four additional applications for hearing on the "standard comparative" issue, which is governed primarily by the guidelines set forth in the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (*Policy Statement*). After hearing evidence under this issue and closing the record, the ALJ reopened the record and designated an issue against the Kelleys:

> To determine whether Colonel Oliver Kelley, a party to the application of Oliver Kelley and Mary Ann Kelley, . . . misrepresented material facts and/or was less than candid in his testimony concerning his lack of contemporaneous awareness of the Statement of Proposed Integration and Diversification filed in the Olney, Texas FM proceeding on April 4, 1988 and, if so, the effect on the qualifications of Oliver Kelley and Mary Ann Kelley . . . to become a Commission licensee.

Memorandum Opinion and Order, FCC 89M-2577 (Admin. Law Judge released Nov. 2, 1989). The ALJ found, "based on the evidence of record, that Colonel Kelley did not engage in any misrepresentations and did not lack candor with this Commission," *Initial Decision* at 2515 para. 14.[2]

3. In his analysis under the "standard comparative" issue, the ALJ found that only two of the applicants, Val-Jo and the Kelleys, are entitled to 100 percent quantitative credit for proposing to integrate their principals into the day-to-day management of the station. He concluded that the decisional distinction between them is their local residence in the service area. The ALJ credited Val-Jo with "a 51 percent full-time city and full-time service area residence credit" (*Initial Decision* at 2522 para. 81), but credited the Kelleys with less than full-time residence. He saw no aspects to the Kelleys' proposal that would enable them to overcome Val-Jo's residence enhancement. [3] The ALJ gave Mrs. Sullivan no quantitative credit because she did not convince him that she "will be in control of the enterprise." *Id.* at 2519 para. 57.

COMPARATIVE CONSIDERATIONS: QUANTITATIVE INTEGRATION CREDIT

4. The Commission considers full-time participation in station operation by owners to be "a factor of substantial importance" in choosing among qualified new applicants for the same broadcast facilities. *Policy Statement*, 1 FCC 2d at 395. Each of the applicants here claims full credit for owners who plan to work in management capacities at their proposed stations at least forty hours a week. The ALJ accepted the representations of Val-Jo and the Kelleys and credited their proposals, but he denied Mrs. Sullivan any credit. *Initial Decision* at 2519 para. 57, 2521 para. 80. We agree with the ALJ that Val-Jo should receive full integration credit. We also conclude that Mrs. Sullivan should receive full credit for her integration proposal but that the Kelleys should receive credit only for Mrs. Kelley's fifty percent interest.

5. *The Kelleys*. The issue with respect to the Kelley's integration proposal is the adequacy of the information Col. Kelley has provided about how he will implement his proposal to be fully integrated in the applicant. Col. Kelley practices law in both Harker Heights and Wichita Falls. As Val-Jo has raised in its exceptions, we cannot determine from the record whether Col. Kelley is winding up his law practice in Wichita Falls, which is about 250 miles from Harker Heights, Tr. 116, or attempting to expand it without describing how he could also meet his integration commitment. The ALJ had found that, even if

Col. Kelley "continues to practice law in Wichita Falls, Texas one day a week, such a limited amount of time will not interfere with his commitment to the Nolanville, Texas broadcast facility." *Initial Decision*, 6 FCC Rcd at 2516. Col. Kelley had testified on redirect examination that he was winding up his Wichita Falls law practice, Tr. 198, but on recross examination he testified, "Now I'm not trying to terminate the law practice up there. I'm -- I'm looking for law practice wherever I can get it." Tr. 207-08. He further testified, "I have contacts, in -- Wichita Falls. I was in practice there for better than a year, and I --and I happily accept business from there." Tr. 210.

6. To receive integration credit, an applicant must make a specific proposal and adhere to it, and there must be reasonable assurance that the plan will be carried out. *Coast TV*, 5 FCC Rcd 2751, 2752 para. 8 (1990). When the applicant has other business interests, it must show the reliability of its proposal in light of those interests. *Blancett Broadcasting Co.*, 17 FCC 2d 227, 230 (Rev. Bd. 1969). Col. Kelley has not done so here. In his written testimony, he addressed only his practice in Harker Heights:

> I presently practice law full-time with an office in Harker Heights, Texas. . . . If our application is granted, I will give up my law practice to devote full-time to management of the radio station. I have an understanding with my law partner that in the event our application is granted, I will be leaving our law partnership, and he will take over my practice.

Kelley Ex. 2 at 1. He did not mention his Wichita Falls practice. Yet, he has maintained a Wichita Falls office, Tr. 198, and practiced as a sole practitioner there. Tr. 149-50. He typically spent "[n]o more than one day a week, six to eight hours" in a general practice in Wichita Falls, Tr. 150, "had it down to half a day a week" in February 1988, Tr. 205, and in the month before the first hearing session "spent about 30 hours practicing law" there. Tr. 207.

7. If Col. Kelley intends to terminate his Wichita Falls practice after constructing the proposed Nolanville station, he has not effectively communicated this to the Commission. The record is contradictory and suggests that he may, indeed, continue handling whatever legal business comes his way in Wichita Falls, but it includes no specifics about how Col. Kelley plans to divide his time between Wichita Falls and Nolanville, how Col. Kelley will handle conflicting demands for his time from client interests in Wichita Falls and his duties at the Nolanville station, or how Col. Kelley will handle the commute of 250 miles each way between Wichita Falls and Nolanville, a drive that takes "four hours and 17 minutes." Tr. 116.[4] Although the ALJ concluded that practicing a day a week in Wichita Falls would not interfere with Col. Kelley's Nolanville commitment, the Kelleys must first make a showing from which such a conclusion can be drawn, since they "have the burden of proof to establish how they will effectuate their integration proposals." *Cuban - American Limited*, 5 FCC Rcd 3781, 3785, *recon. dismissed sub nom. Miami Latino Broadcasting Corp.*, 5 FCC Rcd 7321 (1990); *accord*, *Pleasure Island Broadcasting, Inc.*, 6 FCC Rcd 4163, 4165 (Rev. Bd. 1991) (applicant did not meet its burden with pledge to diminish time to 15 hours a week at automobile dealership 105 miles from proposed station).[5] *Compare Joe L. Aldridge*, 6 FCC Rcd 994, 994 para. 3 (Rev. Bd. 1991) (applicant detailed plans to turn over his accounting firm to his wife and current employees could fill in). The Val-Jo exception is granted, and integration credit for Col. Kelley's fifty percent interest in the applicant is denied.[6] The Kelleys, however, will receive credit for Mrs. Kelley's fifty percent interest. *See Cuban - American* at 3786 n. 4.

8. *Val - Jo*. The Kelleys except to the award of full integration credit to Val-Jo, arguing that the Val-Jo integration proposal "lacks permanence and is utterly implausible" because the Val-Jo stockholders do not have a written agreement documenting Marilyn Vale's commitment to provide the applicant's funding. They argue that William Jones, a white male who is providing expertise and services to the applicant in exchange for his stock, does not have management experience in broadcasting and does not have resources of his own to finance the station in the event Mrs. Vale reneges on the financing. They speculate that Mrs. Vale's association with Jones is uncertain because, as they characterize him, Jones does not seem to have much to offer the applicant. The record shows that Jones has played a key role in preparing and prosecuting the application, however. He found the frequency (Tr. 293-94), recruited Mrs. Vale (Tr. 299-301), got the site, Tr. 346, and selected the equipment, Tr. 264, 266, 347. He also has worked in broadcasting and has nonbroadcast management experience. Tr. 283-84, 292-93. Mrs. Vale, for her part, has been paying the bills and has obtained reasonable assurance of financing. Tr. 265, 289, 320. Both have testified to this arrangement, Tr. 290, 361, 363, 381, and nothing in the record suggests that she might not continue her support. The Kelleys' surmise--that Mrs. Vale might change her mind about associating with Jones, although she has been providing the promised support to the applicant--is "in short, long on generalities and short on facts," *Llerandi v. FCC*, 863 F.2d 79, 86 (D.C. Cir. 1988), and does not suggest that Val-Jo's proposed integration is inherently unreliable. *See Lorraine Walker Arms*, 6 FCC Rcd 5586, 5586 para. 4 (Rev. Bd. 1991); *Vacationland Broadcasting Co., Inc.*, 97 FCC 2d 485, 492-93 (Rev. Bd. 1984) (rejecting speculative allegations) (subsequent history omitted). *See generally Coast TV*, 5 FCC Rcd at 2752 para. 8, in which the Commission provided that "integration credit is due when the applicant sets forth a specific integration proposal; the applicant adheres to that proposal; and there is reasonable assurance that the plan will be carried out," but it does not require that every detail be documented in writing. This exception will be denied.[7]

9. The Kelleys also assert that Mrs. Vale did not commit to terminate her current employment in time to get integration credit, even though she promised to work a forty-hour week (*see* Val-Jo's integration statement) and promised to terminate any employment she might have (*see* Val-Jo Exhibits 4 and 6.)[8] The ALJ concluded, "The fact that such representations were not made in the integration proposals . . . is immaterial, since no such requirement was imposed on the applicants by the Presiding Judge or the Commission." *Initial Decision* at 2518 para. 45. This conclusion is fully consistent with *Northland Communications*, 100 FCC 2d 914, 917 para. 5 (Rev. Bd. 1985), *review denied*, 60 RR 2d 776 (1986), *aff'd by judgment sub nom. Up North Broadcasting Co. v. FCC*, 814 F.2d 774 (D.C. Cir. 1987), and *Kennebec Valley Television, Inc.*, 2 FCC Rcd 1240, 1242 para. 9 (Rev. Bd. 1987),

review granted in part and denied in part, 3 FCC Rcd 4522 (1988), upon which the Kelleys rely for the opposite conclusion. The Board is clear in *Northland* and *Kennebec Valley* that the specifics of an integration proposal could be filed at the exhibit exchange date, although, as the Board noted in *Northland*, it had approved an earlier filing requirement set by an ALJ in another case.[9] Because no earlier date was set in this case, the Kelleys' exception will be denied.[10]

10. *Mrs. Sullivan*. Martha J. Sullivan has taken exception to the ALJ's refusal to credit her integration proposal. Mrs. Sullivan is an individual applicant who has stated her intention to "integrate full-time into the management of the proposed Nolanville, Texas FM Station." Sullivan Ex. 3. In preparing and prosecuting her application she has relied heavily on help from others, including her husband and a consultant, and she has used funds jointly held with her husband to finance the application. *See Initial Decision*, 6 FCC Rcd at 2518-19 para. 56. Because of this reliance, the ALJ concluded that Mrs. Sullivan's "participation in the application process appears to have been minimal and passive to a degree that undermines her claim that she will be actively involved in the management of her station." *Initial Decision* at 2519 para. 57.

11. In her exceptions, Mrs. Sullivan contends that she has provided reasonable assurance that her integration proposal will be carried out as required by *Royce International Broadcasting*, 5 FCC Rcd 7063, 7063-64 para. 8, *recon. denied*, 6 FCC Rcd 2601 (1991), and *Bradley Hand & Triplett*, 89 FCC 2d 657, 660 (Rev. Bd. 1982). We agree. An applicant will receive credit for its integration proposal where it fully identifies the interests of all principals and reliably establishes that the principals will fulfill their commitments. However, a nominally active principal in an application will not receive any credit if that principal "might not, in fact, be exercising control over the applicant at all." *Royce* at 7064 para. 10. A relevant indicium is whether "a person with no disclosed ownership interest (again, rather than the supposedly active owner) is in a position to exercise significant control over the applicant." *Id.*

12. In denying integration credit to Mrs. Sullivan, the ALJ looked to the degree to which she relied on others for assistance, *see Initial Decision* at 2519 para. 57, but he made no finding that anyone other than Mrs. Sullivan has an ownership interest in the applicant or will be in a position to control the operation of the station, and we do not find that the record would support such a conclusion. Here, Mrs. Sullivan relied heavily on Jim Price at Sterling Communications, whom she contacted initially (Tr. 399) and whom she paid to find a channel and prepare the application, including identifying a site and gathering information about equipment costs. However, nothing in the record suggests that either Mr. Price or Sterling Communications is an unnamed principal to this application, has any involvement in the applicant other than providing services as a consultant, or has usurped Mrs. Sullivan's prerogatives as the applicant. Relying on assistance from a paid consultant is not, by itself, a reason to deny integration credit. *See generally Colonial Communications, Inc.*, 5 FCC Rcd 1967, 1969 para. 7, *recon. denied*, 5 FCC Rcd 3797 (Rev. Bd. 1990), *review denied*, 6 FCC Rcd 2296 (1991), *petition for recon. pending*.

13. Likewise, nothing in the record suggests that Mrs. Sullivan's husband is anything other than a supportive spouse. The Commission has long recognized that family relationships may have attributes which would raise questions in a non-family relationship, and it does not assume that these family relationships necessarily "suggest an unspoken interest in the applicant." *Sound Broadcasting Co.*, 6 FCC Rcd 3626, 3628 para. 12 (Rev. Bd. 1991). Here, Mr. Sullivan wrote two checks on his company's account (which Mrs. Sullivan repaid from the family's joint account at counsel's recommendation) and made a telephone call to the site owner at Mrs. Sullivan's request. Mrs. Sullivan wrote a check on her husband's account to pay the application fee, and her son wrote a check on her husband's account while Mrs. Sullivan was on vacation to pay Sterling's fee for preparing FCC Form 301 (Mrs. Sullivan also repaid these amounts). These acts do not make Mr. Sullivan an undisclosed principal, *see Rebecca L. Boedker*, 6 FCC Rcd 2557, 2558 paras. 8- 9 (1991), or show that he has been acting as if he has a "mutual ownership stake in the application." *Compare Richard P. Bott, II*, 4 FCC Rcd 4924, 4929 para. 26 (1989) (sole proprietor given only partial integration credit where it was shown that she and her broadcaster spouse "functioned, and will likely function, as a marital unit in the operation of their broadcast stations"), *review denied*, 5 FCC Rcd 2508 (Rev. Bd. 1990), *aff'd by judgment sub nom. Radio Representatives, Inc. v. FCC*, No. 90-1227 (D.C. Cir. Feb. 22, 1991); *also compare Evergreen Broadcasting Company*, 6 FCC Rcd 5599, 5602-03 paras. 18, 25-26, 5606 n. 17 (1991) (one applicant received no credit because of extent of pre- and post-formation involvement of non-owner, broadcaster husbands who planned to work at station in nonmanagement jobs; another received no credit because communications lawyer husband's role as corporate officer belied passive role); *Las Americas Communications, Inc.*, 6 FCC Rcd 786, 793 paras. 31-32 (Rev. Bd. 1986) (general manager received no integration credit where he had no involvement in the applicant and unintegrated stepfather/local counsel was in control), *aff'd as modified on other points*, 6 FCC Rcd 1507, 1511 para. 30 (1991); *Atlantic City Community Broadcasting, Inc.*, 6 FCC Rcd 925, 932 para. 22 ((Rev. Bd. 1991) (general partner received no integration credit where she "passively acquiesced in almost every aspect, without study, without investigation, and seemingly without care" and where application appeared more like an investment for her and her husband).

14. As a sole proprietor, Mrs. Sullivan has proposed to work full-time as the station's general manager. Sullivan Ex. 3, p. 1. She has promised to terminate her present employment if her application is granted, and she has told her employer of this promise. *Id.*, Tr. 453. In other words, she has presented an integration proposal that she can effectuate., Her reliance on expert and family help does not, without more, suggest that she is not in sufficient control to receive integration credit. Nothing in the record shows that Mrs. Sullivan is not the ultimate decisionmaker.[11] Absent a basis for finding that someone other than or in addition to Mrs. Sullivan has an interest in the station that must be attributed for integration purposes, her integration proposal must be credited. *See Lorraine Walker Arms*, 6 FCC Rcd at 5586-87 para. 5, distinguishing cases where the Commission has scrutinized applications involving allegedly passive investors

whose attorney has played an active role in the applicant's formation from a case like this, where there is only one investor and that investor proposes full integration.

15. Val-Jo and Mrs. Sullivan, with their 100 percent integration (a 10,000 value on the Hirschman-Herfindahl Index), have a clear quantitative integration preference over the Kelleys, who are entitled only to 50 percent integration credit (a rating of 5000 on the Index) for Mrs. Kelley's proposed role at the station. Because of the emphasis the Commission places on full-time participation, a disparity of this magnitude cannot be overcome by the qualitative enhancements asserted by the Kelleys. *See Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5065-66 para. 17 (1989), citing *New Continental Broadcasting Co.*, 88 FCC 2d 830, 850 para. 35 (Rev. Bd. 1981) (a clear quantitative differential of 12.5 percent (1250 using the Index) cannot be overcome by qualitative attributes).

COMPARATIVE CONSIDERATIONS: QUALITATIVE INTEGRATION ENHANCEMENTS

16. When two applicants have equal quantitative integration proposals, the Commission looks to the qualitative attributes of the integrated principals. It places primary emphasis on the applicants' familiarity with the community of license and compares the applicants' local residence and participation in civic affairs "to determine which applicant has the greater likelihood of knowledge of and interest in the community." *Ronald Sorenson*, 6 FCC Rcd 1952, 1953 para. 5 (1991). *See Policy Statement*, 1 FCC 2d at 396. Female ownership and broadcast experience are other pertinent factors, but they have less significance. *See Swan Broadcasting Limited*, 6 FCC Rcd 17, 21 para. 17 (Rev. Bd. 1991).

17. In this case, the ALJ found Val-Jo is the preferred applicant of those remaining in this proceeding on the basis of its qualitative enhancements. Mr. Jones has lived in the city of license since 1985, two years before Val-Jo's application was filed, and has participated "to a moderate degree" in civic activities. *Initial Decision* at 2518 para. 47. He also has four years of nonmanagerial experience in broadcasting. Mrs. Vale, the 49 percent owner, has lived in the proposed service area since 1964, about 23 years before the application was filed, and has "a slight degree of civic enhancement." *Id.* The ALJ did not weigh Mrs. Sullivan's application in this final analysis, because of his conclusion that she is not entitled to any quantitative integration credit, but he did make conditional findings that, if she were found to be entitled to credit on appeal, her application would be "enhanced by her long-term residence in the service area. . . with slight civic involvement." *Initial Decision* at 2519 para. 58. Each applicant complains that its enhancements did not receive adequate credit. Val-Jo and the Kelleys each question the amount of credit given to their competitors.

18. *Val - Jo.* The only substantive challenge to Val-Jo's enhancements is the Kelleys' assertion that Mr. Jones' credit for civic activities is overstated because he did not make the showing of "knowledge of and interest in the Community" as required by the *Policy Statement*, 1 FCC 2d at 396, for two of his activities.[12] One, the Bell County Professionals' Association, was described by Mr. Jones as "more of a trade association that awards those in the media--awards for excellence and advertising." Tr. 751. The other was his United Way Campaign participation for which he twice spent a couple of days distributing material door-to-door. Tr. 317, 328. We will grant this exception for Val-Jo has not made the required showing for these activities.[13] Mr. Jones' other activities were not challenged and he will receive credit for them. In Nolanville he has been an emergency medical technician since June 1985; Secretary-Treasurer of the Lions Club (which he founded) since November 1985; and a City Councilman from July 1985 until April 1986 and June 1988 until November 1988. He also has been a member of the Temple, Texas, Chamber of Commerce since 1985. *See Initial Decision* at 2518 para. 47; Val-Jo Ex. 5, pp. 1-2.

19. *Mrs. Sullivan*. Val-Jo and the Kelleys except to the ALJ's contingent finding that "Mrs. Sullivan has resided within the 1 mV/m contour of her proposed station since 1976." *Initial Decision* at 2518 para. 52, as being without record support, and they also except to the qualitative integration enhancement she receives from this long-term residence. *Id.* 2519 para. 58. We will grant these exceptions. Sullivan Ex. 3 as admitted into evidence states that Mrs. Sullivan "will claim local residence credit on the basis of Mrs. Sullivan's long-time residence within the proposed service area of her proposed Nolanville FM station. Mrs. Sullivan currently resides within the 1 mV/m contour of her proposed Nolanville FM station." The record contains no other information about the duration of her local residence within the proposed service area. A paragraph that was stricken from her Exhibit 3 (Tr. 394) indicated that Mrs. Sullivan had lived "in the Nolanville area for more than thirteen years." Mrs. Sullivan argues that this language should be considered here. However, even if this language were considered part of the record for local residence purposes, it does not show that Mrs. Sullivan lived within the proposed 1 mV/m contour of the station during that period. Mrs. Sullivan points to interrogatory answers she has given that indicate how long she has lived at her current address. However, consistent with 47 C.F.R. § 1.323(b) incorporating 47 C.F.R. § 1.321(d), Mrs. Sullivan may not first use her interrogatory answers to make her affirmative case after the hearing record has been closed and exceptions to the initial decision are being considered. Mrs. Sullivan also argues that her failure to include specific details about her claimed long-term residence is harmless error because her claim is consistent with her integration statement. Indeed, her claim is identical with her November 29, 1988, integration statement, which like her Exhibit 3, offers no specifics to clarify her bald assertion of entitlement to credit for long-term residence.[14] Even if we were to accept her integration statement, we would still have insufficient information with which to compare her to other applicants on this factor. Mrs. Sullivan bore the burden of providing information to support her claim. *See Newton Television Limited*, 3 FCC Rcd 553, 559 n. 10 (Rev. Bd. 1988), *review denied*, 4 FCC Rcd 2561 (1989), *reaffirmed with modifications on other grounds*, 5 FCC Rcd 2755 (1990). Because she did not meet it, she is not entitled to credit for long-term residence in the service area. *Cf. Victorson Group, Inc.*, 6 FCC Rcd 1697, 1701 para. 21 (Rev. Bd. 1991) (failure of proof at hearing can be fatal). Mrs. Sullivan is entitled to credit for her current residence in the service area and for her promise to move to Nolanville itself. *See Policy Statement*, 1 FCC 2d at 396.

20. Mrs. Sullivan claims the ALJ undervalued her civic activities because he denied her credit for activities that occurred in 1988. As Mrs. Sullivan states, *The Baltimore Radio Show, Inc.*, 4 FCC Rcd 6437, 6441 para. 18 (Rev.

Bd. 1989), *review denied*, 5 FCC Rcd 3712 (1990), provides that post-filing involvements can be considered in analyzing an applicant's integration enhancements. However, they are accorded little weight and do not significantly change Mrs. Sullivan's comparative posture in this case. The Kelleys, on the other hand, claim that the ALJ's award to Mrs. Sullivan of credit for "slight civic involvement" (*Initial Decision* at 2519 para. 58) is an overstatement of the credit due her because she was involved with organizations located outside the service area. Mrs. Sullivan has been a member of the Florence Independent School District Parent-Teacher Organization since 1976 and involved with the School District's Boy Scouts Chapter as Troop Treasurer, Den Mother, and Cub Scouts Coordinator from 1976 until 1980. Although these organizations are headquartered outside the service area, Mrs. Sullivan has shown that they do serve part of the service area. Sullivan Ex. 3, pp. 2-3. Mrs. Sullivan has not made the same showing with regard to her membership in the Florence United Methodist Church from 1976 until 1988. (She served on the Church's Worship Committee and as Historian from 1980 until 1987, as Fall Festival Chairman in 1987, as a Sunday School teacher from 1985 until 1987, and on the Tape Ministry for Senior Citizens from 1986 until 1987.) She has included her Church membership in her list of civic activities because some of the Church activities include people from within the service area. Tr. 445, but this fact, alone, is not sufficient to overcome the general principle that no enhancement will be awarded to activities occuring outside the service area. *See The Baltimore Radio Show* at 6441 para. 18. Mrs. Sullivan also has not made the required showing for her membership in ATPE Educational Association, so she is not entitled to credit for this activity, either.

21. In summary, after comparing the qualitative enhancements of Val-Jo and Mrs. Sullivan, we conclude that Val-Jo is the comparatively superior applicant because its principals have more significant local residence that is enhanced by civic activities than does Mrs. Sullivan. Mrs. Sullivan is entitled to credit for her present residence in the service area and her promise to move to Nolanville in the future, but Val-Jo is entitled to more credit under the *Policy Statement* for the long-term (23 years) service area residence of Mrs. Vale (49 percent) and the shorter term (2 years) residence in the community of license of Mr. Jones (51 percent). Mrs. Vale and Mr. Jones, like Mrs. Sullivan, have continued their residence after filing their applications. Although superior past civic activities can offset another applicant's stronger residence, *see Ronald Sorenson*, 6 FCC Rcd at 1953 para. 5, Mrs. Sullivan's activities here do not outweigh Val-Jo's credit. Mrs. Sullivan is entitled to credit only for her PTO membership (for 11 years before she filed her application) and involvement with the Boy Scouts (for 4 years ending 7 years before she filed her application) and to minimal credit for activities begun or continuing after filing. *See Beach Broadcasting Limited Partnership*, 6 FCC Rcd 4485, 4485 para. 2 (1991) (credit for residence and activities after an application has been filed is diminished). Val-Jo has greater credit for the combined activities of its principals, which have continued since 1964 (starting with Mrs. Vale's PTA membership), are more intensive in recent years, and include leadership as well as membership positions. *See Rebecca L. Boedker*, 6 FCC Rcd at 2558 para. 12. Although Mrs. Sullivan has a greater gender preference than Val-Jo (100 percent to 49 percent), this preference has less significance than Val-Jo's overall local residence credit and does not tip the balance away from Val-Jo. *See Id.* at 2559 para. 15.[15]

22. ACCORDINGLY, IT IS ORDERED That the application of Val-Jo Communications, Inc., (File No. BPH-870827MD) for a Construction Permit for a new FM station at Nolanville, Texas, IS GRANTED; and that the applications of Oliver Kelley and Mary Ann Kelley (File No. BPH-870821MB) and Martha Jean Sullivan (File No. BPH-870827MM) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

SEPARATE STATEMENT
OF
BOARD MEMBER ERIC T. ESBENSEN

Because, as the majority notes, the Kelleys cannot prevail in this proceeding on a comparative basis, the exceptions to the misrepresentation/lack of candor issue specified against that applicant need not be reached. However, having reviewed Col. Kelley's testimony and direct case exhibits, I respectfully submit that the ALJ's findings and conclusions should be reversed and that issue resolved against the applicant. By the same token, I very reluctantly concur with the majority as to the disposition of Sullivan's integration credit (based upon the record evidence before us); however, it is an extremely close call. There is no question that Val-Jo is the clearly superior applicant here.

FOOTNOTES

[1] Capricorn filed a Motion for Voluntary Dismissal of Application on August 12, 1991, after Val-Jo and the Kelleys filed a Contingent Motion to Enlarge Issues Against Capricorn Broadcasting Company, Inc., on July 17, 1991, and a Supplement to Contingent Motion to Enlarge Issues Against Capricorn Broadcasting Company, Inc., on July 19, 1991. The Review Board granted the motion and dismissed Capricorn's application with prejudice. *Order, Oliver Kelley and Mary Ann Kelley*, FCC 91R-95 (Rev. Bd. released Oct. 29, 1991).

[2] Because the Kelleys cannot prevail in this proceeding on a comparative basis, we need not reach the exceptions as to the misrepresentation/lack of candor issue specified against that applicant. *See generally Rebecca L. Boedker*, 6 FCC Rcd 2557, 2559 n. 2 (1991).

[3] Both the Kelleys and Val-Jo received some enhancement for gender and past broadcast experience. Val-Jo's forty-nine percent owner is a woman, and its fifty-one percent principal was a radio station account executive from 1984 to 1988. *Initial Decision*, 6 FCC Rcd at 2517. Oliver Kelley performed a variety of tasks at a radio station between 1954 and 1959, and Mary Ann Kelley is a woman. *Id.* at 2515.

[4] Col. Kelley has stated his intention to turn his Harker Heights clients over to his law partner there. The record does not provide similar information about how clients in Wichita Falls will be handled if Col. Kelley has a conflict for his time or discontinues his Wichita Falls practice.

[5] An applicant who promises to terminate his law practice in an integration proposal would not necessarily undermine his promise by practicing law before the station is constructed. *See generally Miami Latino Broadcasting Corp.*, 5 FCC Rcd 7321, 7322 para. 7 (1990); *Poughkeepsie Broadcasting, Ltd.*, 5 FCC Rcd 3374, 3380 para. 26 (Rev. Bd. 1990), *review denied*, 6 FCC Rcd 2497 (1991); *cf. Coast TV*, 4 FCC Rcd 1786, 1786 para. 3 (1989) (principals are not expected "to remain static during often lengthy proceedings"), *modified on other grounds*, 5 FCC Rcd 2751 (1990). However, there must be a commitment to effectuate an integration promise.

[6] The Commission "will deny credit where an applicant fails to establish how it will fulfill its integration proposal." *Cuban-American Limited*, 5 FCC Rcd at 3786 n. 3. Part time credit is also denied, because there is no specific showing of hours at the station to support it. *Id.*

[7] The cases on which the Kelleys rely for their impermanence argument involve very different fact patterns from that presented here. In *Doylan Forney*, 3 FCC Rcd 6330, 6334 (Rev. Bd. 1988), *review denied*, 5 FCC Rcd 5423 (1990), *aff'd by judgment sub nom. Maricopa Media, Inc. v. FCC*, No. 90-1456 (D.C. Cir. Oct. 7, 1991), a law student, who was a minority without broadcast experience, had been recruited by the majority shareholder and given the means to pay for her stock. The minority shareholder had education loans to repay but proposed to work at the station for a year or two without drawing pay and said she would fall back on the law "in 'a couple--few years, probably several years' if the station were not profitable." *Id.* The Board found that this record evidence was too equivocal to provide the required assurance of permanence. In *Signal Ministries, Inc.*, 104 FCC 2d 1481, 1497-98 n. 16 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 1259 (1987), *aff'd by judgment sub nom. Adelphi Broadcasting Corp. v. FCC*, 838 F.2d 571 (D.C. Cir. 1988) (Table), the Board concluded that the ALJ properly rejected the integration proposals of two principals with minority and local ownership enhancements, who were subject by contract to sell two-thirds of their stock after two years if the one percent shareholder wanted it. In *KIST Corp.*, 102 FCC 2d 288, 292 (1985), *aff'd by judgment sub nom. United Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986) (Table), *cert. denied*, 481 U.S. 1050 (1987), the Commission found it incredible that someone would give a 95 percent interest in the corporation to a near stranger (a minority female) who had not been involved in the application and would not likely be involved in the station's affairs as an owner while, at the same time, personally guaranteeing a substantial bank loan and promising substantial additional personal funds.

[8] William Jones made a similar commitment to work full time and terminate other employment. Val-Jo Exhibits 4 and 5. The Kelleys have not taken exception to Mr. Jones' commitment.

[9] The Commission revised this procedure in *Proposals to Reform the Commission's Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 161 para. 27, 169 (1990), *modified on reconsideration*, 6 FCC Rcd 3403, 3403-04 para. 8, 3408, 3409 n.3, (1991). Effective July 1, 1991, standardized integration statements are due on the same day that documents are exchanged pursuant to the Standardized Document Production Order, *i.e.*, within five days after the date for filing notices of appearance. The text of the rule regarding integration statements is in 47 C.F.R. sec. 325(c)(2), as amended.

[10] Citing *Caldwell Broadcasting Corp.*, 100 FCC 2d 115, 125 (Rev. Bd. 1985) (subsequent history omitted), and *Berryville Broadcasting Co.*, 70 FCC 2d 1, 8- 11 (Rev. Bd. 1978) (70-hour work week not credited), the Kelleys argue that Mrs. Vale should not receive full integration credit because of her present employment in her husband's furniture business. Mrs. Vale, however, disclosed her current employment as office manager there (Val-Jo Ex. 6, p. 2) and promised unequivocally to terminate that employment or any other employment to work full time (40 hours a week) at Val-Jo's proposed station. *Id.* at pp. 2-3; Tr. 366. She testified that she is training two people to assume her duties, Tr. 371, and that she has no plans to return to the furniture business if her husband retires. Tr. 372. Here, too, the Kelleys are speculating that the facts might be contrary to the record.

[11] Mrs. Sullivan argues in her exceptions that, as an individual applicant, she has none of the paperwork associated with corporations or partnerships and, therefore, has fewer things to do to prepare, file, and prosecute her application. Brief and Exceptions to Initial Decision, p. 7. She made the decision to pursue the station and use Jim Price's services (Tr. 399). She obtained the bank commitment letter (Tr. 406). She deals exclusively with counsel (Tr. 452). She also testified that neither her non-broadcaster husband nor her broadcaster son will work at the station (Tr. 428).

[12] The ALJ's conclusion that Mrs. Vale had "only a slight degree of civic involvement," *Initial Decision* at 2518 para. 47, is not challenged. Mrs. Vale was a member of and held leadership positions in ALANON Family Group (since 1984), is a church member (since 1975), was a PTA member (1964-88), is a member of the Ladies Auxiliary of the Salado Chamber of Commerce (since 1987), and is a member of Village Artist in Salado (since 1987). Id. at 2517 para. 38. Val-Jo Ex. 6, p. 2.

[13] We are denying credit for the BCCPA because Val-Jo has failed to show how this activity contributes to Mr. Jones' knowledge of and interest in the community. As the Board has made clear in *McClenahan Broadcasting, Inc.*, 5 FCC Rcd 7269, 7273 para. 20 (Rev. Bd. 1990), *review denied*, 6 FCC Rcd 2347 (1991), *recon. dismissed*, FCC 91-266 (released Sept. 3, 1991) any local activities, including work-related activities, are entitled to enhancement credit if they meet the standard of the *Policy Statement. Accord National Communications Industries*, 6 FCC Rcd 1978, 1982 para. 24 (Rev. Bd. 1991).

[14] This distinguishes Mrs. Sullivan's situation from that in *Charisma Boadcasting Corp.*, 6 FCC Rcd 3411, 3412-13 para. 8 (Rev. Bd. 1991). In *Charisma* the Board found harmless technical error in an applicant's failure to quantify its hours-per-week integration commitment in its direct case where its prefiled integration commitment contained that information and there was no variance at the hearing. Mrs. Sullivan's integration statement lacks the missing specificity.

[15] Even if the Kelleys were entitled to full integration credit and compared qualitatively, Val-Jo would be the superior applicant. The Kelleys claim full-time service area residence starting in late October 1987--after they filed their application but before the cut-off date for finalizing their comparative positions. However, like Mrs. Sullivan, they are entitled at most to minimal credit under *Beach Broadcasting*, 6 FCC Rcd at 4485 para. 2, because of the Commission's policy against comparative upgrading after an application has been filed. *See Colonial Communications, Inc.*, 6 FCC Rcd at 2297 para. 11. (The ALJ awarded the Kelleys less than full-time local residence credit from 1987-1988 because they regularly returned to their former residence in Wichita Falls where Col. Kelley maintained some law practice. *Initial Decision* at 2516 para. 30. Mrs. Kelley voted in Wichita Falls during that time, Tr. 83, and did not register to vote in Harker Heights until Nov. 1988. Tr. 61.) The Kelleys also lived in Harker Heights near Nolanville between 1973-1975 and 1982-1986. Kelley Ex. 2, pp. 1-2, Ex. 3, pp. 1-2. However, Mrs. Vale's continuous long-term residence together with Mr. Jones' continuous residence in the community of license starting two years before filing is entitled to greater weight than the

Kelleys' intermittent residence in the service area. *See Swan Broadcasting Limited Partnership*, 6 FCC Rcd 17, 21 para. 18 (Rev. Bd. 1991). During their pre-filing periods of residence in Harker Heights, the Kelleys were active with St. Christopher's Episcopal Church and Mrs. Kelley was a room mother for the PTA in 1974-75. They also were members of the Quarterback Club for Killeen High School in 1985-86 but provided no information about this membership or how this membership provided any insight into the community. In 1988, after filing their application, they were active with the Bell County Republican Party, but because this activity began after they had filed their application, it is entitled to little weight. *See Beach Broadcasting, supra*. In short, when the Kelleys' intermittent local residence and civic activities are compared with continuous residence and more extensive civic activities of the Val-Jo principals, the Val-Jo application is clearly superior. (Val-Jo and the Kelleys are entitled to roughly similar enhancements for gender and past broadcast experience, which do not affect the preference given to Val-Jo for residence and civic activities.)

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 18, 1991

PACIFIC TELECOM, INC. ON BEHALF OF ITS SUBSIDIARIES TELEPHONE UTILITIES OF WASHINGTON, INC. AND PENINSULA TELECOMMUNICATIONS, INC. FILES A PETITION FOR WAIVER OF THE COMMISSION'S PART 36 RULES REGARDING THE CONSOLIDATION OF STUDY AREAS

PUBLIC COMMENT INVITED

On September 19, 1991, Pacific Telecom, Inc. (PTI), on behalf of Telephone Utilities of Washington, Inc. (TU Washington) and Peninsula Telecommunications, Inc. (Peninsula), filed a petition for waiver of the definition of "study area" as set forth in Part 36, Subpart H, Appendix-Glossary of the Commission's Rules, to the extent necessary to allow consolidation of the TU Washington and Peninsula study areas.

Parties may file comments on this petition no later than **January 10, 1992.** Replies should be filed by **January 24, 1992.** Comments should reference AAD 91-79. A copy of each pleading should be sent to Jacqueline Spindler, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and to Downtown Copy Center (DCC), 1114 21st Street, N.W., Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying in the Accounting and Audits public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from DCC.

For further information contact Jacqueline Spindler (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 10, 1991

Released: December 18, 1991

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

George McKay, III 8310-GU
General Manager/VP Operations C3-278
First Media of Monterey, Inc. C5-384
Licensee, Radio Station WRJT-FM
P.O. Box 187
Monterey, TN 38574

Dear Mr. McKay:

This letter constitutes a Notice of Apparent Liability for a Forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

On March 12, 1991, the Commission received a complaint from Vivian E. Warner, Esquire, on behalf of Mr. Mike Neal, alleging that on December 5, 1990, Mr. Neal was successful in finding a key which was the object of the "Jet 107 Missing Key Caper" contest conducted by Station WRJT-FM. Ms. Warner contends that Mr. Neal has received the $1,000.00 portion of his prize, as promised, but has yet to receive the other portion of the prize--the lease of an automobile for one year.

Based on this complaint, the Commission sent you a letter of inquiry on April 29, 1991. In your response dated May 6, 1991, you admit to having advertised a contest in the month of November, 1991 called "The Jet 107 Missing Key Caper." You explain that the contest was to be paid for by "The Warren Motor Company" to promote its business, and that it was responsible to award the lease of a new Dodge Shadow to the winner for a one year period. You assert that WRJT waived the promotional value for exclusive rights to the contest if Warren Motors agreed to spend with WRJT 50% of the cost of the lease of the vehicle during the next 12 months. You state that you looked upon this contest as a paid advertisement for Warren Motors, not a radio contest.

You further explain that you and the former General Manager of Warren Motors made an oral agreement regarding the car lease. When the dealership was subsequently sold, you state, the new owner refused to abide by the original agreement and insisted that the station, not the prize winner, be named on the lease. Because this would increase your potential liability, you refused to sign the lease resulting in Mr. Neal not being awarded the use of the car pursuant to the lease. You assert that Warren Motors was orginally supposed to handle all matters concerning the car because it was the dealership's contest. You feel that WRJT has fulfilled all of its obligations concerning the contest.

Based on the foregoing, including your own admission that the prize car lease was not awarded, it appears Radio Station WRJT-FM, willfully violated Section 73.1216 of the Commission's Rules with respect to the "Jet 107 Missing Key Caper" contest by not awarding a portion of the announced prize. It is evident that WRJT advertised a one year lease as a prize but did not award it, even though it may have been a result of a third party's refusal. Station WRJT's obligation was to award the prize as announced. We conclude that the contest was a licensee conducted contest within the meaning of the rule on the basis that WRJT: 1) admits to having advertised the contest as being the "Jet 107 Missing Key Caper" contest; and, 2) itself awarded a $1,000 prize in the contest. We also conclude that WRJT failed to conduct the contest as announced. Therefore, it appears that Section 73.1216 was violated and a forfeiture is appropriate.

Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, First Media of Monterey, Inc., licensee of Radio Station WRJT-FM, Monterey, TN, is hereby advised of its Apparent Liability for Forfeiture in the amount of $6.250 for its apparent willful violation of Section 73.1216 of the Commission's Rules on the date set forth above.

The amount specified was reached after consideration of the factors set forth in Section 503(b) of the Act and the guidelines described in our recently adopted *Standards for Assessing Forfeitures*, FCC 91-217, released August 1, 1991, (recon. pending). Under these standards, $6.250 is the base forfeiture for the violation of the "licensee-conducted contest" rule.

In regard to this forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Notice of Apparent Liability.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 80-176

In the Matter of

Regulatory Policies Concerning
Resale and Shared Use of
Common Carrier International
Communications Services

ORDER

Adopted: December 10, 1991; Released: December 18, 1991

By the Common Carrier Bureau:

1. By this Order we terminate Common Carrier Docket 80-176. In the Phase II Further Notice of Proposed Rule Making in Common Carrier Docket 90-337, *Regulation of International Accounting Rates*, 6 FCC Rcd 3434 (1991), the Commission seeks comment on the extent to which the Commission should require unlimited resale and shared use for all U.S. carrier-provided international telecommunications services. In this context, the Commission stated that while this issue is raised in a separate proceeding, CC Docket No. 80-176, *Regulatory Policies Concerning Resale and Shared Use of Common Carrier International Communications Services*, 77 FCC 2d 831 (1980), the record in CC Docket No. 80-176 is stale. Thus, the Commission delegated authority to the Common Carrier Bureau to terminate CC Docket No. 80-176 and proposed "considering anew the elimination of any remaining U.S. carrier restrictions for the international resale of telecommunications facilities and services." 6 FCC Rcd at 3437.

2. Accordingly, pursuant to authority delegated to the Common Carrier Bureau in CC Docket No. 90-337, IT IS ORDERED that CC Docket No. 80-176, *Regulatory Policies Concerning Resale and Shared Use of Common Carrier International Communications Services*, is hereby TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-625

In re Applications of

ARNOLD L. CHASE File No. BTCCT-851030KF
(Transferor)

and

ARCH COMMUNICATIONS CORP.
(Transferee)

For Consent to the Transfer of Control
of Channel 61 Licensee Corp.,
Licensee of Station WTIC-TV, Channel 61,
Hartford, Connecticut

CHANNEL 61 File No. BRCT-881201KW
LICENSEE CORP.

For Renewal of License of
Station WTIC-TV, Channel 61,
Hartford, Connecticut

Appearances

Robert A. Beizer, *R. Clark Wadlow*, *Mark D. Schneider*, *Paula G. Friedman*, and *Velma E. Evans* on behalf of Arnold L. Chase, Arch Communications Corp., Channel 61 Licensee Corp. and *Gary P. Schonman* on behalf of the Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

Issued: December 9, 1991; Released: December 20, 1991

I. PRELIMINARY STATEMENT

1. This proceeding involves the application of Arnold L. Chase, Arch Communications Corp. ("Arch") and Channel 61 Licensee Corp. (the "Licensee"), collectively referred to as the "Applicants," for FCC consent to the transfer of control of the Licensee, the licensee of Station WTIC-TV, Channel 61, Hartford, Connecticut (the "Station"), from Arnold L. Chase to Arch. *See Arnold L. Chase*, 5 FCC Rcd. 1642 (1990) ("*HDO*").[1] The applicants filed the pending transfer of control application on October 30, 1985. *Id.* In that application, the Applicants sought a waiver of Section 73.3555 (b) of the FCC's rules, 47 C.F.R. Section 73.3555 (b), which prohibits the common ownership or control of a television and radio station licensed to the same market (the "one-to-a market rule"). *See* Joint Ex. 17 - 6. The Applicants sought the waiver because Chase Broadcasting, Inc. ("CBI"), then the proposed transferee, ultimately was controlled by David T. Chase, the father of Arnold Chase, and David Chase also ultimately controlled The Ten Eighty Corporation ("Ten Eighty"), the licensee of Stations WTIC (AM) and WTIC-FM, Hartford, Connecticut.[2] *See HDO*, 5 FCC Rcd. at 1642.

2. Several petitioners to deny, including Astroline Communications Co. Limited Partnership ("Astroline"), opposed the grant of the transfer of control application. *See Arnold l. Chase*, 61 R.R.2d 11, 113 (1986) ("*Chase*"). The petitioners opposed the grant of a waiver of the one-to-a-market rule, arguing that the Applicants had not presented sufficient evidence to support the waiver under Note 4 to Section 73.3555, which governed waivers of the one-to-a-maarket rule at that time.[3]

3. The Commission rejected the allegations made by Astroline and the other petitioners, granting the transfer of control application and waiving the one-to-a-market rule. *See Chase*, 61 R.R.2d at 135. Astroline appealed the grant of the transfer of control application and the waiver request to the United States Court of Appeals for the District of Columbia Circuit. *Decision*, 5 FCC Rcd. 1642. While the case was pending before the court of appeals, on October 2, 1987, Arnold Chase and CBI consummated the transfer of control. *Id.* Approximately one year later, the court of appeals reversed the Commission's decision and remanded the case to the Commission for further consideration. *See Astroline Communications Co.* v. *FCC*, 857 F.2d 1556 (D.C. Cir. 1988) ("*Astroline*"). The court of appeals held that the Commission had failed to follow proper administrative procedures in establishing a standard for evaluating requests for waivers of the one-to-a-market rule and in considering certain other allegations made by Astroline. *Id.* at 1573-74.

4. On remand, the Commission designated the case for hearing on the following issues:[4]

> (1) To determine whether David Chase, Cheryl Freedman, Chase Broadcasting, Inc., or its corporate affiliates, individually or together, were real-parties-in-interest to the application of Arch Communications Corp. for a contruction permit for a new commercial television station to operate on channel 61, Hartford, Connecticut;
>
> (2) To determine whether David Chase, Cheryl Freedman, Chase Broadcasting, Inc., or its corporate affiliates acquired control of the permit or the license for channel 61, Hartford, Connecticut, before the Commission consented to such a transfer of control;
>
> (3) To determine whether Arch Communications Corp., Chase Broadcasting, Inc., or their corporate affiliates or principals, abused the Commission's processes in connection with the filing and prosecution of the construction permit and transfer applications;
>
> (4) To determine, in light of the evidence adduced under the preceding issues, whether the applicants possess the requisite qualifications to hold a Commission license;
>
> (5) To determine whether the combination of radio and television operations in Hartford, Connecticut, as proposed by the applicants, is consistent with the public interest.

> (6) To determine, in light of the evidence adduced under the proceeding issues, whether a grant of either or both the pending transfer and renewal appliations would serve the public interest, convenience and necessity. *Decision*, 5 FCC Rcd. at 1647-48.

The burden of proceeding on issues (1) through (4) was placed on Astroline, the burden of proceeding on issue (5) was placed on the Applicants, and the burden of proof on all issues was placed on the Applicants. *Id.* at 1648. Astroline did not actively participate in the proceeding and the Bureau assumed the burden of proceeding on issues (1) through (4).[5]

5. The remand hearing was held on May 8, 1991. At the hearing, the Applicants and the Bureau introduced written direct testimony in the form of 32 exhibits, including 17 joint exhibits addressing issues (1) through (4) and 15 exhibits sponsored by the Applicants addressing issue (5). *See* Joint Exs. 1 through 17; Applicants Exs. 1 through 15. Arnold L. Chase and Frank J. Higney, an expert witness sponsored by the Applicants, were cross-examined by the Bureau at the hearing. *See* Tr. at 25-226. The record was closed at the conclusion of the hearing on May 8, 1991.

A. DeFacto Control, Real-Party-in-Interest, and Abuse of Process Issues

6. Arnold Chase first became aware of the availability of Channel 61 in Hartford, Connecticut, around 1970. Joint Ex. 1 at 2. At that time, Arnold reviewed an offering prospectus issued by RKO General, Inc., concerning its sale of Channel 18 in Hartford.[6] The prospectus disclosed that a construction permit for Channel 61 had been, or was about to be, turned in to the Commission, and that there thus would be an allocation for Channel 61 that was available for application by the public. Although Arnold concluded that the operation of an independent UHF television station in Hartford was not Broadcasting Magazine and other media trade press. *Id.* After attempting several non-broadcast ventures with his high school friends, Arnold Chase commenced employment with Station WTIC-FM, owned directly by Ten Eighty and controlled and operated by the Chase family, including Arnold's father, David Chase, his sister, Cheryl Chase Freedman, and her husband Roger Freedman.

7. In late 1978 or early 1979, while reviewing Broadcasting Magazine's annual issue on the state of independent television, Arnold Chase noted that for the first time, more independent television stations made money than lost money. *Id.* At this time, he concluded that independent television broadcasting had turned the corner and that the operation or an independent station on Channel 61 in Hartford might now be a successful venture, and that he would apply for a construction permit for Channel 61.

8. Prior to deciding to apply for the construction permit for Channel 61, Arnold Chase had discussions with several members of his family and senior management personnel at Ten Eighty concerning the financial viability of an independent UHF television venture. *Id.* at 4. He spoke with Perry Ury, President of Ten Eighty and General Manager of Stations WTIC (AM) and WTIC-FM, on one occasion while he was working for Mr. Ury at Station WTIC-FM. *Id.* Mr. Ury was pessimistic about the chances for success of an independent UHF television station in the Hartford/New Haven Area of Dominant Influence ("ADI"). *Id.* Arnold also first called the availability of Channel 61 to the attention of his father David Chase and spoke to David Chase about Arnold's potential application for Channel 61. *Id.* ; Joint Ex. 2 at 2. These conversations were very general and brief, involving only David Chase's opinion about the financial viability of an independent UHF television venture. *Id.*; Joint Ex. 2 at 2. David Chase's reactions were neutral to negative, as he was not interested in pursuing the establishement of an independent television station. *Id.*; Joint Ex. 2 at 2. The discussions between David and Arnold did not involve any specific discussion of Arnold's proposed station operations or its financing. *Id.*

9. At some point in early 1979, Arnold also discussed his possible application for Channel 61 with his sister Cheryl Chase Freedman. *Id.*; Joint Ex. 3 at 2. Ms. Freedman knew very little about the television industry and was neutral about the venture. *Id.*; Joint Ex. 3 at 2. She expressed interest, however, in being involved if Arnold proceeded with an independent UHF television venture in Hartford. Moreover, as a general rule, Ms. Freedman was involved in business ventures in which Arnold had an interest. *Id.*; Joint Ex. 3 at 2. After Arnold decided to proceed with an application for a construction permit for a televison station operating on Channel 61 in Hartford, he retained Robert A. Beizer and his law firm Schnader, Harrison, Segal & Lewis (the "Schnader firm") to perform the FCC work related to the application. Joint Ex. 1 at 5. While Program Director at Station WTIC-FM, Arnold Chase had worked closely with Mr. Beizer on a challenge to that station's decision to change its programming format. *Id.* Arnold had been impressed with the Schnader firm's work on that case and decided to hire the Schnader firm as Arch's FCC counsel. *Id.* Mr. Beizer sent Arnold the FCC Form 301 application to complete. *Id.* No Chase family member other than Arnold had a role in Arnold Chase's decision to hire the Schnader firm. *Id.*; Joint Ex. 2 at 3; Joint Ex. 3 at 3.

10. Arnold Chase also hired the local Hartford law firm of Updike, Kelly & Spellacy (the "Updike firm") to do the corporate work in setting up Arch. *Id.* Arnold designated the Updike firm's address as the address for Arch and established an extra telephone line at the Updike firm for Arch's telephone number. *Id.* Arnold also installed an extension of that telephone line at his home. *Id.* Based on Arnold's instructions, on May 1, 1979, over six months before Arch filed its application, the Updike firm drafted and filed Arch's articles of incorporation, prepared Arch's by-laws and minutes of Arch's initial meetings, and set up Arch's first bank account. *Id.*; Joint Ex. 3 at 3. No Chase family member other than Arnold had any role in Arnold's decision to hire the Updike firm. *Id.*; Joint Ex. 2 at 3; Joint Ex. 3 at 3.[8]

11. Arnold Chase completed much of the engineering portion of Arch's application himself. *Id.* at 6. He did much of the site specification and plotting work in the application. *Id.* He obtained geological survey maps and identified possible sites for Arch's transmitter and tower site, met with several site owners to discuss the availability of sites, and eventually selected a site in Glastonbury, Connecticut that was specified in Arch's initial application. *Id.* Arnold retained Harold Dorshaug to check his engineering calculations, to plot radials, to assist in the completion of the FCC Form 301 and to certify the engineering portion of the application.[9] *Id.* Later, during

the course of the comparative proceeding for Channel 61, Arnold Chase retained Alvin Andrus as Arch's engineer. *Id.* No Chase family member other than Arnold had a role in the engineering of Arch's application or Arnold's decision to hire Mr. Dorshaug of Mr. Andrus *Id.*; Joint Ex. 2 at 3-4; Joint Ex. 3 at 3.

12. In addition to the Schnader firm, the Updike firm, Mr. Dorshaug and Mr. Andrus, Arnold Chase also hired Ward Quaal and Bruce Mayer to assist in developing Arch's application for Channel 61. Joint Ex. 1 at 6. *Id.* Mr. Beizer recommended Mr. Quaal to Arnold, and Mr. Quaal subsequently recommended Mr. Mayer to Arnold, as experienced operators of independent television stations. *Id.* When Mr. Quaal informed Mr. Mayer of the potential consultancy with Channel 61 in Hartford, he specifically directed Mr. Mayer to Arnold Chase. Joint Ex. 7 at 1. Mr. Quaal and Mr. Mayer worked directly with Arnold Chase on Arch and did not work with the other members of the Chase family. Joint Ex. 1 at 6; Joint Ex. 7 at 1-2. The two consultants provided Arnold Chase with advice and research regarding necessary equipment purchases, personnel positions and expected programming costs in order for Arnold to compile Arch's proposed budget and financial qualifications demonstration. *Id.* at 7; Joint Ex. 7 at 1-2. With the assistance of these consultants, Arnold Chase also compiled Arch's proposed programming statement, projecting the amount of public service and commercial broadcasting that Arch would carry. *Id.* at 7.

13. Additionally, Arnold Chase compiled Arch's financial qualifications demonstration. Joint Ex. 1 at 7. With the help of Ward Quaal and Bruce Mayer, Arnold put together Arch's proposed business plan, including equipment and programming proposals and their costs. *Id.* Based on the condition of the Hartford/New Haven ADI at the time, Arnold Chase compiled a modest proposal that would have cost approximately $3,250,000 to build and to operate for one year. *Id.*; Joint Ex. 17-1. Arnold Chase also decided to obtain a letter from Citibank, N.A. ("Citibank") to support Arch's ability to finance the construction and operation of the station. Joint Ex. 1 at 7. Arnold obtained and submitted to the FCC a letter dated October 30, 1979 providing him with reasonable assurance of the availabiltiy of $3,100.00 to use in the construction and operation of Arch's proposed television station. Joint Ex. 1 at 30. Arnold Chase personally obtained the bank letter from Citibank, a bank with which he had a previous banking relationship. *Id.* at 7. [10] He also proposed to rely on his own assets to finance an $890,000 stock purchase that would provide Arch with additional necessary funds. *Id.*

14. Arnold Chase also was primarily responsible for determining the composition of the ownership of Arch. *Id.* Initially, in March or April of 1979, Arnold instructed the Updike firm to divide Arch's stock equally between him and his sister, consistent with his usual approach to new business ventures and his sister's expression of interest. *Id.* at 8; Joint Ex. 3 at 2. Arnold also initially instructed the Updike firm to make him the President and Treasurer of Arch and Ms. Freedman the Vice President and Secretary of Arch. *Id.*; Joint Ex. 3 at 2. The Updike firm established Arch with these owners and officers on May 1, 1979. *Id.*; see Joint Ex. 1-1.

15. Shortly after May 1, 1979 and some months prior to the filing of Arch's application, Arnold Chase also decided that Arch should have principals who were representative of the civic and ethnic composition of the local Hartford community. Joint Ex. 1 at 8. Arnold therefore recruited James Grasso, a friend of his family, to join Arch. *Id.* Arnold also discussed his desires with his sister, who recommended that he contact Randall Pinkston, a local newscaster and classmate of Ms. Freedman at the University of Connecticut law school, to determine if Mr. Pinskston was interested in joining Arch. *Id.* Joint Ex. 3 at 3. Arnold Chase met personally with Mr. Pinkston to discuss Arnold's proposals for Channel 61. *Id.* After several meetings between Mr. Pinkston and Arnold, Mr. Pinkston agreed to join Arch. *Id.* Ms. Freedman also recommended that Arnold speak with Edna Negron Smith, a respected civic leader and friend of an acquaintance of Ms. Freedman. *Id.*; Joint Ex. 3 at 3-4. Arnold Chase subsequently recruited Ms. Smith. *Id.*[11] Cheryl Chase Freedman did no more than introduce Ms. Smith and Mr. Pinkston to Arnold Chase, who subsequently conducted all further activities regarding their recruitment. Joint Ex. 3 at 4.

16. During the preparation of Arch's application during the months of April through November of 1979, Arnold Chase held several formal and informal meetings to go over application matters. *Id.* at 9. Additionally, Mr. Grasso, Mr. Pinkston, Ms. Smith, and Ms. Freedman assisted Arnold with the ascertainment process, interviewing community groups and leaders while conducting the ascertainment surveys. *Id.* Arnold Chase personally conducted various surveys and Ms. Freedman performed three of four surveys during the early months of 1979. *Id.*; Joint Ex. 3 at 4.

17. Sometime between May and August of 1979, Robert Beizer informed Arnold Chase that his family's ownership of Ten Eighty and its Hartford radio stations could pose a problem for Arch and its application for Channel 61 because of the FCC's one-to a market rule and cross-interest policy. *Id.*; Joint Ex. 15 at 1. After discussing the FCC's rules and policies and his options with Mr. Beizer, Arnold decided to propose to terminate his ownership and involvement in Ten Eighty's affairs in order to pursue Channel 61. *Id.* at 9-10; Joint Ex. 15 at 2.

18. Arnold also informed his sister about the prohibitions in the FCC's rules and discussed with her the ramifications of her husband Roger Freedman's participation in the management of Stations WTIC(AM) and WTIC-FM. *Id.* at 9; Joint Ex. 3 at 2; Joint Ex. 15 at 1-2. When faced with the prospect of proposing to terminate her ownership in Ten Eighty's radio stations and the problem of the attribution of her husband's role in those stations, Ms. Freedman decided to terminate her relationship with Arch. *Id.* at 10; Joint Ex. 3 at 2-3; Joint Ex. 4 at 2-3; Joint Ex. 15 at 2. Consequently, Ms. Freedman immediately ceased attending meetings relating to Arch. *Id.*; Joint Ex. 3 at 3. Additionally, Arnold discarded the ascertainments prepared by his sister and conducted an equivalent number of new acertainments to replace the surveys she had conducted. *Id.* Finally, during official meetings in August and September of 1979, over two months before the filing of Arch's application, Cheryl Chase Freedman terminated her stock purchase subscription and withdrew from Arch as an officer and director. *Id.*; Joint Ex. 1-2; Joint Ex. 3 at 3; Joint Ex. 3-1. By September 1, 1979, Ms. Freedman ceased all activity with Arch. *Id.*; Joint Ex. 3 at 3. Subsequent to her resignation, she had no further involvement in the preparation and prosecution of Arch's application. Joint Ex. 3 at 4.

19. In August, September and October of 1979, after Cheryl Chase Freedman terminated her relationship with Arch, Arnold Chase finalized Arch's ownership structure. Joint Ex. 1 at 10. Arnold purchased 50 shares of stock in Arch, which were all the issued and outstanding shares of stock of Arch. Joint Ex. 17-1. Arnold paid from his personal funds $25,000 for his initial 50 shares of Arch stock. Joint Ex. 1 at 11; Joint Exs. 1-3; 1-21. Additionally, Arnold loaned Arch an additional $25,000 of his personal funds to begin the prosecution of its application. Joint Ex. 1 at 11; Joint Ex. 1-21.[12] Arnold Chase also remained the president and a director of Arch. *Id*.; Joint Ex. 1 at 1.[13]

20. In November of 1979, Arnold Chase completed the drafting of Arch's application, and reviewed, signed and certified the accuracy of the application. *Id*.; Joint Ex. 17-1. Arch's original application for the construction permit for the Station was filed on November 15, 1979. *HDO*, 5 FCC Rcd. at 1647. At the time Arch's application was filed, no other Chase family member other than Arnold had any ownership, positional, financial or other interest in Arch, or expected to have any such interest in Arch in the future. Joint Ex. 17-1; Joint Ex. 3 at 4-5; Joint Ex. 4 at 3.

21. During the period November 1979 through September 1983, while Arch prosecuted its application for the construction permit for Channel 61, Arnold Chase directed the affairs of Arch without any participation by his family, including David Chase, Cheryl Chase Freedman, or Roger Freedman. Joint Ex. 1 at 11; Joint Ex. 3 at 4-5; Joint Ex. 4 at 3. Arnold consulted personally with the Schnader firm, Arch's engineers, and Arch's other consultants concerning the prosecution of Arch's application without involvement from other Chase family members. *Id*.; Joint Ex. 3 at 4-5; Joint Ex. 4 at 3. Arnold did not discusss the prosecution of Arch's application with his father, and even explained to his father that he could not discuss the proposed television station's operations with him because of the need to maintain the separate identity of the Ten Eighty radio stations and Arch. Joint Ex. 2 at 3. Arnold similarly did not discuss Arch with Ms. Freedman or Mr. Freedman, also making clear to them his desire that Arch have an independent and separate identity. Joint Ex. 3 at 4-5; Joint Ex. 4 at 3. When the comparative hearing process became active in 1982, Arnold resigned from his employment at Station WTIC-FM in order to devote his full time and effort to securing the construction permit for Channel 61. Joint Ex. 1 at 11.

22. During the application period, Arnold directed the affairs of Arch without any direction from, or participation by, other Chase family members. He consulted with the Schnader firm, Arch's engineers, and Arch's consultants without assistance or involvement by other Chase family members. After the hearing, with no help from Chase Enterprises or his family, Arnold neogotiated the final settlement of the comparative proceeding. *Id*. at 13; Joint Ex. 3 at 5. As part of that settlement, Arnold personally purchased the stock of the last competing applicant for $325,000 and decided to amend Arch's application to specify that applicant's site on Rattlesnake Mountain as Arch's tower and transmitter site. *Id*. Arnold spoke personally with one of the owners of that site to ensure that Arch would have reasonable assurance of the site's availability when Arch's application was granted. *Id*. Subsequent to the filing of the settlement agreement with the FCC, Arnold personally called the owner of the site on several occasions to assure the site owner that Arch's intention to use the site had not changed while Arch waited for the approval of the settlement agreement and the grant of its application. *Id*.[14]

23. After Arch's construction permit was granted in September of 1983, Arnold Chase immediately called one of the owners of the Rattlesnake Mountain site, Enzo DeDominicis, and informed him that the FCC had granted Arch's application. Joint Ex. 1 at 14. Mr. DeDominicis told Arnold that he had changed his mind and was no longer committed to the tower that had been proposed for Arch's transmission facility. *Id*. For several months, Arnold negotiated individually with Mr. DeDominicis in an attempt to develop a joint tower project between Mr. DeDominicis and Arch, without success. *Id*. at 14-15.

24. After several months of failed negotiations with Mr. DeDominicis regarding a joint tower project, Arnold decided to approach David Chase with a proposal that Chase Enterprises or another Chase family business develop an antenna tower facility on Rattlesnake Mountain. Joint Ex. 1 at 15. Arnold personally conceived of the idea of the Chase family venture that would construct a large tower facility and lease space on its tower to numerous businesses that operated transmitting facilities, including Channel 61, other broadcast stations, cellular companies and other communications systems users. *Id*.; Joint Ex. 2 at 4. Arnold performed several rough revenue analysis projections for the tower and transmitter leasing business for his father, who favored the straight-forward rate of return business of leasing land and space. *Id*.; Joint Ex. 2 at 4. Arnold designed a 1,700 foot tower proposal and suggested to his father that as much as 100 acres of the land that could be purchased in this area would be suitable for residential development, a business in which David Chase already was involved. *Id*. at 15-16. David Chase agreed to pursue the tower leasing project because it looked profitable and offered tax advantages. *Id*. at 16; Joint Ex. 2 at 5. Arnold recognized, with respect to Arch, that Arch's lease, rather than purchase, of such a significant tower and transmitting facility would leave more capital available to Arch for other commitments, including program purchases. *Id*.

25. After confirming with FCC counsel that the master antenna facility was a permissible venture for the Chase family and Arch, Arnold Chase, as both a prospective tenant and landlord, and David Chase and Cheryl Chase Freedman, solely as prospective owners of the tower facility, negotiated the purchase of land on Rattlesnake Mountain owned by the Wadsworth Estate adjacent to the DeDominicis property. Joint Ex. 1 at 16; Joint Ex. 3 at 5. Shortly thereafter, negotiations were convened with Mr. DeDominicis involving the sale of the DeDominicis property to the Chase family. *Id*.; Joint Ex. 2 at 5. During these negotiations, Arnold Chase made clear to Mr. DeDominicis and his representatives that Arnold was interested in the project both as a potential owner of the tower venture and as president of Arch, a prospective tenant of the venture. *Id*. at 17. The Chase family members also made clear that David Chase and Cheryl Chase Freedman were participating in the negotiations solely as potential owners of the tower facility and not as representatives of Arch, a prospective tenant of the tower facility. *Id*.; Joint Ex. 2 at 6; Joint Ex. 3 at 6-7. Joint Ex. 3 at 7.

26. The personal financial advisors at Chase Enterprises suggested that Arnold and his sister establish limited partnerships to own the land and the tower and transmitter

building used in the operation of the master antenna facility and that these limited partnerships lease space directly to the tenants. *Id.* at 17; Joint Ex. 2 at 6; Joint Ex. 3 at 6; Joint Ex. 12 at 2. Chase Family Limited Partnership No. 6 purchased the land and Chase Family Limited Partnership No. 7 built and operated the tower facility. *Id.*; Joint Ex. 1-4. Arnold Chase and Cheryl Chase Freedman each owned and controlled 49% of Chase Family Limited Partnership Nos. 6 and 7 and Communications Site Management Corp., then owned by Roger Freedman, held a 2% interest in both Chase family limited partnerships. *Id.*; Joint Ex. 1-4; Joint Ex. 3 at 6; Joint Ex. 4 at 4. The Chase family used limited partnerships to take advantage of the tax benefits accruing from the limited partnership structure. Joint Ex. 12 at 2.

27. Arnold Chase supervised on a full-time basis the clearing and construction of the tower and the transmitter building located on Rattlesnake Mountain. Joint Ex. 1 at 18; Joint Ex. 2 at 6; Joint Ex. 4 at 4; Joint Ex. 12 at 2. He was personally responsible for the selection of the contractors for the construction of the tower and the transmitter building facility, supervising the daily work of the construction personnel and approving the amount and timing of the payment of the contractors and subcontractors. *Id.*; Joint Ex. 4 at 4; Joint Ex. 8 at 2; Joint Ex. 12 at 2. The other Chase family members, including David Chase, Cheryl Chase Freedman and Roger Freedman, had no active involvement in the construction of the tower and transmitter facility or oversight of its construction. *Id.*; Joint Ex. 2 at 6; Joint Ex. 3 at 7; Joint Ex. 4 at 4.

28. In order to establish a rental price for Arch's lease of its antenna and transmitter facility, Arch and the Chase Family Limited Partnership retained the law firm of Bergman, Horwitz, Reynolds & DeSarbo (the "Bergman firm") to determine a *bonafide* fair market lease price for Arch's space on the tower and in the transmitter building. *Id.* at 18; Joint Ex. 12 at 2. The Bergman firm drafted an arms-length lease agreement between the parties, 40 pages in length, containing standard terms and conditions, memorialized on the stationary of the Bergman firm. *Id.*; Joint Ex. 12 at 2. The rental price and terms of the lease agreement for Arch's transmitter and tower space were based on an examination of a number of comparable leases for tower space, as well as an examination of the capital costs involved in establishing the facility and Arch's proportionate use of space. *Id.* at 18-19; Joint Ex. 12 at 2. Arnold Chase signed the lease agreement on behalf of Arch and Arch made the required lease payments to Chase Family Limited Partnership No. 7 from 1984 to 1987. *Id.* at 18; Joint Ex. 1-5; Joint Ex. 6 at 4.

29. In 1991, more than seven years after the establishment of the tower facility and three years after the acquisition of Arch by CBI, Chase Family Limited Partnership No. 7 still operates the tower facility. Joint Ex. 1 at 19. The tower facility is more than 95% occupied and likely will be at capacity sometime this year. *Id.* At the present time, numerous businesses besides Station WTIC-TV operate from the tower facility, including other broadcast stations, cellular communications systems, private radio communications systems and government agencies, including the Federal Bureau of Investigation. *Id.* The rent paid by Arch for its transmitter and tower space now accounts for less than 10% of the tower facility's gross revenues. *Id.* The facility is quite successful, operating with net revenues in excess of $50,000 per month. *Id.*

30. Arnold Chase also decided to locate Channel 61's studio facilities in mezzanine space in a building at One Corporate Center in Hartford owned jointly by Olympia & York ("O & Y") and Chase Family Partnership. Joint Ex. 1 at 20; Joint Ex. 2 at 7; Joint Ex. 12 at 3. O & Y is an independent real estate development firm in which Chase family members hold no ownership interest. *Id.*; Joint Ex. 2 at 7. As a partner in Chase Family Partnership, Arnold Chase owned approximately 12.5% of One Corporate Center in 1984. *Id.* The building existed years before Arch received its construction permit and had many different tenants that were unrelated to the Chase family. *Id.* Prior to its leasing by Arch, the mezzanine space in One Corporate Center had gone unoccupied for a number of years. *Id.* The partnership between O & Y and Chase Family Partnership originally had intended to use the space for the establishment of a movie theater, but that project proved unwise, so the space remained unfinished until the time that Arnold decided to lease the space for Arch's studio facility. *Id.* Arnold decided to locate Arch's studio in the unfinished mezzanine space at One Corporate Center because he believed that when built out, the space would be well suited for use as a television studio. *Id.*

31. In establishing the lease price, the leasing agent for the building used prior building leases as the starting point for determining a fair rental value and consulted with the Bergman firm in determining necessary adjustments given the unusual nature of the space. *Id.* at 20-21; Joint Ex. 12 at 2. Arnold reviewed several proposed leases and their terms prior to the execution of the lease. *Id.* at 21. Albert Reichmann, an officer of O & Y, also reviewed the terms of the proposed transaction to ensure that the lease agreement was fair to all parties. *Id.*; Joint Ex. 2 at 7-8; Joint Ex. 12 at 3. The Bergman firm and the building's leasing agent drafted an arms-length lease agreement between the parties, which when completed was approximately 35 pages in length with an additional 38 pages of attachments. *Id.*; Joint Ex. 12 at 2-3. Arnold Chase reviewed and signed the lease agreement on behalf of Arch. *Id.*

32. Without any assistance or review by David Chase, Cheryl Chase Freedman or Roger Freedman, Arnold Chase supervised the construction of Station WTIC-TV's studio facility on a daily basis, overseeing the contractors performing the "build out." *Id.*; Joint Ex. 2 at 9; Joint Ex. 3 at 8. Towards the end of the construction, Arnold even performed many of the finishing installations himself. *Id.* Arnold Chase also supervised the major maintenance projects undertaken for the Station after the completion of the "build out" and reviewed the charges to the station for any of the services performed to fix structural problems. *Id.* at 22.

33. Arch's lease of studio facilities at One Corporate Center was a *bona fide*, commercially reasonable transaction. In leasing space at One Corporate Center, Arch received centrally-located studio space with high ceilings ideally suited for the studio's purpose without needing to expend initial capital on the purchase of space. *Id.* at 22-23. Arch paid rent to an enterprise in which Arnold Chase had ownership and the Chase Family Partnership and O & Y received revenue from the lease of space that had remained vacant until that time. *Id.* at 23. The partnership that owned One Corporate Center received a commercially reasonable 12% or 13% return on its investment. Joint Ex. 2 at 8.

34. Arnold Chase, along with his financial advisors, also decided that Arch would lease rather than purchase its studio equipment, and that it would lease the equipment from Chase Family Limited Partnership No. 8. Joint Ex. 1 at 23. This permitted Arch to expend its capital on program purchases rather than hard assets. *Id.* Arnold owned 49% of Chase Family Limited Partnership No. 8, as did his sister Cheryl Chase Freedman, and Communications Site Management Corp. owned the remaining 2% of Chase Family Limited Partnerhsip No. 8. *Id.*; Joint Ex. 1-6; Joint Ex. 3 at 7-8; Joint Ex. 4 at 4.

35. Without assistance from his sister, his father or his brother-in-law, Arnold Chase selected the equipment to be purchased for use by the Station. Joint Ex. 1 at 23; Joint Ex. 2 at 8; Joint Ex. 3 at 8; Joint Ex. 4 at 4; Joint Ex. 12 at 2. Arnold similiarly selected the types and brands of that equipment and met with various equipment vendors to negotiate the price and terms of the equipment purchases without assistance from his family. *Id.* at 23-24; Joint Ex. 3 at 8; Joint Ex. 4 at 4-5. Without any assistance from his family or the staff of Chase Enterprise, Arnold personally installed or supervised the installation of the equipment in Arch's studios and at Arch's transmitter and tower site. *Id.* at 24; Joint Ex. 2 at 8-9; Joint Ex. 4 at 5; Joint Ex. 12 at 2.

36. In determining the lease price that Arch would pay Chase Family Limited Partnership No. 8 for the rental of its equipment, Arnold Chase personally obtained several comparable lease quotes from other equipment vendors, including RCA. Joint Ex. 1 at 24. These comparable prices were forwarded to the Bergman firm, which drafted a *bona fide*, commercially reasonable lease between Arch and Chase Family Partnership No. 8 without assistance from Cheryl Chase Freedman. *Id.*; Joint Ex. 3 at 8-9; Joint Ex. 12 at 2. The 12-page equipment lease, memorialized on the Bergman firm's stationary, also contained terms and conditions for the rental of studio and television broadcasting equipment that were standard in the broadcast industry. *Id.*; Joint Ex. 1-5.

37. Arch's lease of its studio equipment from Chase Family Partnership No. 8 was a commercially reasonable business transaction accomplished on arms-length terms. Arch leased its equipment at fair market value on standard terms without having to commit initial capital to equipment purchases. Arch paid the equipment rental fees to a partnership in which Arnold Chase had a 49% ownership interest. Cheryl Chase Freedman was assured of receiving a reasonable rate of return on her investment in the equipment, received tax benefits from the capital investment, and provided financial assistance to her brother without any other involvement on her part. Joint Ex. 1 at 25; Joint Ex. 3 at 8; Joint Ex. 4 at 5; Joint Ex. 12 at 2-3.

38. Prior to deciding to lease Arch's transmitter and tower site, studio space, and studio equipment from partnerships in which other Chase family members had an ownership interest, Arnold Chase checked with the Schnader firm to ensure that such leases would not violate the FCC's one-to-a-market rule or other cross-ownership policies. Joint Ex. 1 at 16, 25; Joint Ex. 3 at 5-6, 9; Joint Ex. 15 at 3. The Schnader firm confirmed on several occasions that the leases were permissible and in compliance with all FCC rules amd policies as long as the leases were at arms-length and did not inject David Chase, Cheryl Chase Freedman, or Roger Freedman into the management of Channel 61's broadcast operations. *Id.*; Joint Ex. 3 at 9; Joint Ex. 4 at 6; Joint Ex. 15 at 3. The Schnader firm even provided Citibank with an opinion letter and memorandum of law confirming that the transactions involved in the leases were in compliance with the FCC's one-to-a-market rule and cross-interest policy. *Id.* at 25; Joint Ex. 1-7; Joint Ex. 4 at 6; Joint Ex. 15 at 4.

39. With respect to the construction of the Station facilities, Arnold hired the Austin Company as the designer and developer of Arch's studio. *Id.* He also hired Charles "Buc" Fitch as Arch's chief engineer to oversee the construction of Channel 61, *Id.* He subsequently supervised the Austin Company and Mr. Fitch, receiving their recommendations and overseeing their implementation of all decisions regarding the construction of the Station. *Id.* Arnold also retained, as an independent contractor, the firm that constructed the tower on Rattlesnake Mountain and supervised that firm's work. *Id.* He retained and supervised Lawrence Titus, an engineer, as an independent contractor to assist in the construction of Channel 61. *Id.* at 26-27.[15] Neither David Chase, Cheryl Chase Freedman nor Roger Freedman participated in decisions regarding the hiring of contractors or the supervision of the construction of Station WTIC-TV. *Id.* at 27; Joint Ex. 2 at 9; Joint Ex. 3 at 7; Joint Ex. 4 at 4.

40. Arnold Chase did retain and supervise several independent contractors who had relationships to Chase Enterprises. Joint Ex. 1 at 27. Arch used the services of Frank Ohman, an architect at Chase Enterprises, to design certain aspects of the Station's studio in the building at One Corporate Center. *Id.* Mr. Ohman's architectual services were routine professional services provided in building out the facility at One Corporate Center, a building owned by an entity affiliated with his employer, Chase Enterprises. *Id.* The services were billed to, and paid for by, Arch at market rates. *Id.*; Joint Ex. 1-8. Additionally, Arnold Chase's mother, Rhoda Chase, assisted Arnold in the purchase of Arch's studio office furnishings. *Id.* Mrs. Chase had an interior design business, and in purchasing some of Arch's furnishings, used her exisitng accounts at Chase Enterprises. *Id.* Arch was billed for the cost of the furnishings. *Id.*; Joint Ex. 1-9.

41. In constructing the tower facility on Rattlesnake Mountain, building out the studio space at One Corporate Center and purchasing studio equipment, Arnold Chase and the Chase family limited partnerships also used Chase Fiscal Corporation ("Chase Fiscal") and Mountain Development Corp. ("Mountain Development"), two companies owned and operated by Chase family members, as contracting agents or general contractors. Joint Ex. 1 at 28; Joint Ex. 8 at 2; Joint Ex. 12 at 1-2. Chase Fiscal, owned by David Chase, served merely as a funding vehicle for the payment of expenditures by Chase Family Limited Partnerships Nos. 6, 7 and 8, which later reimbursed Chase Fiscal for any of its expenditures. *Id.*; Joint Ex. 8 at 2, Joint Ex. 12 at 1. Mountain Development, owned 25% by Arnold Chase, under its name or the name Enterprise Construction Company Ltd., provided construction services for the development of shopping malls and plazas both before and after its construction work on Rattlesnake Mountain and One Corporate Center. *Id.*; Joint Ex. 2 at 6-7; Joint Ex. 8 at 2-3. David Chase and Cheryl Chase Freedman owned the remaining interests in Mountain Development, which was funded by capital contributions by Arnold, his father and his sister, and loans from his father. *Id.*; Joint Ex. 1-10; Joint Ex. 8 at 2-3; Joint Ex. 12 at 1.

42. Arnold Chase decided to use Mountain Development for construction work on the tower site and studio build-out projects. Joint Ex. 1 at 29. Arnold, personally and alone, negotiated the purchase of necessary television station equipment, supervised the work performed by Mountain Development's employees on the Rattlesnake Mountain tower facility and the mezzanine studio facility at One Corporate Center, and monitored the payment of all subcontractors working on the project. *Id.*; Joint Ex. 3 at 7; Joint Ex. 8 at 2; Joint Ex. 12 at 2-3. No other Chase family Member, including David Chase, Roger Freedman and Cheryl Chase Freedman, participated in the supervision of the purchase or construction. *Id.*; Joint Ex. 2 at 8-9; Joint Ex. 3 at 7; Joint Ex. 8 at 2-3.

43. Chase Enterprises has staff accountants who keep and process the accounting and financial records of Chase family venture like the Chase family limited partnerships, Mountain Development, and Chase Fiscal. Joint Ex. 1 at 29; Joint Ex. 8 at 1; Joint Ex. 12 at 1. After Arnold received an invoice from a contractor, subcontractor or equipment vendor for an expenditure by a Chase family limited partnership and approved its payment, the staff accountants would prepare a check drafted on the Mountain Development or Chase Fiscal account to pay the invoice. *Id.*; Joint Ex. 8 at 2. If the staff accountants received an invoice directly, they would present it to Arnold for approval even if the invoices pertained to a contract that Arnold already had signed. *Id.* at 29-30; Joint Ex. 8 at 2. Arnold reviewed the invoices to make certain that the expenditures were for work or equipment used in the project and that the quality of work or equipment was up to his satisfaction. Joint Ex. 8. At times, Arnold decided to pay the invoice in full and at other times he made partial payments. *Id.* In certain instances, Arnold held off making a final payment until he was sure that the project was done to his satisfaction. *Id.* No one other than Arnold Chase looked at the invoices to evaluate the quality of the work or equipment provided or to control the limits on the amount of money spent on the projects.[16]

44. Chase Family Limited Partnerships Nos. 6, 7 and 8 primarily obtained their funds from a loan Citibank provided to Arch and Chase Family Limited Partnerships Nos. 6, 7 and 8. Joint Ex. 1 at 30. Consistent with Arnold's past personal relationship with Citibank, the bank letter obtained by Arnold from Citibank in 1979, and the Chase family's personal and business relationship with Citibank, on August 14, 1984, Arnold Chase executed definitive loan documents with Citibank calling for Arch's receipt of funds from a $12,000,000 loan from Citibank. *Id.* at 30-31. Arch's borrowing of funds was consolidated with the borrowing by the Chase Family limited partnerships because the borrowed funds all related to the construction of the tower facility and the equipping of Arch's studio and Citibank decided to include the various loans as part of one loan package. *Id.* at 31.

45. Arnold Chase reviewed drafts of the Citibank loan documents and discussed several of the deal points raised in the loan documents with Citibank personnel. Joint Ex. 1 at 31. Cheryl Chase Freedman, Roger Freedman and others reviewed the loan documents on behalf of the Chase family limited partnerships, although Cheryl Chase Freedman did not become personally involved in negotiating the terms of the loan. *Id.*; Joint Ex. 3 at 9; Joint Ex. 4 at 6; Joint Ex. 12 at 5. David Chase was not personally involved in obtaining or negotiating the Citibank loan. Joint Ex. 2 at 9. Chase Enterprises accountants reviewed the loan documents to ensure that the loan was booked properly for Chase Family Limited Partnership Numbers 6, 7 and 8. Joint Ex. 6 at 2. The accountants at Chase Enterprises did not review the loan for Arch or discuss the loan documents with Arch personnel. *Id.*

46. As part of the loan, Arnold pledged his Arch stock to secure the total $12,000,000 loan in order that Arch's tower site could be purchased and developed and Arch's equipment purchased and leased. Joint Ex. 1 at 31; Joint Ex. 1-11. As the sole owner of Arch and the 49% owner of Chase Family Limited Partnership Nos. 6, 7 and 8, Arnold also guranteed the total $12,000,000 loan in order that Arch's tower site could be purchased and developed and its equipment purchased and leased. *Id.* at 32; Joint Ex. 1-12. As the 49% owner of Chase Family Limited Partnerships Nos. 6, 7 and 8, Cheryl Chase Freedman also agreed to guarantee the $12,000,000 to secure the repayment of the loan by the Chase family limited partnerships. *Id.*; Joint Ex. 1-12; Joint Ex. 3 at 9. In order to ensure that Arnold and Cheryl Chase Freedman could be made liquid, the Bank requested, and David Chase agreed, that David Chase would purchase interests that his two children held in a mall in Middletown, Conecticut for $6,000,000 if necessary. *Id.*; Joint Ex. 1-13; Joint Ex. 2 at 9.

47. After the Citibank loan was consummated, Citibank occasionally asked questions concerning the status of the loan and the performance of the borrowers, Arch and the Chase family limited partnerships. Joint Ex. 1 at 33; Joint Ex. 13 at 2. When Citibank personnel needed to discuss the performance of Arch, Arch's financial condition or Arch's payment of its obligations, the Citibank personnel met with Arnold Chase and Arch's management at Arch's offices without other Chase family members or Chase Enterprises personnel being present. *Id.* at 33-34; Joint Ex. 4 at 6; Joint Ex. 5 at 4; Joint Ex. 13 at 2. When Citibank personnel wanted to discuss the loan as it pertained to the Chase family limited partnerships, they discussed those matters with Roger Freedman, Cheryl Chase Freedman or Chase Enterprises staff at the offices of Chase Enterprises. *Id.* at 34; Joint Ex. 4 at 6; Joint Ex. 5 at 4.

48. Arnold Chase personally funded the prosecution of Arch's application for the construction permit for the Station, providing to Arch a total of $680,941 from Arch's inception up through the settlement of the comparative proceeding. Joint Ex. 1 at 34. Of this sum, Arnold provided $25,000 in the form of his initial capital contribution and $655,941 in the form of personal loans to Arch. *Id.*; Joint Ex. 1-16. During the construction of Station WTIC-TV, from September of 1983 to September 17, 1984, Arnold provided Arch with a total of $1,114,150 in funds, $25,000 in the form of a capital contribution and $1,089,150 in the form of personal loans. *Id.* at 34-35; Joint Ex. 1-17. From September 17, 1984 through October 2, 1987, Arnold Chase loaned Arch an additional $20,980,645, or $15,730,645 net of repayment of his prior loans, to fund Arch's operating deficit. *Id.* at 35; Joint Ex. 1-18. Arnold's personal loans to Arch were reflected in promissory notes executed by Arnold Chase. Joint Ex. 1-19.[17] Station Management understood that Arnold Chase's personal funds were being used to fund the Sta-

tion and not the funds of David Chase or Chase Enterprises. Joint Ex. 7 at 2; Joint Ex. 13 at 1-2; Joint Ex. 16 at 2.

49. Of the $680,941 that Arnold provide to Arch to cover the costs of prosecuting the application, $605.441 came directly from Arnold's personal cash on-hand, sales or proceeds of his independent investments, and his personal margin borrowings. Joint Ex. 1 at 36; Joint Ex. 1-21. Arnold borrowed $75,500 from David Chase in order to obtain liquid assets to provide his personal loans to Arch during the prosecution of his application. *Id.* at 37; Joint Ex. 1-21; Joint Ex. 1-21; Joint Ex. 5-2. Of the $1,114,150 that Arnold provided to Arch from September of 1983 to September 17, 1984, $949,321 came directly from his cash-on-hand, personal investment proceeds or margin borrowings and $134,859 came from funds loaned to him by his father. *Id.*; Joint Ex. 1-22; Joint Ex. 5-2. After Station WTIC-TV commenced broadcasting, Arnold used $1.041,254 of his cash-on-hand, investment proceeds and margin borrowings to fund Arch and, rather than sell his interests in Chase family businesses or other investments, borrowed $3,132.566 from his father and $16.806.825 from Connecticut Financial Asscoaites ("CFA") controlled by his father, to fund Arch's operating losses. *Id.*; Joint Ex. 1-23; Joint Ex. 5-2.

50. Arnold and other members of his family historically have borrowed funds from David Chase. or each other. to provide liquid capital to pay certain business or personal expenses. Joint Ex. 1 at 36; Joint Ex. 2 at 10-11; Joint Ex. 5 at 10; Joint Ex. 12 at 5. These interest-bearing loans are a method of making liquid ownership interests in numerous family businesses or other independent investments which, although valuable, are best kept as operating concerns and not sold or otherwise liquidated. *Id.* Joint Ex. 2 at 10; Joint Ex. 5 at 11. When Arnold borrowed funds from his father, he signed promissory notes and other documents calling for the repayment of the principal with interest. *Id.*; Joint Ex. 6 at 5. In all instances, personal accountants kept schedules of the principal amount of cash loans outstanding and interest due on the loans. *Id.*; Joint Ex. 2 at 10; Joint Ex. 5 at 11. Thus, every loan to Arnold from David Chase of CFA was reflected by an interest bearing note and reflected in a loan schedule. *Id.* at 37; Joint Ex. 1-24; Joint Ex. 6 at 5. At the time Arnold borrowed funds from his father or CFA, his personal net assets, in excess of $50 million, were sufficient to secure the repayment of such loans. *Id.*: Joint Ex. 2 at 12; Joint Ex. 5 at 11.

51. During Arch's application process, when expenditures were not frequent, Arnold drafted and signed the personal checks that were deposited into Arch's bank account. Joint Ex. 1 at 38. When Arch began to become active as an operating business. Arnold's personal checks made payable to Arch were processed by the standard method for processing almost all of his personal checks. *Id.*; *see* Joint Ex. 3 at 10. When Arch or Station WTIC-TV required cash to meet an operating deficit. Arnold or a member of his staff at the television station would prepare a personal fund request. *Id.*; Joint Ex. 4 at 7; Joint Ex. 13 at 1. Arnold reviewed and signed the personal fund requests and had them delivered to the staff accountant handling his personal accounts at Chase Enterprises, along with support documents included for tax return preparation and documentation purposes. *Id.*; Joint Ex. 4 at 7; Joint Ex. 13 at 1-2. Arnold's personal staff accountant then obtained funds from his personal bank account, a personal investment account, a personal margin borrowing account of a loan from his father or CFA, and prepared his personal check payable to Arch. *Id.* at 38; Joint Ex. 6 at 5. Arnold's personal accountant would decide whether to use Arnold's personal liquid funds or to borrow funds based upon standing instructions concerning income tax and estate planning positions and cash liquidity. Joint Ex. 6 at 5-6.[18]

52. Arnold's personal fund requests were not reviewed for substance by David Chase, Roger Freedman, Cheryl Chase Freedman, or anyone else at Chase Enterprises. Joint Ex. 2 at 13; Joint Ex. 3 at 11; Joint Ex. 4 at 8; Joint Ex. 12 at 5. At no time in Arch's history were any of Arnold's personal fund requests rejected. Joint Ex. 1 at 39; Joint Ex. 3 at 11; Joint Ex. 12 at 5; Joint Ex. Id; Joint Ex. 13 at 1-2. Moreover, at no time did a member of the Chase family other than Arnold or a Chase Enterprises accountant ever question or discuss the substance of any of Arnold's personal fund requests for Arch with Arnold or any Arch employee. *Id.* at 39-40; Joint Ex. 3 at 11; Joint Ex. 11 at 4; Joint Ex. 13 at 1-2. All of Arnold's personal fund requests for Arch were processed and funded within 24 hours, and usually the funds were provided on the same day that they were requested. *Id.* at 40; Joint Ex. 1-25; Joint Ex. 11 at 4; Joint Ex. 12 at 1-2. [19] While Roger Freeman or Cheryl Chase Freedman may have reviewed fund requests to verify Arnold's signature, they did not evaluate the propriety of Arnold's spending on Arch or relate the sums to any Arch budget. Joint Ex. 4 at 8; Joint Ex. 12 at 5.

53. Arnold Chase or someone under his direction at Station WTIC-TV made all decisions concerning what expenses Station WTIC-TV would incur without any assistance from David Chase, Cheryl Chase Freedman. Roger Freedman or any Chase Enterprises employees. Joint Ex. 1 at 41; Joint Ex. 2 at 13; Joint Ex. 3 at 11; Joint Ex. 12 at 5, 8. All services purchased by Arch were contracted for by Arnold or Station WTIC-TV personnel under Arnold's sole direction. *Id.*; Joint Ex. 12 at 5. 8. David Chase. Cheryl Chase Freedman. Roger Freedman and Chase Enterprises employees played no role in contracting for Station WTIC-TV's services or paying for those services. *Id.*: Joint Ex. 2 at 13; Joint Ex. 3 at 11; Joint Ex. 4 at 8-9. There were no checks and balances on Arch's spending exercised by Chase Enterprises. David Chase, Cheryl Chase Freedman or Roger Freedman. and David Chase never altered the standard personal funding process at Chase Enterprises to control Arnold Chase's personal spending on Arch. Joint Ex. 12 at 8.

54. All invoices for services rendered to Arch were sent to Arch at its studios. *Id.*; Joint Ex. 13 at 1. Arch's check book and its other financial records were maintained at Station WTIC-TV's studios. and all of Arch's checks were signed personally by Arnold or by two authorized Station employees under his direction. *Id.*; Joint Ex. 7 at 2.[20] Arch also maintained its own accounting records at Arch's studio and offices. Joint Ex. 1 at 42; Joint Ex. 13 at 1. Arch produced and kept its own budgets, monthly financial statements, revenue reports from billing. production billing, revenue projections. cash requirements. cash disbursements, trial balances and film debt and amortization schedules. *Id.*; Joint Ex. 13 at 2.[21] Roger Freedman and his staff at Chase Enterprises did not have routine access or input into the compilation and substance of Arch's financial records. *Id.*: Joint Ex. 4 at 9; Joint Ex. 13 at 1. Cheryl Chase Freedman never saw Arch's check

register or check book, or other accounting records, prior to the FCC's approval of the transfer of control application. Joint Ex. 3 at 12, 14.

55. While Arch generated its own quarterly and annual financial statements, these reports were reviewed and word-processed by accountants at Chase Enterprises and forwarded to Citibank together with the statements for the Chase family limited partnerships pursuant to the terms of the Citibank loan documents. Joint Ex. 1 at 42; Joint Ex. 4 at 9; Joint Ex. 12 at 1. In reviewing Arch's financial statements, the accountants received completed statements from Arch's accounting staff and merely assured that the reports were consistent with generally accepted accounting principles ("GAAP"). *Id.*; Joint Ex. 4 at 9; Joint Ex. 6 at 3. The accountants at Chase Enterprises also completed the "related party" footnotes for the financial statements by ensuring that the transactions between Arch and any other business in which Arnold or his family had an interest, such as the Chase family limited partnerships, were properly reported. *Id.* at 42-43; Joint Ex. 4 at 9; Joint Ex. 6 at 3; Joint Ex. 8 at 4-5. The accounting tasks performed by Chase Enterprises were routine, perfunctory services that did not involve discretionary decision-making for Arch. Joint Ex. 12 at 1, 8.

56. While Roger Freedman or members of his staff at Chase Enterprises thus had access to financial statements for Arch, they did not provide financial advice to Arch. Joint Ex. 4 at 9; Joint Ex. 5 at 12-13; Joint Ex. 8 at 4-5. Roger Freedman did not review the financial statements on a regular basis as he did with other businesses owned by Chase Enterprises. *Id.* The accounting staff at Chase Enterprises had very little to do with Arch and saw very few ties between Chase Enterprises and Arch except that Arch was owned by Arnold Chase. Joint Ex. 8 at 5-6.

57. Arnold Chase's staff accountants at Chase Enterprises also prepared Arch's annual tax returns in conjunction with their preparation of his personal tax returns. Joint Ex. 1 at 44; Joint Ex. 6 at 1; Joint Ex. 12 at 1. The tax return preparation involved completion of tax forms pursuant to standard accounting and Internal Revenue Service conventions without any excercise of judgement. *Id.*; Joint Ex. 6 at 1. The Chase Enterprises accountant who prepared the Arch tax return, John Redding, obtained a trial balance from Arch, completed a spread sheet, and placed numbers in the appropriate places on the IRS form. *Id.* The preparation of Arch's tax return was a purely routine and perfunctory task. *Id.* at 1-2. Chase Enterprises accountants did not perform any tax planning services for Arch. *Id.* at 2.

58. Arch was charged a market rate for the services provided by the staff accountants and the word-processing staff at Chase Enterprises. Joint Ex. 1 at 43; Joint Ex. 4 at 10. Arch was charged $1,000 per month for the review of the financial statements and their footnotes and was billed for word-processing charges. Joint Ex. 1 at 43; Joint Ex. 1-28; Joint Ex. 1-29; Joint Ex. 6 at 3. Arch also reimbursed Chase Enterprises for Federal Express deliveries to Citibank in 1984 when the delivery of loan documents to Citibank was charged to a Chase Enterprises account and not allocated to an Arch account. *Id.*; Joint Ex. 1-30. Arch was billed for the tax return preparation services at a competitive rate. Joint Ex. 1 at 44; Joint Ex. 1-31; Joint Ex. 6 at 3.

59. Prior to having the staff acccountants at Chase Enterprises prepare Arch's tax returns and review and word-process Arch's financial statements, Arnold Chase checked with the Schnader firm to ensure that it was permissible under FCC rules for Chase Enterprises accountants to perform these services for Arch. Joint Ex. 1 at 44; Joint Ex. 4 at 9; Joint Ex. 15 at 4-5. The Schnader firm advised Arnold and Roger, separately, that such routine personal accounting, word-processing and tax return completion services could be performed without violating the FCC's rules. *Id.*; Joint Ex. 4 at 9-10; Joint Ex. 15 at 4-5. The provision of these services did not involve David Chase, Cheryl Chase Freedman, Roger Freedman or any Chase Enterprises employees in Arch's management; the services were provided at arms-length for fair value.

60. As a matter of course, Chase Enterprises usually provided other services to Corporations or partnerships operated by Chase Enterprises or Chase family members that were not provided to Arch. Joint Ex. 1 at 45. Chase Enterprises prepared budgets and income projections for its other businesses but not for Arch. *Id.*; Joint Ex. 8 at 6; Joint Ex. 11 at 4; Joint Ex. 12 at 5. Chase Enterprises also kept accounting records and check registers for many of its other businesses but not for Arch. *Id.*; Joint Ex. 8 at 1-2, 4-5. Unlike the situation with other businesses operated by Chase family members, neither Chase Enterprises nor any of its owners, officers or employees other than Arnold performed these tasks for Arch or otherwise provided management services to Arch. *Id.*; Joint Ex. 5 at 9. Chase Enterprises and Chase family members other than Arnold did not communicate with Arch regarding operational decisions or even request information regarding such plans. Joint Ex. 5 at 9; Joint Ex. 11 at 3.

61. Additionally, Chase Enterprises provided legal services to its businesses but not to Arch. Joint Ex. 1 at 45; Joint Ex. 3 at 12. Arnold Chase hired outside legal counsel to represent Arch separately from counsel for Chase Enterprises. *Id.* These legal counsel, including the Updike firm and Green & Kleinman (the "Kleinman firm"), Arch's program contract counsel, reported directly to Arnold or his staff at Arch and did not consult with Cheryl Chase Freedman or Chase Enterprises' legal staff. *Id.*; Joint Ex. 3 at 12; Joint Ex. 13 at 2. Prior to Arnold's retention of Arch's corporate counsel and Arch's labor relations counsel, these firms had never provided legal services to Chase Enterprises. *Id.*; Joint Ex. 3 at 12. Even where Arnold used counsel that had served him at a Chase Enterprises business, that counsel dealt with Arnold on all matters pertaining to Arch and Station WTIC-TV without any involvement from his sister. *Id.*; Joint Ex. 3 at 12.

62. Arnold Chase determined how Station WTIC-TV would be staffed. Joint Ex. 1 at 46. Arnold personally hired Station WTIC-TV's senior management personnel and with the assistance of those personnel hired the staff at Station WTIC-TV without any direction from his family or Chase Enterprises. *Id.*; Joint Ex. 2 at 13; Joint Ex. 4 at 12; Joint Ex. 9 at 1; Joint Ex. 16 at 1. During Arnold Chase's tenure as the President and sole stockholder of Arch, he personally hired and supervised Mr. Mayer, David J. Uhrich and Edward Karlik as general managers or station managers of Station WTIC-TV. *Id* ; Joint Ex. 7 at 2; Joint Ex. 16 at 1. He personally hired Mr. Mayer and Mr. Uhrich prior to Station WTIC's commencement of on-air broadcasts and personally hired Mr. Karlik after the FCC approved the transfer application but before the transfer was consummated. *Id.* He personally interviewed, or already was aquainted with, many of the management

employees that were hired directly by Bruce Mayer during his tenure as General Manager of Station WTIC-TV, including Susan Craig, the business manager hired by Mr. Mayer. *Id.*; Joint Ex. 7 at 5; Joint Ex. 11 at 1; Joint Ex. 16 at 4.

63. Arnold also supervised Station WTIC-TV's personnel on a daily basis. *Id.*; Joint Ex. 13 at 1; Joint Ex. 16 at 2. He set or reviewed all personnel policies, staffing requirements, salary levels and benefit packages. *Id.*; Joint Ex. 7 at 5. He hired Bruce Mayer as Arch's General Manager to plan and implement various personnel functions but retained ultimate authority over all personnel actions. *Id.*; Joint Ex. 7 at 2; Joint Ex. 9 at 1. Mr. Mayer and Susan Craig, the Station's business manager, made all personnel decisions in conjunction with Arnold, and looked to Arnold for the ultimate approval of their proposals. Joint Ex. 7 at 5, Joint Ex. 13 at 1.

64. On the other hand, until the FCC approved the transfer application, David Chase, Cheryl Chase Freedman and Roger Freedman and their staffs at Chase Enterprises had no role in the staffing of Station WTIC-TV or the supervising of the Station's personnel. Joint Ex. 1 at 46-47; Joint Ex. 2 at 13; Joint Ex. 3 at 13; Joint Ex. 4 at 12-13; Joint Ex. 7 at 5; Joint Ex. 9 at 1; Joint Ex. 10 at 1-2; Joint Ex. 16 at 2, 4.[22] Roger Freedman did not interview Station WTIC-TV's key management personnel or supervise them while they were employed at Arch.[23] Joint Ex. 4 at 12; Joint Ex. 13 at 1; Joint Ex. 16 at 2. Cheryl Chase Freedman did not meet with Mr. Mayer, David Uhrich or other Arch management employees. Joint Ex. 3 at 13; Joint Ex. 7 at 5; Joint Ex. 16 at 4-5. David Chase, Cheryl Chase Freedman and Roger Freedman did not have any access to personnel rosters, salary break-downs or performance appraisals and had no role in any personnel decisions at Station WTIC-TV. *Id.*; Joint Ex. 1 at 48; Joint Ex. 7 at 5; Joint Ex. 9 at 2. Additionally, Chase family members other than Arnold were not involved in the firing of Arch employees prior to the FCC's consent to Arch's acquisition by CBI. Joint Ex. 1 at 48; Joint Ex. 16 at 3, 4. While Arnold's office was at Station WTIC-TV from early 1984 until 1990 and he did not have any office at Chase Enterprises, no member of the Chase family other than Arnold ever appeared at the television station prior to the FCC's approval of the transfer application. other *Id.*; Joint Ex. 7 at 5; Joint Ex. 9 at 2; Joint Ex. 16 at 4-5.

65. During the period 1983 through 1986, employees at Arch, Ten Eighty and Chase Enterprises all were told that Arnold Chase was the owner of Arch, that Station WTIC-TV and the Ten Eighty radio stations had to be run separately, and that other members of the Chase family did not have any role in Arch's ownership or control. *Id.*; Joint Ex. 3 at 13; Joint Ex. 4 at 14; Joint Ex. 8 at 6; Joint Ex. 9 at 1; Joint Ex. 10 at 4; Joint Ex. 11 at 2. Arnold told many of these employees about Arch's separate identity and the requirements of the FCC's rules concerning joint ownership. *Id.*; Joint Ex. 11 at 2; Joint Ex. 13 at 7. Bruce Mayer, Perry Ury, Cheryl Chase Freedman and Roger Freedman similarly informed employees at Arch, Ten Eighty and Chase Enterprises respectively, of Arch's separate identity and the FCC's requirements. *Id.*; Joint Ex. 3 at 13; Joint Ex. 4 at 14; Joint Ex. 9 at 1-2; Joint Ex. 10 at 4; Joint Ex. 13 at 7. Mr. Freedman specifically reminded various Chase Enterprises accountants of the requirement that Chase Enterprises not become involved in operational or management decisions made by Arch. Joint Ex. 4 at 14; Joint Ex. 12 at 4.

66. Employees of Chase Enterprises and Arch recall that meticulous attention was paid to avoiding discussions of Arch's operation and management with Chase Enterprise peronnel prior to the FCC's grant of the transfer of control application. Joint Ex. 5 at 2; Joint E. 8 ay 6; Joint Ex. 9 at 1-2; Joint Ex. 12 at 4; Joint Ex. 13 at 7. Current and former employees saw no instance prior to the transfer of control where David Chase, Cheryl Chase Freedman, or Roger Freedman made decisions for Arch. Joint Ex. 8 at 6; Joint Ex. 9 at 2; Joint Ex. 16 at 3-5; Joint Ex. 12 at 4; Joint Ex. 13 at 7. Only after the transfer of control did CBI management become involved in reviewing expenses incurred by Arch or otherwise managing Arch. *Id.*; Joint Ex. 11 at 3-4; Joint Ex. 13 at 6-7; Joint Ex. 16 at 4-5. Similarly, only after the transfer of control did Chase Enterprises, and Chase family members other than Arnold, become involved in hiring and programming decisions for Station WTIC-TV. Joint Ex. 11 at 3-4; Joint Ex. 16 at 4.

67. Prior to the FCC's approval of the transfer of control application, only Arnold and the employees under his supervision at Arch decided which programs would be aired on Station WTIC-TV and what prices would be paid for that programming. Joint Ex. 2 at 13; Joint Ex. 4 at 10; Joint Ex. 12 at 4; Joint Ex. 13 at 2; Joint Ex. 16 at 3. Arnold prepared the initial cost estimated and budget proposal for Station WTIC-TV including the amounts to be spent on Station WTIC-TV's programming. Joint Ex. 1 at 48. Arnold subsequently revised the allocations for programming from time to time based on his assessment of the Hartford/New Haven ADI. *Id.* In addition, Arnold made necessary contacts in the program syndication community, reviewed programming purchase proposals, and supervised the actions of Station WTIC-TV's management personnel, including Bruce Mayer and David Uhrich, in negotiating programming purchases. *Id.* at 49; Joint Ex. 7 at 3; Joint Ex. 12 at 4; Joint Ex. 13 at 2; Joint Ex. 16 at 3. Arnold untimely made all decisions regarding the selection of programming with the assistance of his staff and without any assistance from David Chase, Roger Freedman, Cheryl Chase Freedman or Chase Enterprises personnel. *Id.*; Joint Ex. 2 at 13-14; Joint Ex. 3 at 13; Joint Ex. 4 at 10; Joint Ex. 7 at 3; Joint Ex. 16 at 3.

68. Only Arnold Chase, his employees at Arch, and Arch's legal counsel were involved in negotiations with program suppliers prior to the issuance of the FCC's consent to CBI's purchase of Arch. Joint Ex. 1 at 49; Joint Ex. 3 at 18; Joint Ex. 4 at 10; Joint Ex. 7 at 3; Joint Ex. 12 at 4; Joint Ex. 13 at 2; Joint Ex. 16 at 3. Arnold was personally involved in many negotiations of contracts and consulted with Bruce Mayer on the remainder of Station WTIC-TV's purchases during 1984 and the first half of 1985. *Id.*; Joint Ex. 7 at 3. Subsequent to Mr. Mayer's departure in September of 1985, Arnold consulted with David Uhrich concerning program purchases and contract negotiations for the Station. *Id.*; Joint Ex. 16 at 3. Arnold Chase retained the Kleinman firm to provide legal advice and assistance with regard to Station WTIC-TV's program contractors and the Kleinman firm discussed these contracts only with Arnold and the Station's managers, including Mr. Mayer and Mr. Uhrich, not with Cheryl Chase Freedman or any other member of Arnold's family or Chase Enterprises. *Id.*; Joint Ex. 3 at 13; Joint

Ex. 7 at 3; Joint Ex. 13 at 2. Arnold Chase personally reviewed and signed the overwhelming majority of the hundreds of program contracts entered into by Arch. *Id.*; Joint Ex. 1-32; Joint Ex. 7 at 3; Joint Ex. 16 at 3.[24] During contract negotiations for programming, Arnold and Station management never stated or implied that the Chase family stood behind Arch or Station WTIC-TV. Joint Ex. 1 at 50; Joint Ex. 7 at 3-4; Joint Ex. 16 at 3. There is no reference in any of Arch's pre-transfer of control programming contracts to Chase Enterprises or any member of the Chase family other than Arnold. *Id.*; Joint Ex. 1-32.

69. Prior to the FCC's approval of Arch's acquisition by CBI, David Chase, Cheryl Chase Freedman, Roger Freedman and their staffs at Chase Enterprises were not involved in any discussions with program suppliers regarding the purchase of Station WTIC-TV's programming. Joint Ex. 1 at 50; Joint Ex. 2 at 13-14; Joint Ex. 4 at 10. No guarantees of program contracts were provide by Chase Enterprises or any member of the Chase family other than Arnold. *Id.* The Station's program contracts were not sent to Chase Enterprises or reviewed by David Chase, Roger Freedman, Cheryl Chase Freedman or the legal staff at Chase Enterprises prior to FCC consent to the transfer of control. *Id.*; Joint Ex. 2 at 14; Joint Ex. 3 at 13-14; Joint Ex. 7 at 3; Joint Ex. 16 at 3.

70. David Chase, Cheryl Chase Freedman and Roger Freedman did not review for substance Arch's levels of program commitments or comment to Arnold Chase on the level of program expenses until the summer of 1985, when Arnold entered serious discussions concerning CBI's acquisition of Arch. Joint Ex. 1 at 61; Joint Ex. 4 at 10-11; Joint Ex. 16 at 3. At the time of CBI's decision to acquire Arch, Arch's level of programming commitments and purchases were discussed with Roger Freedman and his staff. *Id.* at 51; Joint Ex. 4 at 11. When Arnold and his family made the decision to go forward with plans to apply for FCC consent to CBI's acquisition of Arch, Roger Freedman reviewed Arch financial statements and discussed with Arnold the 1985 budget for Arch. *Id.*; Joint Ex. 4 at 11. At that time, Roger Freedman recognized that Arch was losing a significant amount of money, primarily due to the cost of its programming and the level of revenues produced by that programming. *Id.*; Joint Ex. 4 at 11. Arnold Chase does not recall Roger Freedman providing any advice concerning Station WTIC-TV. *Id.*[25]

71. Later, in February of 1986, after CBI and Arnold has executed the purchase agreement concerning Arch and the transfer of control application had been filed, Susan Craig, Arch's business manager, and Arnold met with Roger Freedman and Richard Steele, Mr. Freedman's assistant at Chase Enterprises, to review Arch's 1986 budget. Joint Ex. 1 at 51; Joint Ex. 4 at 11; Joint Ex. 13 at 4-5. During the meeting, which lasted only about thirty minutes, Mr. Freedman and Mr. Steele both indicated that they thought that the Station's budget was high, especially compared to the average budget of an independent television station. *Id.*; Joint Ex. 4 at 11; Joint Ex. 5 at 3; Joint Ex. 13 at 4-5. Mr. Freedman specifically mentioned the programming budget, which was 50% higher than the allocation for progamming in 1985, and suggested that Arnold review the budget and make appropriate reductions where possible. *Id.*; Joint Ex. 4 at 11. Arnold indicated that he would review the budget and decide what he thought was appropriate given the circumstances. *Id.* at 51-52; Joint Ex. 5 at 4; Joint Ex. 13 at 4-5. After reviewing the budget, Arnold determined that no changes would be made because the expenditures were necessary to establish Arch as the number one independent television station in the Hartford/New Haven ADI and thus ensure Station WTIC-TV's survival.[26] *Id.* at 52; *see* Joint Ex. 5 at 4.

72. Arnold Chase arranged for the purchase of medical and liability insurance coverage for Station WTIC-TV and its employees. Joint Ex. 1 at 52. He personally consulted with his personal insurance planner and cousin, Burton Farber, who owns and manages an insurance agency. *Id.*[27] When Arnold met with Burton Farber, he instructed Mr. Farber to provide Arch with the best and most economical policies he could find for health, long-term disability and liability coverage. *Id.* at 53. Arnold provided his employees at Station WTIC-TV with dental coverage even though he was aware that the other Chase family businesses in which he had been involved, including Ten Eighty, did not provide dental coverage. *Id.*; Joint Ex. 10 at 2.

73. Mr. Farber associated Arch with Chase Medical Plan, a self-insured group health plan that included Chase Enterprises and other Chase family businesses. *Id.*; Joint Ex. 5 at 10. Several other businesses that were not owned and operated by the Chase family also were included in this health plan. *Id.*; Joint Ex. 5 at 10. Arch obtained its long-term disability coverage in a similar fashion. *Id.* Chase Enterprises billed Arch for its share of the cost of the health and long-term disability insurance on an arms-length basis. *Id.*; Joint Ex. 1-33; Joint Ex. 5 at 10. Arch had its own separate liability policy that was not part of a group plan with businesses operated by Chase Enterprises. Joint Ex. 1 at 53-54.[28]

74. Stations WTIC(AM) and WTIC-FM treated Station WTIC-TV on an arms-length basis with respect to the acceptance and sale of advertising. Joint Ex. 4 at 11; Joint Ex. 7 at 4-5; Joint Ex. 10 at 3-4. No joint or combination advertising rates were used between Station WTIC-TV and Stations WTIC(AM) and WTIC-FM. Joint Ex. 1 at 54; Joint Ex. 7 at 4. When Station WTIC-TV sold time, it never claimed that it was anything but a station owned by Arnold Chase. Joint Ex. 9 at 2. The Station's rate cards prior to the transfer of control all used Arnold Chases's initials, unlike the radio stations. *Id.* The Ten Eighty radio stations never helped Station WTIC-TV target advertisers, and Chase Enterprises management similarly did not help the Station target advertisers. *Id.* Station WTIC-TV competed against the radio stations for the sale of advertising time without any assistance from those stations. *Id.*

75. While the Ten Eighty radio stations and Station WTIC-TV advertised on one another, the stations dealt on an arms-length basis, with the salespersons at each station making the usual sales calls. Joint Ex. 1 at 54; Joint Ex. 9 at 2-3. Some spots were paid for in cash and other spots were the subject of trade agreements, similar to the process for selling and buying advertising time on other stations in the market. *Id.*; Joint Ex. 7 at 5; Joint Ex. 10 at 3; Joint Ex. 13 at 2. At the direction of Arnold Chase, Station WTIC-TV advertised on the radio stations to a much greater extent than the radio stations advertised on the Station. Joint Ex. 1 at 54. The radio Stations were established in the market, while Station WTIC-TV was a start-up venture in need of publicity. *Id.*; Joint Ex. 10 at 3. Arnold personally allocated a large amount of cash and trade time to secure promotions of Station WTIC-TV,

believing such promotion to be an essential element of the Station's future success. *Id.* at 55. Because of the assignment of the call sign "WTIC-TV" to Channel 61, many competitors of the "WTIC" radio stations refused to carry ads for Station WTIC-TV and likewise would not advertise on Station WTIC-TV. *Id.* Arch thus was required to spend more of its advertising dollars on spots to be broadcast on Stations WTIC(AM) and WTIC-FM, and radio stations WTIC(AM) and WTIC-FM initially were heavier buyers of time on Station WTIC-TV than other radio stations. *Id.*; Joint Ex. 9 at 3.

76. Despite Station WTIC-TV's desire to advertise extensively on Station WTIC(AM) and WTIC-FM, the stations took great care to ensure that all dealings were on an arms-length basis. Joint Ex. 4 at 11-12; Joint Ex. 10 at 3-4. The radio stations refused Station WTIC-TV's request for trade advertising when the trade balance between the stations was too high. *Id.*; Joint Ex. 1 at 55; Joint Ex. 10 at 3. There were times when advertising purchases proposed by the television station were rejected and other times when cash up front was required to pay for advertisments. Joint Ex. 1 at 55; Joint Ex. 10 at 3. When the Ten Eighty radio stations were out of inventory, no special deals were made to clear time for the Station. Joint Ex. 10 at 3. Additionally, Stations WTIC(AM) and WTIC-TV competed for the sale of advertising time and did not provide each other with special rates. *Id.*; Joint Ex. 1 at 55. Even after the transfer of control, the stations still compete to sell advertising time to advertisers in the Hartford/New Haven ADI. *Id.*; Joint Ex. 10 at 3.

77. With respect to national sales of advertising time, Station WTIC-TV and Stations WTIC(AM) and WTIC-FM both used divisions of Katz as their national sales representatives. Joint Ex. 1 at 56; Joint Ex. 7 at 4. Katz has separate divisions and personnel for its television and radio representative firms and these separate divisions and personnel were located in different offices. *Id.* Arnold decide to retain Katz independent of any input or discussion with the other Chase family members. *Id.*; Joint Ex. 3 at 14; Joint Ex. 4 at 12. He separately negotiated the television station's deal with the television representative division of Katz without assistance from his family or Chase Enterprises. *Id.*; Joint Ex. 3 at 14; Joint Ex. 7 at 4. He personally met with the personnel of Katz's television division to secure the representation. *Id.*; Joint Ex. 7 at 4.

78. After the grant of Arch's construction permit, Arnold Chase reviewed with the Schnader firm certain changes in the FCC's attribution rules that permitted him to retain his ownership interest in Ten Eighty. Joint Ex. 1 at 56. The Schnader firm informally confirmed their interpretation of the FCC's attribution rules and their application to Arnold's case with staff of the FCC's Mass Media Bureau. *Id.* The Schnader firm filed a letter with the FCC in May of 1984 confirming the FCC staff's oral conclusion that the attribution rules permitted Arnold Chase to retain his ownership interest in Ten Eighty and stating that Arnold intended to retain that interest in Ten Eighty. *Id.* at 56-57; Joint Ex. 17-4.

79. In December of 1983, Arnold Chase learned of the possibility that his father, sister and brother-in-law, or Chase Enterprises itself, could acquired an interest in Arch. Joint Ex. 1 at 57. While reviewing the FCC's public notices, which Arnold obtained on a daily basis, Arnold learned of the FCC's decision in the *Metromedia* case, a decision involving a waiver of the one-to-a-market rule in Dallas, Texas to permit the ownership of a television station and an AM radio station operating on 1080 MHz, the very same frequency that Station WTIC(AM) operated on in Hartford. *Id.* Arnold discussed with the Schnader firm the application of that case to his situation in Hartford, and understood that although the case was precedent for a waiver, the general proposition of the case and the particular application of the case to Arch were not certain. *Id.*

80. Arnold briefly raised the possibility of a waiver of the one-to-a-market rule with his sister and his father in early 1984. Joint Ex. 1 at 57; Joint Ex. 2 at 14; Joint Ex. 3 at 14; Joint Ex. 4 at 15. Although neither the discussions of the case nor the discussions of their possible involvement in Arch were extensive, Arnold did ask if they were interested in acquiring ownership interests in Arch if it were permissible under the FCC's rules. *Id.* at 57-58. Although David Chase still had minimal interest in independent television, both David Chase and Cheryl Chase Freedman indicated interest in acquiring ownership if that was what Arnold wanted and if it were possible under the FCC's rules. *Id.* at 58; Joint Ex. 2 at 14; Joint Ex. 3 at 15. The possibility of joint ownership of the Station and Stations WTIC(AM) and WTIC-FM was discussed with various management level employees of Chase Enterprises and Ten Eighty at this time, although no steps were taken to merge the operations of the stations. Joint Ex. 12 at 3-4; Joint Ex. 13 at 6.

81. Shortly after these discussions, in June of 1984, Channel 61 requested a waiver of the FCC's rules to permit the use of the common call letters WTIC-TV. Joint Ex. 1 at 58; Joint Ex. 17-5. Arnold Chase initiated the request based on his desire to boost the profile of the television station in the community. *Id.* Although Arnold initiated the call sign request without any suggestion from his family or Ten Eighty's management, he obtained the consent of his family and Ten Eighty officials prior to filing the call sign request. *Id.*; Joint Ex. 3 at 15. The Chase family cooperated in the request, and Perry Ury, President of the radio stations, provided a letter indicating that the radio stations consented to the request. *Id.*; Joint Ex. 17-5. The call sign request filed with the FCC by the Schnader firm disclosed the intentions of Cheryl Chase Freedman and David Chase to acquire, if permitted by the FCC after an appropriate application and approval, a substantial interest in Station WTIC-TV. *Id.*; Joint Ex. 17-5. This disclosure reflected the extent of the conversations between Arnold and his family to that date: if the FCC would permit the joint ownership of the Hartford broadcast stations, David Chase and Cheryl Chase Freedman would acquire an interest in Arch. *Id.*; Joint Ex. 3 at 15.[29]

82. Station WTIC-TV's losses mounted during the end of 1984 and the first half of 1985. *See* Joint Ex. 1-27. After the first half of 1985 had passed, substantial losses had occurred and given the significant expenses that would have to continue for the next several years, Arnold decided to pursue his interest in having further financial involvement from his family. Joint Ex. 1 at 59. He again approached his family concerning an attempt to combine Arch under the ownership of the family in order to provide access to new sources of funds and resources that would not only stabilize Station WTIC-TV's financial condition, but also provide the ability to produce news programming on the Station. *Id.*; Joint Ex. 2 at 14-15; Joint Ex. 3 at 16; Joint Ex. 4 at 15.

83. The staff at Chase Enterprises drafted a contract for the sale of Arch to CBI. Joint Ex. 1 at 60; Joint Ex. 3 at 16. Because the Station had lost so much money and incurred so many obligations, the consideration for Arnold's stock in Arch was largely based on CBI's assumption of debt. The agreement was executed on October 29, 1985 and the transfer of control application was filed the next day. *Id.* at 61; Joint Ex. 17-6.

84. During the pendency of the transfer of control application before the FCC, CBI took a more active role in reviewing financial reports and major actions of Arch to ensure that there were no material changes in the financial condition of Station WTIC-TV. Joint Ex. 1 at 61; Joint Ex. 3 at 16-17; Joint Ex. 4 at 16; Joint Ex. 12 at 6. Arnold met with Roger Freedman several times in the fall of 1985 and in February of 1986 to discuss Arch's expenditures and budget. *Id.*; Joint Ex. 4 at 16; Joint Ex. 13 at 4-5. Arnold continued to make the decisions regarding Arch's governance intil the time that the FCC approved the transfer of control application. *Id.*; Joint Ex. 13 at 6. Arnold made no changes in Station WTIC-TV's operation based on any suggestion made by Roger Freedman or his staff prior to the FCC's approval of the transfer of control application. *Id.*; Joint Ex. 4 at 16; Joint Ex. 13 at 4-6.

85. In late August of 1986, the Chase family received word from the Schnader firm that the FCC either had approved or was about to approve the transfer of control application. Joint Ex. 1 at 62. After receiving the news release of the FCC's decision, Roger Freedman and Chase Enterprises's accountants commenced a due diligence investigation of Station WTIC-TV's financial and management condition prior to closing. *Id.*; Joint Ex. 3 at 17; Joint Ex. 4 at 16-17. Among other things, Roger Freedman and Richard Steele looked in detail at Station WTIC-TV's program contract obligations, production and promotional expenditures, and personnel staffing. *Id.*; Joint Ex. 4 at 17; Joint Ex. 5 at 4; Joint Ex. 13 at 6. Mr. Steele produced numerous schedules depicting the status of the Station's program commitments after reviewing program contracts, revenue reports and other documents. *Id.*; Joint Ex. 4 at 17; Joint Ex. 5 at 5; Joint Ex. 13 at 6.

86. After the initial results of the due diligence inquiry were compiled, Roger Freedman and Richard Steele met to discuss the results of the due diligence inquiry. Joint Ex. 5 at 5. Mr. Steele and Mr. Freedman then met with Arnold and several others to go over the results of their due diligence study. *Id.*; Joint Ex. 4 at 17; Joint Ex. 1 at 62. There were several meetings with various employees of Arch and Chase Enterprises concerning the extent of the liabilities of the Station. *Id.* Specifically, Roger Freedman and Richard Steele expressed their extreme displeasure with the levels of the program contract commitments, personnel staffing expenses, technical expenses of the Station and promotional expenses. *Id.*; Joint Ex. 4 at 17. The program liabilities of the Station alone had increased by 50% from the high level reported to CBI in late 1985 and early 1986. Joint Ex. 5 at 5. Roger Freedman and his staff made clear that the financial condition of the Station was much worse than Arnold had conveyed to them or had been evident from a review of the 1985 financial statements. *Id.*; Joint Ex. 3 at 17. Mr. Freedman and Mr. Steele stated that the levels of debt, program commitments and staffing of the Station could not come close to being supported by Station WTIC-TV's revenue. *Id.* at 62-63; Joint Ex. 4 at 17. Roger Freedman made clear that he could not recommend that CBI acquire Arch given the significant changes in its debt and program commitment levels between the fall of 1985 and the fall of 1986 and its overall liabilites at that time, and Cheryl Chase Freedman considered rejecting the acquisition of Arch. *Id.* at 63; Joint Ex. 3 at 17; Joint Ex. 4 at 17; Joint Ex. 5 at 6.

87. Arnold subsequently terminated many of Arch's program contracts and initiated litigation to reduce the level of Arch's programming costs. Joint Ex. 1 at 63. While he alone made this decision for Arch, he did it with the understanding that CBI intended to offer to acquire some the programming rights terminated by Arch at reduced prices if CBI were to acquire Arch. *Id.*; Joint Ex. 3 at 18. Arnold was aware that subsequent to his termination of some of Arch's programming rights, David Chase, Roger Freedman and Cheryl Chase Freedman negotiated with program suppliers concerning their willingness to permit CBI to guarantee payment of programming expenses. *Id.*; Joint Ex. 3 at 18; Joint Ex. 5 at 7. At all times during the renegotiation of some program contract liabilities and the litigation over other program contract liabilities, Arnold always was careful to indicate that he represented the present owner of Arch and its prospective seller while the other Chase family members made clear that they represented the potential buyer of Arch. *Id.*; Joint Ex. 1-35; Joint Ex. 2 at 16-17; Joint Ex. 3 at 18; Joint Ex. 4 at 18. Roger Freedman informed syndicators that he did not represent Arch, but only its potential buyer, because he wanted to make clear that CBI was not yet liable for any of Arch's debts or obligations. Joint Ex. 4 at 18. At various points during 1986 and 1987, various program suppliers came to agreements with Arch and CBI regarding the restructuring of Arch's program liabilities. Joint Ex. 1 at 64; Joint Ex. 5 at 7.

88. In addition to reducing program costs at Station WTIC-TV, Arnold also eliminated several departments and personnel positions at the Station. Joint Ex. 1 at 64. The decisions regarding which departments and personnel positions to eliminate were made by Arnold without direct involvement from his family. *Id.*; Joint Ex. 4 at 19. He decided to hire a general manager for the Station, Ed Karlik, who Roger Freedman and Arnold had hired to manage several broadcast properties for CBI and CCI in the spring of 1986. *Id.* Arnold had interviewed Mr. Karlik at the time he was hired to run CBI's television group and was quite impressed with his record. *Id.* In late 1986, after the FCC approved the transfer of control application, Arnold discussed Mr. Karlik's availability with him, and after several discussions with Mr. Karlik and Roger Freedman, hired Mr. Karlik as General Manager of Station WTIC-TV. *Id.*; Joint Ex. 4 at 19. While Mr. Karlik was able to commit the great majority of his time to Station WTIC-TV, he also continued to oversee CBI's station in Memphis. *Id.* Arnold agreed to pay Mr. Karlik for his time as general manager of Arch even though he continued to remain on CBI's payroll and spent time assisting in the management of the Memphis television station. *Id.* at 64-65. Arnold was solely responsible for supervising Ed Karlik with respect to Mr. Karlik's duties at Arch. Joint Ex. 4 at 19.

89. Arnold Chase sold Arch to CBI on October 2, 1987. Joint Ex. 1 at 65; Joint Ex. 3 at 18. CBI's decision to acquire Arch was based in part upon the reduction in Arch's liabilities and in part upon the Chase family's desire to assist Arnold Chase. Joint Ex. 5 at 7-8. The purchase price for Arch was changed at the suggestion of the Bergman firm because of the extremely poor financial

condition of the Station. *Id.* at 8; Joint Ex. 1 at 65. The contract price was reduced from $1,000,000 to $1 and Arnold's proposed employment contract was eliminated. *Id.* Additionally, the repayment of Arnold's personal loans to Arch was stretched out over time. *Id.* These revisions to the purchase agreement were suggested by outside counsel on the transaction because that counsel felt that the financial condition of the Station would not justify, on an arms-length basis, the payment of a greater amount. *Id.*

90. After the consummation of the transaction, certain services provided by employees of Chase Enterprises after the FCC's approval of the transfer of control application were billed back to Arch. Joint Ex. 1 at 65; Joint Ex. 6 at 4. These charges included the cost of Richard Steele's time in compiling schedules of Arch's program contract liabilities and other expenses and the proportionate share of salaries for the time of CBI personnel spent providing management advice to Arch, including Ed Karlik. *Id.* at 65-66; Joint Ex. 1-36; Joint Ex. 5 at 8. The staff at Chase Enterprises decided that these charges should be billed to Arch at the time of consummation because Richard Steele's work ultimately had benefited Arch, as had the management services provide to Arch by CBI personnel. *Id.* at 66; Joint Ex. 5 at 8; Joint Ex. 6 at 4.

91. After the consummation, David Chase, Cheryl Chase Freedman and Roger Freedman made changes in the various management policies of the Station. Joint Ex. 3 at 18; Joint Ex. 4 at 19. Roger Freedman and Richard Steele assumed day-to-day supervisory responsibilities mfor ther Station's financial operations. *Id.* at 18-19; Joint Ex. 4 at 19; Joint Ex. 13 at 6-7. Program contract commitments could not be made without Roger Freedman's aproval. *Id.* at 19; Joint Ex. 4 at 19. Additionally, Roger Freedman began to set all budgeted levels of expenditure. *Id.*; Joint Ex. 4 at 19. Cheryl Chase Freedman began reviewing all contractual arrangements made by the Station. *Id.*

B. One-to-a-Market Issue

92. Station WTIC-TV is a UHF television station operating on Channel 61 with 5,000 kilowatts effective radiated power from a height above average terrain of 1,692 feet. Applicants Ex. 1 at 1. Station WTIC(AM) is a full-time station operating at 1080 kHz with 50 kilowatts, directionally at night. *Id.* Station WTIC-FM operates on 96.5 Mhz with 20 kilowatts effective radiated power from a height above average terrain of 810 feet. *Id.*

93. The Hartford/New Haven ADI is the 23rd largest ADI in the United States, collectively encompassing an estimated 911,400 television households. Applicants Ex. 3 at 3; Applicants Ex. 3-2. There are a multitude of media outlets in the Hartford/New Haven ADI serving these households.

94. *Television Stations Licensed To Communities Within The Hartford*New *Haven ADI.* There are currently ten televison stations licensed to communities within the Hartford-New Haven ADI, with eight separate and distinct owners. Applicants Ex. 3 at 4. These ten television stations are:

Station	City	Channel	Affil.	Ownership
WFSB	Hartford	3	CBS	Post-Newsweek
WTNH	New Haven	8	ABC	Cook Inlet
WHCT	Hartford	18	IND	Astroline
WTXX	Waterbury	20	IND	Renaissance
WTWS	New London	26	IND	R. Rangoon
WVIT	New Britain	30	NBC	Viacom
WTIC	Hartford	61	IND	Applicants
WEDH	Hartford	24	PBS	CT ETV
WEDN	Norwich	53	PBS	CT ETV
WEDY	New Haven	65	PBS	CT ETV

Applicants Ex. 3-3. Of these ten televison stations, three are network affiliates, four are independents, and three are public broadcasting stations. *Id.*; Applicants Ex. 3 at 4. Station WHCT, channel 18, currently is off-the-air, and has requested FCC consent to remain off-the-air until October 19, 1991. Tr. at 172; *See* Application of Martin W. Hoffman, Trustee, File No. BALCT-910506KH.

95. The ratings of the television stations in the Hartford/New Haven ADI indicate that the three network affiliates are the dominant stations in the market. Applicants Ex. 3 at 4. During 1990, Station WFSB received between a 22 and a 25 audience share, Station WTNH received between a 10 and 12 audience share. Applicants Ex. 3-4. Share WTIC-TV received between a 5 and a 7 audience share during 1990. *Id.* Station WTKX has competed with Station WTIC-TV over the past three to four years with regard to ratings, and Stations WHCT and WTWS, along with the PBS affiliate Station WEDH, also have generated audience shares. *Id.*; Applicants Ex. 3 at 4.

96. In addition to the ten full-power television station licenses outstanding in the Hartford/New Haven ADI, an additional construction permit is outstanding for Station WTVU, channel 59, New Haven. Applicants Ex. 3-3; Applicants Ex. 3 at 4. The licensee of Station WTVU expects to commence broadcasting by the end of 1991. Applicants Ex. 3 at 4; Tr. at 171. Station WTVU is owned independently from any of the other television stations licensed to communities in the Hartford/New Haven ADI. *See Id.* Applicants Ex. 3-3.

97. *Radio Stations In The Hartford Metro.* There are 23 radio stations, with 19 separate and distinct owners, licensed to communities in Hartford County, which comprises the Hartford Metro as defined by Arbitron. Applicants Ex. 3 at 6:; Applicants Ex. 3-12. These 23 radio stations are:

Station	Community	Frequency	Licensee
WJMJ(FM)	Hartford	88.9	St. Thomas Semina
WRTC(FM)	Hartford	89.3	Trinity College
WQTQ(FM)	Hartford	89.9	Hartford Bd. of Ed.
WERB(FM)	Berlin	89.9	Berlin Bd. of Ed.
WWUH(FM)	W. Hartford	91.3	Univ. of Hartford
WZMX(FM)	Hartford	93.7	Multi Market Media
WKSS(FM)	Hartford	95.7	Precision Media LP
WTIC(FM)	Hartford	96.5	Applicants
WTIC(AM)	Hartford	1080	Applicants
WPKX(FM)	Enfield	97.9	Goldenberg
WFCS(FM)	New Britain	97.9	Conn. State College
WRCH(FM)	New Britain	100.5	Enzo DeDominicus
WNEZ(AM)	New Britain	910	Enzo DeDominicus

WDRC(FM)	Hartford	102.9	Buckley Broadcasting
WBRC(AM)	Hartford	1360	Buckley Broadcasting
WHCN(FM)	Hartford	105.9	Beck-Ross Commun.
WCCC(FM)	Hartford	106.9	G'ter Hartford Comm.
WCCC(AM)	Hartford	1290	G'ter Hartford Comm.
WRYM(AM)	W. Hartford	840	Hartford County Br.
WNTY(AM)	Southington	990	WNTY Associates
WLVH(AM)	Manchester	1230	Jeffrey Dressler
WPOP(AM)	Hartford	1410	Merv Griffin Group
WLVX(AM)	Bloomfield	1550	Living Communic.

Applicants Ex. 3-13. The Applicants.owners of the licensee of the Ten Eighty radio station, also are the owner of Station WTIC-TV. Tr. at 121; Applicants Ex. 1 at 1.

98. *Radio Stations In The New Haven Metro*. There are an additional 18 radio stations with 16 separate and distinct owners licensed to communities in New Haven County, which is adjacent to Hartford County and comprises the New Haven Metro. Applicants Ex. 3 at 6; Applicants Exs. 3-1, 3-16. These 18 radio stations are:

Station	**Community**	**Frequency**	**Owner**
WQAQ(FM)	Hamden	88.3	Quinnipiac College
WNHU(FM)	West Haven	88.7	Univ. of New Haven
WYZ(FM)	New Haven	92.5	WATR Inc.
WATR(AM)	New Haven	1320	WATR Inc.
WYBC(FM)	New Haven	94.3	Yale Broadcast Co.
WPLR(FM)	New Haven	99.1	Southern Starr
WKCI(FM)	New Haven	101.3	Noble Broadcast
WAVZ(AM)	New Haven	1300	Noble Broadcast
WADS(AM)	Astonia	690	Silva and Santos
WELI(AM)	New Haven	960	Clear Channel
WWEB(AM)	Wallingford	1170	Choate-Rosemary Hall
WXCT(AM)	New Haven	1220	Milstar Group
WWCO(AM)	New Haven	1240	Winthrop Broadcast.
WNHC(AM)	New Haven	1340	Edith Willis
WMMW(AM)	New Haven	1470	Anthony Pescatello
WFIF(AM)	Milford	1500	Dolmar Broadcasting
WQQW(AM)	Waterbury	1590	Taft Group
WIOF(FM)	New Haven	104.1	Merv Griffin Group

Applicants Ex. 3-13. One of these 16 separate and distinct owners, the Merv Griffin Group, also is the licensee of a Hartford county radio station. Applicants Ex. 3 at 6.

99. Many of the Hartford County and New Haven County radio stations penetrate each other's respective county, making the environment of these two Metro areas more competitive. Applicants Ex. 3 at 6. At least three of the New Haven radio stations even place 1 mV/m coverage contours over the city of Hartford. *Id.*; Applicants Ex. 3-14 (A-C).[30] Ten Hartford radio stations earn shares of the New Haven County audience and four New Haven stations show audience shares in Hartford County. Applicants Ex. 3-15; Applicants Ex. 3 at 6. Two New Haven County radio stations, Station WIOF(FM) and Station WWYZ(FM), earn better shares in Hartford County than they earn in New Haven County. *Id.*; Applicants Ex. 3 at 7.[31] Finally, Arbitron has indicated that Hartford County and New Haven County equally and collectively comprise the metropolitan portion of the Hartford/New Haven ADI. Applicants Ex. 3 at 7; Applicants Ex. 3-16.

100. *Other Radio Stations In The Hartford / New Haven ADI*. In addition to the radio stations licensed to the Hartford and New Haven Metros, there are an additional 31 stations with 25 separate and distinct owners in non-Metro counties in the Hartford/New Haven ADI. *See* Applicants Ex. 3 at 3, 6; Applicants Ex. 3-11. The number of radio stations competing in the Hartford/New Haven ADI is equal to or greater than the number of stations in other similarly sized markets. Tr. at 176.

101. *Cable Television Penetration*. As of February 1991, the Hartford/New Haven ADI had a cable penetration rate of 82%. Applicants Ex. 3 at 6. The Hartford/New Haven ADI's cable penetration rate is the highest of any of the top 50 ADIs, approximately 4% to 5% higher than the next two highest penetrated markets, West Palm Beach, Florida and San Diego, California. *Id.*; Applicants Ex. 3-9. Hartford County has a 78.6% penetration rate and New Haven County has an 87.2% penetration rate, while the national average is estimated at 59.2%. *See* Applicants Ex. 3 at 6; Applicants Ex. 3-9.

102. Specifically, there are 23 cable systems serving the Hartford/New Haven ADI. Applicants Ex. 3 at 6. These cable systems service anywhere from 76,927 basic subscribers to 1,944 basic subsribers, with a total of more than 765,000 households served. *Id.*; Applicants Ex. 3-10. Ownership of these cable systems is divided among 17 separate system operators, with Storer Communications Company and United Artists Entertainment Company having the greatest number of basic subscribers. *Id.*; Applicants Ex. 3-10. Each of the cable systems has a channel capacity of more than 35 channels. *Id*.

103. *Out - of - Market Television Penetration*. The Hartford/New Haven ADI receives an usually large amount of television signal penetration from televison stations licenses to communities outside of the market. The Hartford/New Haven ADI is penetrated by television stations from New York City, Secaucus, Boston, Newark, Bridgeport and Springfield. Applicants Ex. 3 at 4. Three Springfield television stations place a city-grade coverage contour over the city of Hartford and receive ratings within the Hartford/New Haven ADI. *Id.*; Applicants Ex. 3-5 (A-C).[32] According to Arbitron ratings, 12 outside television signals have a significant presence in the Hartford/New Haven ADI, including 5 network affiliates, 4 independents and 3 PBS stations licensed to adjacent markets, as well as 5 cable originated services. *Id.* at 4-5; Applicants Ex. 3-6.[33]

104. The pervasive presence of effective out-of-market video signals is demonstrated by the percentage of "out-of-market viewing" versus "local viewing" in the Hartford/New Haven ADI. Among the top 50 markets in the United States, the Hartford/New Haven ADI has the highest percentage of "other viewing," with only 66.8% of the market's total daily viewing going to local television stations, according to Arbitron's diary methodology. Applicants Ex. 3 at 5; Applicants Ex. 3-7. A.C. Nielsen's meter methodology demonstrates that viewing of out-of-market stations ranged from 41% to 63% on a daily basis,

while viewing of local stations thus ranged from 59% to a low of 37% across the days of the week. *Id.*; Applicants Ex. 8 (A-B).

105. *Out - of - Market Radio Penetration.* The Hartford Metro is penetrated by radio stations from Worcester, Springfield, New York City, and Westerly, Rhode Island. Applicants Ex. 3 at 7; Applicants Ex. 3-17. Seven radio stations with seven separate owners from outside of the market penetrate the Hartford Metro, including Stations WAAF (FM), Worcester; Stations WAQY(FM), WHYN(FM), and WMAS(FM), Springfield; Station WWRX, Westerly; and Stations WCBS and WFAN, New York. *Id.*; Applicants Exs. 3-17 (A), 3-18. The three Stations licensed to Springfield place a 60 dBu contour over the community of Hartford. Applicants Ex. 3-17 (B-C).[34]

106. *Newspaper Publications.* Five daily newspapers, each separately owned and operated, are published in Hartford County. Applicants Ex. 3 at 8; Applicants Ex. 3-25. *The Hartford Courant* is the largest daily newspaper published in Hartford County with a daily circulation of 227,763 and a Sunday circulation of 307.878. Applicants Ex. 3-25. The total daily circulation of these five Hartford County newspapers is 338,580, with four of the five newspapers having a daily circulation exceeding 20.000. *Id.* An additional 11 daily newspapers are published within the Hartford/New Haven ADI, each of the 11 being separately owned and operated. *Id.*; Applicants Ex. 3 at 8. These 11 newspapers have a combined daily circulation of 383,094 and a combined Sunday circulation of 334,630 with five of the nine newspapers having a daily circulation exceeding 20,000. *Id.* The largest of the 11 non-Hartford County newspapers is the *New Haven Register*, with a daily circulation of 106.324 and a Sunday circulation of 139,135. *Id.*

107. In addition to daily newspapers, 18 weekly newspapers are published in Hartford County. Applicants Ex. 3 at 8. The 18 weekly newspapers are published by five different owners and have a combined circulation of 146,776. Applicants Ex. 3-26. An additional 19 weekly newspapers are published in other counties in the ADI. *Id.* These 19 weekly newspapers are owned and operated by 16 different publishers and have a combined circulation of 338,697. *Id.*; Applicants Ex. 3 at 8.

108. *Alternative Video Services.* There are currently four separate organizations licensed to provide low power television service in the Hartford/New Haven ADI. Applicants Ex. 3 at 8; Applicants Ex. 3-21. At least two of these low power television stations, licensed to Hartford, have commenced broadcast operations. Applicants Ex. 3-21; Tr. at 184. Additionally, Station WXTV, Channel 41, Patterson, New Jersey operates a television translator in Hartford on Channel 47. Applicants Ex. 3 at 8; Applicants Ex. 3-24. At least one Multiple Distribution Service ("MDS") is operating in Hartford at this time, and six other organizations are seeking authority to establish Multichannel MDS ("MMDS") systems in the Hartford-New Haven ADI. Applicants Ex. 3 at 8; Applicants Ex. 3-22. Finally, both the Archdiocese of Hartford and the Connecticut Educational Telecommunications Corporation operate Instructional Television ("ITV") stations in the Hartford area. *Id.*; Applicants Ex. 3-23.

109. Given the presence of all these various media, the Hartford/New Haven ADI is an extremely competitive market with a large number of effective voices present. Applicants Ex. 3 at 4-5. As testified to by an expert, the Hartford/New Haven ADI is at least as competitive and diverse as the other markets of comparable size in terms of the number of stations within the market, and is made even more competitive and diverse by the extensive penetration of out-of-market video and audio signals from the New York and Boston markets. *Id.*; Tr. at 174-76.

The Public Interest Benefits Of The Waiver.

110. *Public Interest Benefits Resulting From The Waiver.* In the fall of 1985, only Stations WFCB, WTNH and WVIT, three network affiliates, provided local evening news programs in the Hartford/New Haven ADI. Tr. at 87, 89 102; Applicants Ex. 1 at 5. At the time Station WTIC-TV commenced broadcast operations in September of 1984, a local Hartford newspaper, *The Hartford Courant*, published an editorial urging Station WTIC-TV to enrich the Station's service area with the broadcast of more news and public affairs programming as soon as the Station was able to establish its secure place in the market. Applicants Ex. 1-2. In seeking a waiver of the one-to-a-market rule, the Applicants stated that the joint ownership of Station WTIC-TV and the Ten Eighty radio station would permit Station WTIC-TV to initiate the only 10:00 p.m. newscast available in the Hartford/New Haven ADI as well as the market's only local independent new program. Applicants Ex. 1 at 6; Joint Ex. 17-6. The Applicants indicated that the joint ownership would provide a necessary source of funding and valuable efficiencies of operation that would permit the initiation of desirable news programming. *Id.*; Joint Exs. 17-6, 17-7.

111. Subsequent to the transfer of control of Arch to CBI, Station WTIC-TV began the broadcast of a half-hour nightly newscast commencing at 10:00 p.m., and became one of only three high-band UHF independent television stations in the United States with a local newscast. Applicants Ex. 1 at 6; Applicants Ex. 3 at 9-10. The Station commenced the construction of its news operation in March of 1988. *Id.* In April of 1989, the Station began to broadcast on week-days its locally-produced 10:00 p.m. news program. *Id.* In January of 1991, the Station also began to broadcast its 10:00 p.m. newscast on week-ends. *Id.* On a daily basis, Station WTIV-TV also provides a locally produced two-minute weather up-date at 10:58 p.m. and two 30-second local news briefs during prime time. *Id.* at 7; Applicants Ex. 3 at 9. Since commencing its news operations, Station WTIC-TV also has interrupted its regular commercial programming to provide locally-produced news and weather coverage. *Id.*[35]

112. Station WTIC-TV expended significant sums to purchase and install equipment for its news facility. In equipping and developing its newsroom, news studio, news production room and audio control room for news broadcasts, Station WTIC-TV spent more than $850,000 on captial improvements and acquisitions for the Station, exclusive of weather equipment. Applicants Ex. 1 at 7; Applicants Ex. 1-4; Applicants Ex. 3 at 12.[36] When Station WTIC-TV commenced its news broadcasts in April of 1989, the Station had a news staff of 23 employees. *Id.* at 8. Currently, Station WTIC-TV employs approximatle 36 news personnel. *Id.* at 8; Applicants Ex. 3 at 11. On an annualized basis for 1989, the combined salaries of the news personnel exceeded $1,000,000. *Id.* Additionally, Station WTIC-TV utilizes the services of independent contractors to present its news at a cost exceeding $100,000 on an annual basis.[37] *Id.*

113. In connection with its news operations, since September of 1989, Station WTIC-TV has shared the use of a sophisticated and state-of-the-art Doppler radar weather facility with Station WTIC(AM) and WTIC-FM. Applicants Ex. 1 at 8. The Doppler weather facility, which operates as The New England Weather Service ("NEWS"), purchased and installed news and weather equipment at the Station at a cost of approximately $700.000. *Id.*; Applicants Ex. 3 at 13. NEWS is one of the most effective and precise weather equipment facilities in the Northeast United States, having weather equipment rarely found outside of major market network affiliate television stations. *Id.*; Applicants Ex. 3 at 13; Tr. at 191.[38] NEWS has a separate personnel staff that provides services to Station WTIC-TV, employing approximately 6 full-time and 4 part-time staff members, including technical personnel and meteorologists. Applicants Ex. 1 at 9. The combined annual salaries of the NEWS staff has ranged from $125.000 to $175.000. *Id.*

114. Despite certain economies and subsidies realized through the combined ownership of Stations WTIC-TV, WTIC(AM) and WTIC-FM by the Chase family including the operation of NEWS, the news department os Station WTIC-TV always has operated at a loss. Applicants Ex. 1 at 10; Applicants Ex. 3 at 12. During 1989, exclusive of all capital purchases, general overhead and administrative expenses, Station WTIC-TV expended over $1.050,000 on the operation of its new department with a deficit between $300.000 and $400.000. *Id.*; Applicants Ex. 3 at 12. During 1990 Station WTIC-TV's news department similarly expended more than $1.400.000 on its news operations, with a deficit between $130.000 and $250.000. *Id.*; Applicants Ex. 3 at 12. During January and February of 1991, since the commencement of the week-end prime time news program on January 5, 1991, Station WTIC-TV has incurred significant additional news program expenses and operated at a deficit between $50.000 and $150.000 during these two months. *Id.*; Applicants Ex. 3 at 12. NEWS also has operated at a deficit. NEWS spent more than $180.000 on its operations in 1989 with an operational deficit of $140.556, and in 1990, NEWS expended more than $320.000 on its operations with a deficit of $188.184. *Id.*; Applicants Ex. 3 at 14.[39]

115. Despite the substantial cost of its news operation and its operational deficit, Station WTIC-TV remains committed to providing locally-produced news service that rivals the news programming of the Station's VHF network affiliate competition. Applicants Ex. 1 at 11. Local community leaders have testified that Station WTIC-TV's 10:00 p.m. newscast meets a need for an early local newscast at a time not otherwise available in the Hatford/New Haven ADI. Applicants Ex. 4 at 2; Applicants Ex. 6 at 2; Applicants Ex. 7 at 2; Applicants Ex. 9 at 1. These leaders also indicate that Station WTIC-TV's news programs cover news and events not previously covered in the market. Applicants Ex. 7 at 2; Applicants Ex. 8 at 2; Applicants Ex. 12 at 2; Applicants Ex. 14 at 1; Applicants Ex. 15 at 1. The Station's news coverage, for example, added to the availability of information regarding state legislative and budget activity, Applicants Ex. 4 at 2-3, and local veterans' memorials and activity, Applicants Ex. 10 at 1. Given the benefits of the joint ownership of the Licensee and Ten Eighty, Station WTIC-TV hopes eventually to expand its week-day 10:00 p.m. news program to one hour. Applicants Ex. 1 at 11. The Applicants also hope to provide some mid-day program in the future. *Id.*

116. Station WTIC-TV currently broadcasts its locally-produced news program in Spanish on the SAP channel, one of only two stations in the top 50 markets known to provide such a translation. Applicants Ex. 1 at 11; Applicants Ex. 3 at 10. At a cost of approximatley $10,000, Station WTIC-TV purchased transmitting equipment that has enabled the Station to provide the Spanish language translation of its news on the SAP channel since April of 1989. *Id.* At a cost in excess of $10.000 annually, Station WTIC-TV personnel thus provide the Hispanic viewer with the option of listening to the audio portion of the news in Spanish on the SAP channel. *Id.* In May of 1990, Station WTIC-TV made its Spanish translation of its 10:00 newscast accessible to Spanish-speaking individuals who do not own television sets capable of activating the SAP channel. *Id.* Pursuant to an agreement between Station WTIC-TV and the National Black Media Coalition ("NBMC"), NBMC's low power station W11BJ, Hartford, Connecticut, began the broadcast in Spanish of Station WTIC-TV's nightly newscast. *Id.* Station WTIV-TV also has negotiated an agreement with the licensees of low power stations W13BF, Hartford, Connecticut and Channel 51, Springfield, Massachusetts, that similarly ensure that the Hispanic community will have access to the Spanish translation of Station WTIC-TV's News at 10:00 even absent access to a television set with an active SAP channel. *Id.* Community leaders and residents have testified that the Spanish translation of the news is a valuable public service. Applicants Ex. 6 at 2; Joint Ex. 17-7.

117. Station WTIC-TV also has upgraded its locally-produced public affairs program and added a new public affairs show subsequent to CBI's acquisition of the Station. While the Station's budget for public affairs programs, including salaries, was slightly less than $50.000 prior to the transfer of control, the budget for such programs has doubled since the transfer of control. Applicants Ex. 1 at 12. The increase in budget for public affairs programs includes additional expenses for local program production and an additional allocation of salaries for personnel spending more time on public affairs programs. *Id.*

118. Prior to the transfer of control, Station WTIC-TV broadcast a locally-produced public affairs show entitled "Connecticut Now" at 6:30 a.m. on Sunday mornings. Applicants Ex. 1 at 13. "Connecticut Now" then generally consisted of interviews with local personalities involved in government or other civic activities. *Id.*; Tr. at 93. Subsequent to the transfer of control, Station WTIC-TV increased the amount of time spent on "Connecticut Now" by several of its production staff. *Id.* The Station also upgraded the profile of the personalities on the program using contacts established by Stations WTIC(AM) and WTIC-FM. *Id.* Finally, the Station improved the time period of the show from 6:30 a.m. to 9:30 a.m. on Sunday mornings. *Id.* The change in the broadcast hour of "Connecticut Now" was valuable to the community. *See* Applicants Ex. 6 at 2; Applicants Ex. 7 at 2; Applicants Ex. 11 at 1; Applicants Ex. 15 at 1.

119. Subsequent to the transfer of control, Station WTIC-TV also added a new public affairs program entitled "Profiles" to its schedule. Applicants Ex. 1 at 13. "Profiles" is broadcast on Monday nights once every few months at 10:30 p.m., and involves a half-hour of profiles

on local citizens or citizens' groups that provide service to the Connecticut community. The Station gave "Profiles' a budget, exclusive of salaries, of $6,000, and allocated to that program the services of a Production Manager-Executive Producer for 16-18 hours per week and a Director for 6-8 hours per week in addition to the services of Jemma Joseph, the Station's Public Affairs Director. *Id.* The addition of "Profiles" to Station WTIC-TV's programming filed a need for prime-time public affairs programming in the Hartford community. *See* Applicants Ex. 4 at 2; Applicants Ex. 7 at 2; Applicants Ex. 13 at 2; Applicants Ex. 15 at 1.

120. With its new ability to cover news and its increased financial and staff commitment to public affairs programming, Station WTIC-TV also has added the ability to produce locally public affairs and news specials. For example, on election night in November of 1990, Station WTIC-TV ran a one hour news special covering the local elections. Applicants Ex. 1 at 14. During this special, Station WTIC-TV was able to use the audio feeds from Stations WTIC(AM) and WTIC-FM to cover statements being made by local and state-wide candidates in Connecticut. *Id.* Additionally, in conjunction with its airing of a public affairs program produced by Hearst Entertainment called "Great Expectations," a program for youth about staying in school and rejecting drug use, Station WTIC-TV has planned to produce and broadcast its own local program covering the same topics for youth in Connecticut. *Id.*

121. Subsequent to the transfer of control, Station WTIC-TV also engaged in joint promotions and charitable affairs in conjunction with Stations WTIC(AM) and WTIC-FM. Applicants Ex. 1 at 4. The stations co-sponsored a "Kids Fair" to raise money for the Children's Concern, a group that assists battered and abused children. *Id.* As part of the jointly-sponsored Kids Fair, Station WTIC-TV held auditions for children who wanted to participate in locally-produced news spot broadcast on the Station for children. *Id.* The Station has commenced production of the 60-second news spots, which are broadcast at 8:00 a.m. and 5:00 p.m. on the Station. *Id.* Station WTIC-TV and Stations WTIC(AM) and WTIC-FM also jointly sponsor a Fourth of July celebration for the Downtown Council, Riverfest Committee. *Id.* at 15. The celebration, simulcast on the radio and television stations for the benefit of the community, supports the recapture and clean-up of the Connecticut River. *Id.*; Applicants Ex. 5 at 1-2; Applicants Ex. 9 at 2. Station WTIC-TV and Stations WTIC(AM) and WTIC-FM also jointly have sponsored and simulcast events for the Special Olympics and FoodShare, a project to benefit the homeless. *Id.*

122. *Capital and Efficiencies Resulting From The Waiver.* These news programs, public affairs programs and public service benefits commenced on the Station as a result of CBI's acquisition of Arch and the combination of Station WTIC-TV and Stations WTIC(AM) and WTIC-FM under the combined ownership of the Chase family. As an initial matter, the acquisiton of Arch by CBI provided new levels of capital to be expended or loaned to Arch. Applicants Ex. 1 at 15; Applicants Ex. 2 at 4. David Chase and Cheryl Chase Freedman added significant financial resources to be provided directly to Station WTIC-TV or to secure additional credit for loans to the television station. *Id.*; Applicants Ex. 2 at 4. Specifically, when jointly owned with Ten Eighty at the parent company level, CBI and its parent Chase Communications, Inc. ("CCI") were able to secure significant additional funds and credit to support Station WTIC-TV's existing operating deficit, future obligations, and development of a news department. *Id.*; Applicants Ex. 2 at 4-5. Subsequent to CBI's acquisition of Arch, CCI and CBI together loaned Arch approximately $9,500,000 and Chase Investments, Inc., a Chase Enterprises subsidiary, advanced Arch approximately $5,000,000 to fund operating deficits and commence the broadcast of news. *Id.*; Applicants Ex. 2 at 5.

123. The cash flow of Ten Eighty and its two assets, Stations WTIC(AM) and WTIC-FM, was the major asset on which CBI and CCI relied in securing additional funds, securing additional credit and ensuring that loans made under old lines of credit were not called. Applicants Ex. 2 at 5. in 1987, the operations of Ten Eighty had positive operating cash flow significantly in excess of $5,000,000, which at the time accounted for all of the positive cash flow of CCI aand CBI. *Id.* In late 1987 and 1988, after the transfer of control, the earnings power of the Ten Eighty radio stations thus provided the equity to cross collateralize Arch's outstanding loans in addition to funding Arch's operational deficit. *Id.* Even after the transfer of control, Citibank threatened to call in its loan to Arch as a result of Station WTIC-TV's operating deficit. *Id.*; Applicants Ex. 1 at 16. CBI and CCI prevented Citibank from calling in its loan, in large part by providing the guarantee of CCI and the pledge of stock of CBI, all backed by the value of Ten Eighty and Stations WTIC(AM) and WTIC-FM. *Id.*; Applicants Ex. 1 at 16. The joint ownership of Station WTIC-TV and Stations WTIC(AM) and WTIC-FM therefore made possible financing for Arch after the transfer of control in 1987 and in 1988 that otherwise would not have been available to Arch. *Id.*[40]

124. Aside even from the ability to keep current loans outstanding and to borrow additional capital, the participation of Ten Eighty resulted in the availability of better credit terms to Station WTIC-TV. Applicants Ex. 2 at 6; Applicants Ex. 1 at 16. Station WTIC-TV was able to operate at a deficit without having its loan called because Ten Eighty effectively served as cross-collateral for Station WTIC-TV's loans. *Id.* Station WTIC-TV therefore was able to continue to operate despite its deficit, and even was able to expend millions of dollars on the establishment of its news department and news programming that would not have been permitted if the Station was operating on a stand-alone basis. *Id.* Moreover, Station WTIC-TV was able to save approximately $100,000 in interest costs annually because it did not have to pay interest at the default rate, which is 3 points higher than the loan rate. *Id.*

125. In addition to providing an infusion of capital, David Chase, Cheryl Chase Freedman and Roger Freedman also provide Station WTIC-TV with local common ownership and management advice on a basis that is both cost - efficient and sensitive to the needs and interests of the Hartford community. Applicants Ex. 1 at 16; Applicants Ex. 2 at 6. David Chase and Cheryl Chase Freedman have been local Hartford residents for more than thirty years. *Id.* Subsequent to the FCC's approval of the transfer of control application, David Chase, Cheryl Chase Freedman and Roger Freedman were able to provide essential business, legal and accounting management services to Station WTIC-TV. *Id.* Cheryl Chase Freedman has served as legal counsel to Station WTIC-TV, and Roger

Freedman has provided financial management controls as part of his management of the CCI broadcast group. Applicants Ex. 2 at 7. The Freedman' advice has been provided at no charge since October of 1987. *Id.*; Applicants Ex. 1 at 16.

126. Additionally, the transfer of control of Arch to Chase Enterprises has permitted Arch to utilize the services of experienced management personnel that otherwise would not have been available to Station WTIC-TV. Applicants Ex. 1 at 17; Applicants Ex. 2 ay 7. CCI and Chase Enterprises personnel provide program acquisition, budgeting, legal and personnel guidance based on years of television broadcasting experience that otherwise would not be available to a stand-alone high-band UHF independent television station such as Channel 61.[41] Among other things, CCI has developed and funded at the parent corporation level standardized financial reporting systems and structures, standardized personnel policies and procedures, standardized computer system software, standardized program product analysis and negotiation systems and other standardized management systems. Applicants Ex. 2 at 7. The management personnel who develop, implement and manage these standardized systems involve a staff of at least 15 employees, including attorneys, accountants and management personnel. *Id.* These personnel are able to split the cost of their salaries and services between CCI's broadcast stations making the services cost-efficient. *Id.* Moreover, the CCI group jointly retains SelTel, an affiliate, as their national sales representative, receiving a discount in the form of reduced sales commissions for the group. *Id.*

127. The combinanation of radio stations WTIC(AM) and WTIC-FM and Station WTIC-TV under the Chase family ownership also made possible the joint development, use and financing of the New England Weather Service. Applicants Ex. 1 at 9; Applicants Ex. 3 at 14. The Chase family established NEWS to serve both the television and the radio stations because it would not have been cost efficient to establish NEWS just to serve the televison station. *Id.* at 17. Arnold Chase insisted that the management of Stations WTIC(AM) and WTIC-FM abandon Accuweather, their long-standing weather service, to subscribe to NEWS so that NEWS could be operated on Station WTIC-TV. *Id.*

128. Although the NEWS equipment cost approximately $700,000 to purchase and install and the annual salaries of the NEWS personnel total approximately $150,000, Station WTIC-TV receives the NEWS service at a net cost of less than $40,000 per year. Applicants Ex. 1 at 9; Applicants Ex. 3 at 14. While Station WTIC-TV pays $4,500 per month for the NEWS service including its weathermen and color graphic weather displays, Ten Eighty pays NEWS $6,500 per month for its NEWS service.[42] *Id.* NEWS and Station WTIC(AM) also use Station WTIC-TV's studio to house NEW's equipment and to broadcast weather up-dates on the Ten Eighty radio stations, paying Station WTIC-TV $1,250 per month rent for the use of its space and the radio station aduio booth. *Id.* From the very inception of NEWS, Station WTIC-TV and Station WTIC(AM) jointly have promoted and advertised the service of NEWS in the Hartford/New Haven ADI. Applicants Ex. 1 at 17-18; Applicants Ex. 1-13. Stations WTIC(AM) and WTIC-FM thus subsidize the NEWS and absent Ten Eighty's joint development, financing and promotion of NEWS, Station WTIC-TV would not have been able to expend the $700,000 in capital and $320,000 in annual costs necessary to operate NEWS. *Id.*; Tr. at 90.

129. The Ten Eighty radio stations and Station WTIC-TV also participate in other traditional sharing of efficiencies of equipment, services, facilities, personnel and experience in providing news programming on Station WTIC-TV. Applicants Ex. 1 at 18; Applicants Ex. 3 at 11. Since CBI's acquisition of control of Station WTIC-TV, the Station has jointly subscribed to news wire services with the Ten Eighty radio stations. *Id.* Initially, by adding a second wire service drop, Station WTIC-TV was able to save approximately $40,000 in wire service subscription fees. *Id.* Currently, as part of a group acquisition of the wire service, Station WTIC-TV's group discount saves the television station approximately $1,500 per month, between $15,000 to $20,000 per year. *Id.* at 19; Tr. at 189.

130. Subsequent to the transfer of control of Station WTIC-TV to Chase Enterprises, Station WTIC-TV has used the traffic airplane operated by Station WTIC(AM) approximately 12 times per year to provide video news coverage on the Station. Applicants Ex. 1 at 19; Tr. at 108. By having access to Station WTIC(AM)'s regular traffic airplane and mobile platform at no cost, the television station's ability to provide quality news programming is enhanced with a minimum savings of at least $8,000 to $12,000 in airplane rental costs to the Station. *Id.*; Tr. at 189. The value of the airplane's use, however, is greater because it permits instant access to the airplane at any hour, a factor important in news operations and available only through the purchase of an airplane. Tr. at 106, 189.

131. Station WTIC-TV also shares the use of the radio station's two-way mobile radio facilities to facilitate communications between field news reporters and their field crew and between news management personnel and the field reporters. Applicants Ex. 1 at 19. The two-way radio facilities are an essential communications tool for field reporting and are used by Station WTIC-TV on a daily basis. *Id.* Stations WTIC(AM) and WTIC-TV currently are developing a plan that would permit communications between the personnel of the radio stations and the television station using the two-way facilities, resulting in instantaneous and simultaneous delivery of news stories covered by the stations. *Id.* The joint use of the two-way radio facilities saves Station WTIC-TV between $10,000 and $20,000 the costs of purchasing, licensing and operating its own such facilities, and improves the efficient use of the spectrum. *Id.* at 19-20; Tr. at 189-90.

132. Station WTIC-TV also has used the audio news feed of the radio stations for news reports. Applicants Ex. 1 at 20. For example, on election night in November of 1990, Station WTIC-TV used the live audio feed of Station WTIC(AM) to provide on-the-spot coverage of statements being made by the candidates. *Id.* Because Station WTIC-TV has only four mobile crews, on days like election day when more field teams are desirable for complete coverage of the news in Connecticut, Station WTIC-TV has utilized the field news coverage of Station WTIC(AM) at no cost in order to provide complete and quality news coverage. *Id.* The availability of the radio station audio feed saves the Station up to $60,000 in the cost of additional field crews and equipment. Tr. at 94,190.

133. In addition to the sharing of audio feeds, the radio stations share leads, contacts and access to public figures with Station WTIC-TV. Applicants Ex. 1 at 20; Applicants Ex. 3 at 11. As a twenty-four hour news station, Station

WTIC(AM) employs around-the-clock assignment editors and news desk personnel who consult with Station WTIC-TV. *Id.* On a daily basis, Station WTIC-TV's news assignment editors confer with the assignment editors of the radio stations to receive up-dates on news and to discuss suggested stories and coverage. *Id.* Station WTIC(AM)'s assignment editors also have alerted Station WTIC-TV's News Director to specific local news events, leading to television coverage of late and fast-breaking news stories. *Id.* at 20-21. Station WTIC(AM)'s long-standing tradition as a quality news operation in Connecticut also has given Station WTIC-TV much greater access to newsmakers in Connecticut since the transfer of control to CBI. *Id.* at 21; Tr. at 94. Station WTIC(AM) suggests public figures who will be useful sources of information, provides introductions to public figures, and affords the television station the benefit of the weight of the radio stations' reputation in Hartford and Connecticut.

134. Station WTIC-TV also uses Station WTIC-FM's subcarrier channel to provide weather data to the television station's weather reporters at their homes. Applicants Ex. 1 at 21. In the event of a weather emergency or alert, Station WTIC-TV thus has the ability to broadcast, and has aired, NEWS's informed reports on the weather instantaneously from these remote locations. *Id.* Station WTIC-TV and Ten Eighty's radio stations also share the use of data transmission lines to send news copy between the stations. *Id.* The stations also share the use of the radio stations' news computer system at no cost to the Station. *Id.* Station WTIC-TV thus has access to Station WTIC(AM)'s extensive news database, which contains detailed historical information as well as current news events.[43] *Id.* at 22. The availability of the computer data base saves the Station between $75,000 and $375,000, depending upon the technology Station WTIC-TV would choose to purchase. Tr. at 200. The information stored on Station WTIC(AM)'s data base, however, would be difficult to purchase at any price. *Id.* at 201.

135. Station WTIC-TV also saves money by sharing telephone systems and telephone answering services with Stations WTIC(AM) and WTIC-FM. Applicants Ex. 1 at 22. In the near future, the shared telephone system will permit direct and instantaneous communication between the news departments at the television station and the radio stations. *Id.* Such access will enhance the stations' ability to provide immediate and efficient quality coverage of fast-breaking news stories and events. *Id.*

136. In addition to assisting Station WTIC-TV with its acquisition of news assets and information, Station WTIC(AM) and WTIC-FM also cross-promote Station WTIC-TV's news programs. Applicants Ex. 1 at 22; Applicants Ex. 3 at 11. On a daily basis, between 6:00 p.m. and 10:00 p.m., Station WTIC(AM) promotes Station WTIC-TV's 10:00 p.m. news program at least twice and usually more frequently. *Id.* The promotions of the WTIC-TV News at 10:00 include references to specific stories that will be covered on the television station's nightly news program. *Id.* Additionally, Station WTIC(AM) and WTIC-TV jointly publish advertisements promoting the broadcast stations and their news coverage. *Id.* Station WTIC-TV and Station WTIC(AM) jointly advertise the NEWS weather reports that are broadcast on the radio stations and the Station. *Id.*; Applicants Ex. 1-13. The cross-promotion, as well as significant levels of trade advertising concerning the news, are extremely valuable in establishing the newscast with the public. *Tr.* at 201-02. Additionally, the credibility of the weather service on the Station is enhanced because the NEWS weatherman appears on both the Station and the Ten Eighty radio stations, an additional form of cross-promotion. *Id.* at 202.

137. The cross-promotion by the radio stations is not limited to promotion of Station WTIC-TV's news programming, but also includes the cross-promotion of entertainment programming carried on Station WTIC-TV. Applicants Ex. 1 at 22-23.[44] Given the ability to cross-promote Station WTIC-TV's news and entertainment programming, Station WTIC-TV has saved tens of thousands of dollars in advertising costs that otherwise would need to have been expended to promote and establish that programming, especially Station WTIC-TV's nightly newscast. *Id.*

138. The influx of funds and the efficiencies of operation resulting from the joint ownership of Station WTIC-TV and the Ten Eighty radio station allows the Station to provide news programming equal to that of VHF network affiliates. Station WTIC-TV spends significantly more dollars on its news efforts than do other UHF independent stations. Applicants Ex. 3 at 13. In 1989, the "average" UHF independent in ADIs 11-25 spent $416,479 on news. *Id.*; Applicants Ex. 3-29.[45] Station WTIC-TV, in less than a full year in 1989, spent nearly $1.1 million, over two and one-half times the average. *Id.* Station WTIC-TV now undoubtedly ranks near the top of all UHF independents in terms of its expenditures on news. *Id.* Although Station WTIC-TV does not approach the level of expense that major market affilitates devote to their news operations, between three and six million dollars annually, *Id.*; Applicants Exs. 3-31, 3-32, Station WTIC-TV uses the synergies of news operations with Stations WTIC(AM) and WTIC-FM to achieve the level of product of an affiliate news operation. *Id.*

139. *Other Cost Savings And Efficiencies Resulting From The Waiver.* CCI's common ownership of Arch, Ten Eighty and other television stations has provided the advantage of less expensive programming purchases to Station WTIC-TV. After the FCC approved the transfer of Arch to CBI, Station WTIC-TV was able to restructure its programming obligations and reduce its expenses because of the joint ownership proposed by the Chase family. Applicants Ex. 2 at 8. To reduce significantly program payments through price reductions and "stretch-outs," Chase Enterprises and CCI guaranteed many of the payments to be made under the renegotiated plans. *Id.*; Applicants Ex. 1 at 23. At the time, the gurantees of CCI and Chase Enterprises were backed primarily by the equity and cash flow of Ten Eighty and its radio stations. *Id.* Moreover, program suppliers were willing to make concessions in renegotiating the program payments based on the promise that Station WTIC-TV would be a better outlet for their product when combined under the management of the respected radio stations licensed to Ten Eighty.[46] *Id.*

140. Moreover, the consolidation of Arch with Ten Eighty and the other Chase family television stations resulted in Station WTIC-TV's ability to obtain a Fox Broadcasting Company ("Fox") affiliation. Applicants Ex. 2 at 9; Applicants Ex. 1 at 23; Tr. at 110-13. In awarding affiliations, Fox analyzes, among other things, the availability of news on the station, the coverage area of the station, the management of the station and the financial stability of the owners of a station. *Id.*; Tr. at 110-12. After

CCI's acquisition of Arch, through CBI, Station WTIC-TV was able to initiate news programming and increase its public affairs programming through the infusion of capital and efficiencies of operation from Ten Eighty. Applicants Ex. 1 at 9-22. Additionally, through the infusion of new capital, Station WTIC-TV was able to maintain its large off-the-air coverage area and state-of-the-art technical facilities despite a cost of more than $300,000 annually. *Id.* at 23-24; Applicants Ex. 2 at 9. Finally, the superior management reputation of Ten Eighty in the Hartford/New Haven ADI and the financial stability of Ten Eighty's corporate parent served Station WTIC-TV well in Fox's analysis. Applicants Ex. 2 at 9. Fox's representatives expressly indicated to Arnold Chase that the joint ownership provide the Station with sufficient stability to justify the award of the Fox affiliation. Tr. at 110-13.

141. The ownership of Station WTIC-TV jointly by the Chase family has had value in the maintenance of the existing technical facilities osf Station WTIC-TV. Applicants Ex. 1 at 23. The operation at maximum facilities provides free off-the-air broadcast service to almost the entire state of Connecticut. *Id.* at 23-24. The cost, however, of providing such service on a high-band UHF channel is extremely high, with utility costs exceeding $300,000 annually and lease prices for the transmitter, antenna and tower space also approaching $300,000 per year. *Id.* at 24; Applicants Ex. 2 at 9.

142. Finally, the joint ownership of Station WTIC-TV in a group of broadcast stations had led to the traditional benefits of shared retention of professional services and consultants. Applicants Ex. 1 at 24. The Station's independent accountants and auditors can perform work at the same time for the Licensee as for other broadcast stations in the group, reducing the cost of the services to the Station. *Id.* Similarly, outside legal counsel can provide services for Station WTIC-TV as part of services provide to the communications group, enabling the Station to receive more services at a shared cost. *Id.*[47] The sharing of the costs of outside consultants has saved Station WTIC-TV approximately $10,000 per year. Tr. at 109.

143. *The Adverse Effects of Divestiture.* Given the substantial economic benefits and efficiencies resulting from the joint ownership of the Licensee and Ten Eighty, divestiture of the Licensee by Chase Enterprises likely would have a severe adverse effect on Station WTIC-TV's news programming and weather service. Absent the joint ownership of Station WTIC-TV and Station WTIC(AM), the television station's news facilities would be severely debilitated because Channel 61 would lose the benefit of hundreds of thousands of dollars in wire service discounts, free use of radio station news facilities and personnel, and joint weather operation. Applicants Ex. 1 at 25; Applicants Ex. 3 at 14. The NEWS operation could not subsidize the television station's use of the weather service absent the joint ownership, making it very unlikely that NEWS would continue to be broadcast on Channel 61. *Id.*; Applicants Ex. 3 at 14-15. It is unlikely that another owner of Station WTIC-TV would or could support the operating deficit of hundreds of thousands of dollars for one-half hour of locally produced news programming. Applicants Ex. 1 at 25; Applicants Ex. 3 at 11, 14-15; Tr. at 101, 192. Other stand-alone independent UHF television stations in the Hartford/New Haven ADI had twice tried to broadcast local newscasts and failed before Station WTIC-TV established its news programming. Tr. at 85.

144. The percentage of other stations similar to Station WTIC-TV that provide news programming supports the proposition that absent the joint ownership of the Station and the Ten Eighty radio stations, Station WTIC-TV would not broadcast news. Out of a total of 131 independent stations, including stations that are affiliated with Fox, Univision or Telemundo, 23 stations (18%) produce local news. Applicants Ex. 3 at 10; Applicants Ex. 3-27. Of the 23 independents producing local news, only 15, less than 12% of the total number of independent stations, are UHF independent stations. *Id.*; Applicants Ex. 3-27. In the entire United States, only three high-band UHF independent stations, including Station WTIC-TV, produce local news.[48] *Id.*; Applicants Ex. 3-27. It clearly is unusual for independent UHF stations to produce local news programming, and even more unusual for high-band UHF independent stations such as Station WTIC-TV to produce nightly newscasts. *Id.*; Tr. at 185.[49]

145. Similarly, divestiture of the Licensee by Chase Enterprises likely would result in the termination of the provision of Spanish language news programming on the Station. Applicants Ex. 1 at 25. Even aside from the probable loss of news altogether, a Spanish language translation of the newscast is extremely rare, appearing only on Station KTLA, a Tribune-owned VHF station in Los Angeles. Applicants Ex. 3 at 10. It is unlikely that Station WTIC-TV would maintain the Spanish language translation under any other ownership. Tr. at 92.

146. Additionally, absent the tradition and reputation of Station WTIC(AM)'s news and civic commitment, Channel 61 likely would revert to its prior, more limited amount of local public affairs programming due to the cost of producing such programming. *Id.*; Tr. at 97. The costs of the current public affairs programming would be exorbitant for a stand-alone independent UHF television station without a news presence. Tr. at 97. Divestiture of the Licensee by Chase Enterprises would prevent Station WTIC-TV and Stations WTIC(AM) and WTIC-FM from continuing to co-sponsor the civic events the stations have developed, such as Kids Fair, the Riverfest Fourth of July celebration, and further Special Olympics benefits because separately owned stations simply do not engage in such promotions absent extremely unusual circumstances. Applicants Ex. 1 at 25-26; Tr. at 103.

147. *Lack Of Adverse Effects From The Combination.* No harm has been shown to occur to the competitive market in the Hartford/New Haven ADI from the joint operation. Station WTIC-TV and Stations WTIC(AM) and WTIC-FM do not have any anticompetitive advantages in the Hartford/New Haven ADI with respect to the purchase of programming. Applicants Ex. 1 at 26. Radio stations and television stations generally do not purchase related entertainment programming due to the different nature of their broadcast operations. *Id.* In the few circumstances where the Ten Eighty radio stations and Station WTIC-TV could have had an interest in acquiring similar programming rights, they have not had the ability to do so in the Hartford/New Haven ADI. *Id.* For example, Stations WTIC(AM) and WTIC-FM hold the rights to broadcast the Hartford Whalers hockey games but the television broadcast rights to those games were purchased by another licensee in the market despite Station WTIC-TV's bid. *Id.*

148. Additionally, Stations WTIC(AM) and WTIC-FM do not sell advertising for Station WTIC-TV or otherwise attempt to pressure their advertisers to purchase spots on the Station. Applicants Ex. 1 at 26. The sales staffs at each broadcast station operate competitively, each seeking to provide advertisers with the best and most economical outlet for their advertising dollars. *Id.* Each broadcast station must set its rates competitively, not just against the other Chase broadcast stations in the market, but against other broadcast and media outlets in the same market. *Id.*

149. Finally, radio station ratings for the Hartford/New Haven ADI suggest that the joint ownership of the Station and the Ten Eighty radio stations has not provided the radio stations with additional market power. Station WTIC(AM)'s share in the market has slipped from 18% in the Fall of 1986 to 15% in the Fall of 1990. Applicants Ex. 3 at 7. Station WTIC-FM has experienced a more severe drop in its share, going from 15% in the Fall of 1986 to 9% in the Fall of 1990, a 40% decline. *Id.* The combined share of the Ten Eighty radio stations thus dropped from 33% to 24%, a 27.3% decline. *Id.*

The Financial Condition of Station WTIC-TV.

150. As of September 30, 1985, Arch had incurred total losses of approximately $5,945,000 since its inception in November of 1979. Applicants Ex. 2 at 10; Joint Ex. 5-2; Applicants Ex. 2-1. Additionally, Arch had an operating loss of approximately $5,300,000 for its first year of broadcast operation, which commenced on September 17, 1984. *Id.* As of September 30, 1985, Arch owed more than $7,285,000 in debt to Citibank, N.A., and Arnold L. Chase, the two parties that had lent funds to Arch. *Id.*; Applicants Ex. 1 at 5. Finally, as of September 30, 1985, Arch had more than $16,850,000 in committed future programming obligations. *Id.*; Applicants Ex. 1 at 4.

151. As of September 30, 1985, Arnold Chase already had advanced to Arch more than $2,200,000 of his personal funds obtained directly from his personal cash accounts, investment accounts and brockerage accounts. *Id.* at 3. He had approximately $4,400,000 remaining in liquid assets apart from his investments in Chase Enterprises and Chase family businesses along with $3,500,000 in liabilities that were unrelated to Chase Enterprises or Chase family businesses. *Id.* Arch's losses of $5,300,000 per year thus exceeded Arnold Chase's total liquid assets unrelated to Chase family businesses. *Id.* Given its financial condition at the beginning of October 1985, within 30 days of the filing of the transfer of control application, Arch needed an infusion of new capital to ensure the continued operation of the television station. *Id.*; Applicants Ex. 1 at 6.

152. Despite his diminishing independent worth, Arnold Chase had ownership interest in Chase Enterprises and other Chase family businesses of significant value, and had begun to draw on these assets through the process of regular arms-length borrowings from David Chase at the time that Station WTIC-TV commenced broadcast operations. Applicants Ex. 2 at 3. Although prior to initiating Arch's broadcast operations Arnold Chase had borrowed less than $250,000 from David Chase to obtain personal funds to loan to Arch, during Arch's first year of on-air broadcasting, Arnold Chase borrowed approximately $4,400,000 from David Chase or companies related to David Chase in order to obtain liquid funds to infuse into Arch. *Id.* While Arnold Chase continued to borrow funds from David Chase to make liquid his personal ownership interests in Chase family businesses, he had limits on the amount of such loans that could be used for personal expenditures. *Id.*; Tr. at 75. At the time Arnold Chase contracted to sell Arch to CBI, continued annual borrowings from David Chase at the existing rate would have caused, within the next year, Arnold Chase's total debt to David Chase to exceed approximately 20% of Arnold Chase's net worth. *Id.* Where approximately 90% of these assets were in real estate ventures and privately-held affiliated investments, such a level of debt and interest payments relating to this debt would have been significant to Arnold and difficult for the Chase family personal funding process to handle. *Id.* at 4; Tr. at 76-77.

153. Moreover, Station WTIC's future obligations suggested that its financial condition would get worse, making it more difficult for Arnold Chase to continue to mortgage his interests in Chase family businesses to obtain personal funds for Arch. Applicants Ex. 2 at 4. Station WTIC-TV sustained heavy losses during the period between the filing of the transfer of control application on October 30, 1985 and the FCC's grant of that application by decision released September 26, 1986. *Id.*; Applicants Ex. 2-2. As of September 30, 1986, Arch had incurred total losses of $11,956,792 since its inception in November of 1979. *Id.*; Applicants Ex. 2-2. Additionally, Arch had an operating loss of approximately $6,000,000 for its second year of broadcast operation. *Id.*; Applicants Ex. 1 at 5. As of September 30, 1986, Arch owed approximately $6,845,000 in debt to Citibank, N.A., and was in default of its loan convenants as the result of Arch's substantial operating deficit. *Id.* Arch also owed $8,040,882 to Arnold Chase. *Id.* Finally, as of September 30, 1986, Arch had approximately $36,000,000 in committed future programming obligations. *Id.*; Applicants Ex. 1 at 5. These financial results for the year confirm that absent the sale to CBI, Arnold Chase could not have continued to fund Arch's operation of Station WTIC-TV, much less commence the provision of the news programming that he desired and promised to provide to the community. *Id.*; Tr. at 83.

154. Now, after more than three years of joint operation of Station WTIC-TV and the Ten Eighty radio stations under the combined ownership of Chase Enterprises, the financial condition of the Station has improved to the point where the Station has the ability to provide news, public affairs and commercial programming competitive in the market. Applicants Ex. 2 at 9. Divestiture of Station WTIC-TV, however, would permit certain program suppliers to accelerate the payment dates for certain of their program, jeopardizing the availability of programming to Station WTIC-TV and thus the Station's continued operation. *Id.* Additionally, under the terms of the Chase Manhattan Bank group financing in 1990, a sale of Station WTIC-TV at a price not approved by the bank would give Chase Manhattan the right to accelarate repayment of sums due pursuant to the financing, potentially adversely affecting Station WTIC-TV's assets as well as the operation of the other broadcast stations that are part of the financing. *Id.* at 9-10.

155. The Ten Eighty radio stations are profitable and desirable facilities. Tr. at 64. Nevertheless, Channel 61, while a television station in a top 25 market, is a UHF facility operating on the highest number UHF channel of any commercial television station in the market. Applicants Ex. 1 at 4. A high-band UHF station such as Channel 61 is undesirable and at a substantial disadvan-

tage against VHF and low-band UHF television stations because of the inferior signal propagation characteristics of UHF signals. *Id.*; Applicants Ex. 3 at 15; Tr. at 64. High-band UHF facilities must operate at a high level of power to broadcast a sufficient signal to compete against VHF and low-band UHF stations. Applicants Ex. 3 at 15. This level of power can cause utility bills for a high-band UHF station to be as much as 30% higher than stations required to operate with less power. *Id.*; Tr. at 197. Station WTIC-TV, operating on Channel 61, is especially disadvantaged, given the rolling Connecticut terrain, local foliage conditions, and channel position in the market. *Id.* At Channel 61, the Station is more than 30 channels away from its nearest competitor, preventing viewers without digitally tuned receivers from randomly sampling the Station's programming. *Id.* Even with the high penetration of cable television systems in the Hartford/New Haven ADI, the Station faces a competitive disadvantge with regard to the need to provide an adequate signal to cable systems head-ends and channel carriage on the cable systems. Tr. at 99-100; 178.[50]

CONCLUSIONS OF LAW

156. It must first be determined whether David Chase, Cheryl Chase Freedman or other principals of Chase Enterprises abused the FCC's processes by specifying a surrogate, Arnold Chase d/b/a Arch, to apply for the construction permit for the Station when they intended to control the licensee of the Station from the outset. *HDO*, 5 FCC Rcd. at 1643. As part of this inquiry, it must also be determined whether David Chase, Cheryl Chase Freedman or Chase Enterprises planned to assume control of Arch from the day Arch filed its application for Channel 61 or whether they ever assumed *de facto* control over Arch prior to receiving Commission consent in September of 1986. *Id.*; *HDO*, 5 FCC Rcd. ay 1643. Second, it must be determined whether the Applicants have justified the grant of a waiver of the one-to-a-market rule to permit the joint ownershp of Station WTIC-TV and Stations WTIC(AM) and WTIC-FM. *Id.*; *HDO*, 5 FCC Rcd. at 1646-47.

157. Astroline has alleged that David Chase, Cheryl Chase Freedman and Chase Enterprises were real-parties-in-interest behind Arch's original application for the construction permit for Channel 61. *HDO*, 5 FCC Rcd. at 1643. Astroline also has alleged that David Chase, Cheryl Chase Freedman and Chase Enterprises prematurely and without prior FCC consent assumed *de facto* control of Arch. *Id.* After full discovery and the development of extensive evidence on these issues, it is clear that Chase Enterprises and its principals, including David Chase and Cheryl Chase Freedman, were not real-parties-in-interest in Arch's application and that neither David Chase, Cheryl Chase Freedman nor any of the other principals of Chase Enterprises assumed a role in Arch's governance prior to receiving FCC consent to CBI's proposed acquisition of Arch.

158. The Commission analyzes real-party-in-interest and unauthorized transfer of control issues on a case-by-case basis. *See Turner Broadcasting System, Inc.*, 101 F.C.C. 2d 843, 848 (1985); *Storer Communications Corp.* v. *FCC*, 763 F.2d 436, 442 (D.C. Cir. 1985); *Stereo Broadcasters, Inc.*, 55 F.C.C.2d 819, 821 (1975). Generally, however, a party will be the real-party-in-interest or have control over an applicant or licensee where the party is in a position to control the operation or policies of the applicant, the licensee or the station.[51] *See WHDH, Inc.*, 17 F.C.C.2d 856, 863 (1969), *aff' d sub nom. Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841 (D.C. Cir.), *cert. denied* 403 U.S. 922 (1970); *High Sierra Broadcasting, Inc.*, 55 R.R.2d 627 (Rev. Bd. 1983).

159. The principal indicia of real-party-in-interest status or *de facto* control include governance of policies regarding (1) the personnel matters of a station, (2) the programming of a station, and (3) the finances of a station. *See Southwest Texas Public Broadcasting Council*, 85 F.C.C.2d 713, 715 (1981). Control also can be found where a party dominates the management of the corporate affairs of the applicant or licensee, including the prosecution of its FCC application or the construction of its station. *See Benjamin L. Dubb*, 16 F.C.C.2d 274, 288 (1951).

160. The Commission has long recognized that familial and business relationships, standing alone, are insufficient to create real-party-in-interest or unauthorized transfer of control problems. *See KTRB Broadcasting Co., Inc.*, 46 F.C.C.2d 605, 607 (1974); *Thomas and Essie Collins*, 53 R.R.2d 219 (Rev. Bd. 1983); *High Sierra*, *supra*, 96 F.C.C.2d at 435.[52] The Commission's Review Board has acknowledged that "even independent family relationships may have attributes, such as financial and business ties, which in non-family situations would be persuasive indicia of common ownership or control or real party status." *Cannon's point*, *supra*, 93 F.C.C.2d at 654. Thus, in the *HDO*, the Commission recognized that financial arrangements between Arnold and his family, absent indicia of control, would not support a finding that Chase family members other than Arnold were real-parties-in-interest in the Station or accomplished an unauthorized transfer of control of Arch. *HDO*, 5 FCC Rcd. at 1650 n.23.

161. *Real - Parties - In - Interest In Arch's Application.* The record in this proceeding establishes that David Chase, Cheryl Chase Freedman and Chase Enterprises were not real-parties-in-interest in Arch's original application for the contruction permit for the Station at any time from its filing to its grant. Instead, the evidence adduced in this proceeding makes clear that Arnold Chase decided to apply for the construction permit for the Station, formed Arch, and prosecuted Arch's application for the Station without any material assistance, or interest, from David Chase, Cheryl Chase Freedman or Chase Enterprises.

162. Arnold first conceived of the Station, and he alone was interested initially in building and operating an independent television station on channel 61 in Hartford. Arnold's decision to apply for the construction permit for the Station was made without any advice or encouragement from his family, who were either ignorant of or negative concerning Arnold's desire to construct and operate the Station. Similarly Arnold alone hired and supervised the consultants that assisted Arch in the preparation and prosecution of its application, and Arnold himself performed the tasks necessary for the completion of Arch's application, including finding Arch's tower site and completing Arch's financial qualifications demonstration. Arnold established Arch's ownership and capital contributions and initially appointed Arch's officers and directors. Finally, Arnold, without involvement or assistance from his family, supervised the prosecution of Arch's application and negotiated the settlement of the comparative proceeding that resulted in the grant of

Arch's application. At the time of the filing of Arch's application, and during the time the application was being prosecuted, Arnold Chase made clear to his father and his sister that he alone governed Arch and that he would not discuss Arch's governance with them. *Id.*[53]

163. The evidence thus demonstrates that Chase family members other than Arnold did not participate in Arch's application or govern its prosecution. The Commission will not find that family members are real-parties-in-interest in an applicant merely because they own media in the same market, and absent any indicia that the Chase family members participated in Arch's governance during the prosecution of its application, it must be concluded that David Chase, Cheryl Chase Freedman and Chase Enterprises were not real-parties-in-interest in Arch. *See Collins, supra*, 53 R.R.2d at 221; *Badlands Broadcasting, supra*, 37 R.R.2d at 1721; *KTRB Broadcasting, supra*, 46 F.C.C.2d at 607; *Morris's, Inc.*, 28 R.R.2d at 1725; *Community Broadcasting Co.*, 16 F.C.C.2d at 895. This is especially true in this instance, where extensive evidence exists in the record demonstrating that Arnold Chase was the moving force behind Arch's application for the construction permit for the Station.

164. *There Was No Unauthorized Transfer of Control During The Construction of The Station.* The record in this proceeding also demonstrates that David Chase, Cheryl Chase Freedman and Chase Enterprises did not improperly involve themselves in the affairs of Arch or the Station, much less prematurely assume control of Arch or the Station, prior to the FCC's September 1986 consent to Arch's proposed transfer of control. Instead, the record shows that Arnold governed Arch during the construction and initial operation of the Station without any direction from his family or Chase Enterprises. While Arnold maintained certain business ties with his family during this period, the ties between Arnold and his family never improperly involved Arch's governance and were maintained on a *bona fide*, arms-length basis at all times.

165. Arnold Chase designed and supervised the development and construction of Arch's Station without guidance or direction from his family. Arnold personally selected the studio site, tower and transmitter site, and equipment for the Station and personally supervised the construction of the studio, tower and transmitter building without any assistance from his family. Arnold selected all the contractors that performed work in constructing the Station, and he supervised these contractors, determining when and how much they were paid. *Id.* On the other hand, David Chase, Cheryl Chase Freedman and Chase Enterprises did not provide advice or guidance in selecting the contractors that constructed the Station's studio site and tower and transmitter site, in purchasing the Station's equipment, or in supervising the construction of the Station's studio or tower facilities. *Id.*

166. Chase family member other than Arnold, namely Cheryl and Roger Freedman, held ownership interests in (1) the building in which the Station's studio was leased, (2) the land and tower on which the Station's transmitter and antenna were constructed and leased, and (3) the equipment leased by the Station. Under Commission precedent, no adverse implications can be drawn from the Freedmans' ownership and leasing of these facilities if the financial arrangements exising between the Chase family members were no different than would be expected from any other lessor. *See HDO*, 5 FCC Rcd. at 1650 n.23. For numerous reasons, the ownership interest held by the Freedmans never involved them in the control of the operations of Arch, and instead were merely reasonable, *bona fide* business transactions accomplished on arms-length terms.

167. First, Arnold Chase owned a substantial portion of the building, land, tower and equipment used by Arch in the operation of the Station, making it logical for him to choose these facilities for the Station's use. Second, Arnold designed and supervised the construction of Arch's facilities without direction from his family, demonstrating his control over the Station rather than the control of his family. Third, the tower facility and the building in which the studio was located were independent businesses operated separately and independently from Arch. Fourth, the leases covering Arch's studio, transmitter and tower site, and equipment were *bona fide* leases at fair market value with terms standard in the industry. Finally, Arch's FCC counsel reviewed the proposed lease structure and advised Arnold that his family's ownership of the tower site, the building in which Arch leased its studio, and Arch's studio equipment was not improper or impermissible under the FCC's rules.

168. Where the Freedmans' ownership interests in these Chase family limited partnerships did not involve them in Arch's governance, but instead was incident to the operation of larger *bona fide* business interests, Arch's lease of its studio, antenna site and equipment from the Chase family limited partnerships does not require any adverse inference concerning the control of Arch. *See HDO*, 5 FCC Rcd. at 1650 n.23;[54] *Seven Hills, supra*, 64 R.R.2d at 293; *WHW Enterprises, Inc.*, 51 R.R.2d 409, 419 (Rev. Bd. 1982). Indeed, the family relationship between Arnold and the Freedmans makes more natural and reasonable the existence of these other jointly-owned investments and businesses that are not prohibited by the FCC's rules. *See Cannon's Point, supra*, 53 R.R.2d at 952; *Morris's, Inc.*, 28 R.R.2d at 1728; *Central Westmoreland Broadcasting Co.*, 40 F.C.C.2d 21 (1973); *Medford Broadcasters, Inc.*, 34 F.C.C.2d 989 (1972).

169. The record evidence in this case also demonstrates that Arnold Chase exercised operational control over the Station, including the establishing of policy and supervision of implementation of policy regarding personnel, programming and advertising matters. Chase family members other than Arnold had no role in the personnel, programming and advertising operations of the Station. Finally, the Ten Eighty radio stations were operated separately from the Station in all respects prior to the Commission's approval of the transfer of control application.

170. Arnold Chase was responsible for all personnel decisions at the Station, including the hiring and firing of personnel, the supervision of those personnel, and the establishment of personnel policies at the Station. Station WTIC-TV did not share any staff with the Ten Eighty radio stations, and the personnel policies at the broadcast stations were administered separately. *Id.*[55] Moreover, current and former employees of the Station, the Ten Eighty radio stations and Chase Emterprises confirmed in this proceeding that all employees of Station WTIC-TV, Stations WTIC(AM) and WTIC-FM, and Chase Enterprises were told that the television and radio stations were separately owned and operated. *Id.* The personnel of the Station, the Ten Eighty radio stations and Chase Enterprises thus were told that Arch was owned and run by Arnold Chase alone and that the Chase family members other

than Arnold Chase alone and that the Chase family members other than Arnold were not involved in the management of the Station. *Id.*

171. Arnold Chase similarly controlled the programming of Station WTIC-TV without any involvement from David Chase, Cheryl Chase Freedman and other personnel at Chase Enterprises. Arnold Chase thus was responsible for budgeting, selecting, negotiating and contracting for the programming broadcast on the Station up through the time that he transferred control of Arch to CBI. Chase family members other than Arnold had no role in the process of budgeting, selecting, negotiating or contracting for the purchase of the Station's programming until the decision was made to acquire control of Arch in mid-1985. At that time, up through the time CBI purchased Arch's stock in October of 1987, Chase Enterprises and its principals excercised no control over the programming aired on the Station, but merely undertook the standard degree of diligence review exercised by any potential buyer of a broadcast facility over the purchase of programming by that facility. Up through the FCC's approval of CBI's acquisition of Arch in September of 1986, Arnold retained control over all programming decisions made by Arch without any material involvement from Chase Enterprises.

172. Finally, Arnold Chase and Station WTIC-TV handled all advertising matters for the Station separately from the advertising operations of Stations WTIC(AM) and WTIC-FM. Station WTIC-TV did not sell time jointly with the Ten Eighty radio stations; all purchases of time by the respective stations were handled on arms-length basis. Additionally, while both the radio stations and Station WTIC-TV used divisions of Katz as their national advertising representatives for a period of time, Arnold Chase personally negotiated the Katz television representation with a separate division of Katz without any resort to the relationship between Katz and the Ten Eighty radio stations.

173. Where the advertising, programming and personnel operations of the Station were so clearly managed by Arnold Chase separately from the operations of the Ten Eighty radio stations, Chase Enterprises and its principals clearly were not real-parties-in-interest in Arch and did not assume the unauthorized control of Arch. *See Alabama Radio, supra*, 69 F.C.C.2d at 1263 n.9; *Bee Broadcasting, supra*, 3 FCC Rcd. at 4325. In both *Bee Broadcasting* and *Alabama Radio*, the Commission concluded that family members of the owners of broadcast facilities were not real-parties-in-interest in the control of the broadcast facilities despite certain financial relationships between the family members because the owners of the facilities exercised all operational controls over the subject broadcast facilities. *Alabama Radio, supra*, 69 F.C.C.2d at 1262-63. A similar conclusion is warranted here.

174. Arnold Chase's financial governance of Arch and the Station support the proposition that at all times prior to the FCC's consent to the transfer of control of Arch, Arnold Chase alone, without the direction of his family or Chase Enterprises, controlled the Station and its affairs. Arnold Chase, and personnel ultimately under Arnold's sole direction, were responsbile for incurring and paying the obligations of the Station. Moreover, Arnold Chase expended significant amounts of his personal funds on Station operations and ultimately was responsible for paying all sums required to meet the liabilities of Arch.

175. As an initial matter, Arnold Chase ultimately was responsible for all decisions to incur liabilities at the Station. Arnold himself, or consultants and employees directly under his exclusive supervision, made all purchases by the Station and paid all bills sent to the Station. *Id.* On the other hand, David Chase, Cheryl Chase Freedman and Chase Enterprises personnel made no financial commitments for Arch. *Id.* Arch also kept its own financial records and books without direction or supervision by Chase Enterprises.[56]

176. Arnold Chase also made the decision to borrow funds from Citibank in order to meet Arch's costs of constructing and operating the Station. While the Chase family limited partnerships also participated in this borrowing, in order to obtain funds to develop the master antenna facility and to purchase the equipment that was leased to Arch, Arnold Chase reviewed and negotiated the loan for Arch. Arnold Chase personally guranteed the entire loan, and thus was liable for all funds loaned by Citibank to Arch. [57] Arnold also pledged his stock in Arch to secure the Citibank loan used to fund the development of Arch's facilities. *Id.* Whenever Citibank personnel needed to discuss Arch's operation under the loan agreement, they spoke with Arnold at the Station and not with Chase Enterprises personnel. *Id.*

177. Arnold Chase also expended his personal funds to pay the expenses of Arch and the Station. In order to fund the prosecution of Arch's application and to fund the construction of the Station, Arnold Chase spent over $1,750,000 of his personal funds. While Arnold borrowed a small portion of these funds from David Chase, he spent more than $1,500,000 of his own personal cash-on-hand or investment proceeds to meet Arch's expenses. Arnold also spent over $1,000,000 of his own personal cash-on-hand or investment proceeds to fund the operation of the Station immediately subsequent to the Station's commencement of broadcasts. Such a significant personal financial commitment to Arch and the Station undercuts any claim that Arnold was not in control of the Station.

178. Arnold Chase also borrowed significant amounts from his father or corporations controlled by his father in order to fund the Station's operating deficit. In borrowing funds from his father, primarily after Arnold already had expended over $2,000,000 of his own funds, Arnold did not cease to be liable for the obligations of the Station. Instead, Arnold borrowed the funds pursuant to a standard Chase family procedure that permits family members to tap their non-liquid assets to fund personal ventures or purchases. Each and every time Arnold borrowed funds from his father, the borrowing was subject to a promissory note with interest payable. Additionally, the borrowing was secured by the value of Arnold's ownership interests in the Chase family businesses. Most importantly, the borrowings were beyond the substantive review and control of David Chase, Cheryl Chase Freedman, Roger Freedman and Chase Enterprises personnel, so that no adverse inferences concerning the control of Arch can be drawn from the borrowings. *HDO*, 5 FCC Rcd. at 1650 n.23. Up through the FCC's consent to CBI's aquisiton of control of Arch, Arnold Chase always retained absolute authority over Arch's financial commitments and expenditures.

179. Commission precedent confirms that Arnold Chase maintained control of Arch's finances and that Chase Enterprises and other members of Arnold's family were not real-parties-in-interest in Arch. *See Seven Hills, supra.*

64 R.R.2d at 293; *WHW Enterprises, supra*, 51 R.R.2d at 419. In *Seven Hills*, the Review Board stated that "where there is no extrinsic evidence that a financier's leverage has manifested itself in actual operations of a licensee" there can be no finding of *de facto* transfer of control. The Board rejected the proposition that financial relationships, including the financing of broadcast operations, are even strongly indicative of control absent evidence that the third party threatened to cease or limit financial assistance absent operational changes. The Board's conclusion, directly on point in this case, is supported by other case precedent concerning debtor-creditor relationships between relatives. *See High Sierra, supra*, 55 R.R.2d at 636; *Collins, supra*, 53 R.R.2d at 222. *Cf* . *WHW Enterprises, supra*, 51 R.R.2d at 419 n.11; *Morris, Pierce & Pierce*, 88 F.C.C.2d 713, 717-19 (Rev. Bd. 1981); *Bee Broadcasting, supra*, 3 FCC Rcd. at 4325.

180. In *Bee Broadcasting*, the Mass Media Bureau rejected a challenge to a transfer of control application where the transferee loaned the licensee sufficient funds to complete construction of the station. 3 FCC Rcd. at 4325. The Commission found no evidence to suggest that the licensee relinquished ultimate control over the station's basic operational matters, particularly issues involving financial, personnel, and programming matters, or that a principal of the transferee exercised control, either directly or indirectly, over these matters. The Bureau first concluded that the transferee's loan to the licensee did not establish that the transferee had acquired control prior to Commission approval. *Id.*[58] Where the transferor retained control over the station's programming and employment decisions, the FCC concluded that the transferor maintained ultimate control over the broadcast facility at issue. In the present case, there is no doubt that Arnold Chase retained control over all personnel, programming and financial decisions made at the Station and that David Chase, Cheryl Chase Freedman and all other Chase Enterprises personnel had no involvement in making such decisions.

181. Finally, in *High Sierra*, a decision involving mutually-exclusive applicants for a construction permit, the Review Board affirmed the Presiding Judge's refusal to add a real-party-in-interest issue against an applicant whose three partners, all siblings, had not invested any funds in the applicant but had relied on their father for financial support. 96 F.C.C.2d at 435. The Review Board noted that the applicant had disclosed the father's role and the father admitted his desire to help his children enter into the business world. Consequently, the father's role was held to be ministerial in nature because the father testified that he would not control the applicant even in the event of default and the partnership agreement itself prevented the father from acquiring any interest in the applicant.

Waiver of the One-To-A-Market Rule is Warranted

182. Subsequent to its initial grant of Arch's transfer of control application in September of 1986, the Commission revised its standard for evaluating requests for waivers of the one-to-a-market rule. *See Amendment of Section 73. 3555*, 4 FCC Rcd. 1741, *recon. granted in part* 66 R.R.2d 1115 (1989) ("*Second Report*"). In its *Second Report*, the Commission established three categories of waiver requests: (1) those involving "failed stations;" (2) those involving stations located in the top 25 markets with 30 independently owned voices; and (3) those not meeting the first two tests, considered under a 5-part case-by-case analysis. *Id.* at 1751. In the *HDO*, the Commission determined that the Applicants did not meet the "failed station" test, because the Station was not off-the-air and Arch was not in a formal bankruptcy proceeding. 5 FCC Rcd. at 1646. The Commission also determined that the Applicants did not meet the "top 25 markets/30 voices" test because, although the Hartford/New Haven ADI was in the top 25 markets, only 24 separate and independent voices were counted in the ADI. *Id.* The Applicants' request for a waiver of the one-to-a-market rule thus must be examined under the 5-part case-by-case analysis. *Id.* at 1646-47.

183. Under the case-by-case standard for reviewing proposed combinations otherwise contrary to the one-to-a-market rule, the Commission evaluates five specific factors: (1) the potential benefits of the combination; (2) the types of facilities involved; (3) the number of stations already owned by the applicant; (4) the financial difficulties of the station; and (5) the nature of the market. *See Second Report, supra*, 4 FCC Rcd. at *1753*.[59] The Commission has stated that it "does not require that all five criteria be satisfied as a precondition to grant of a waiver." *See Radio-TV Cross-ownership*, 4 FCC Rcd. 6489, 6491 (1989). In the *HDO*, the Commission indicated that it was particularly interested in the public interest benefits resulting from the combined ownership of the Station and the Ten Eighty radio stations and the nature of the Hartford/New Haven ADI, especially the degree of cable penetration and the availability of non-broadcast media in the market. *HDO*, 5 FCC Rcd. at 1647. When examined under the case-by-case standard for waivers of the one-to-a-market rule, a grant of the Applicants' request for a waiver is warranted.

184. The Applicants' request for a waiver of the one-to-a-market rule should be granted because the Hartford/New Haven ADI has a diversity of voices and level of competition that is equal to or greater than the markets which meet the "top 25 markets/30 voices" test. *See Melody Music, Inc.* v *FCC*, 345 F.2d 730 (D.C. Cir. 1965) (similar factual situations must be treated similarly under FCC's rules). The Hartford/New Haven ADI is the 23rd largest ADI, and thus is within the top 25 markets. Findings, 104. Under the count mandated by the FCC's "top 25 markets/30 voices" test, the Hartford/New Haven ADI currently contains at least 25 separate and independent voices, including seven separate television station owners in the ADI and eighteen different owners of radio stations in the Hartford Metro.[60] For at least two reasons, additional television and radio voices in the Hartford/New Haven ADI exist above these 25 voices that make the ADI at least the equivalent of a market meeting the "top 25 markets/30 voices" test.

185. First, at least nine other television and radio stations in addition to the 25 voices provide *city - grade or other primary service* to the city of Hartford. These nine stations include 3 Springfield television stations that provide city-grade service to Hartford, 3 Springfield radio station that place a 60 dBu contour over the city of Hartford, and 3 New Haven radio stations that place a 1 mV/m contour over the city of Hartford. When these nine stations are included in the analysis with the 25 "voices" counted under the "top 25 markets/30 voices" test, the waiver requested by the Applicants must be granted because the Hartford/New Haven ADI contains at least as many or more "voices" as markets meeting the "top 25

markets/30 voices" test. *See Duane J. Polich*, 66 R.R. 2d 1562, 1563-64 (1989) (waiver of one-to-a-market rule granted based in part upon penetration of community of license by distant stations); *Melody Music, supra*, 345 F.2d at 732-33.

186. Second, in addition to the 3 New Haven radio stations that place 1mV/m contour over the city of Hartford, an additional 12 radio stations are licensed to communities within New Haven County, a metropolitan county adjacent to the Hartford Metro. The Hartford/New Haven ADI is unique among ADIs in the top 25 markets, being the only ADI with two separate Metros. While the bifurcation of the metropolitan portion of the Hartford/New Haven ADI by Arbitron results in the Applicants' inability to meet the "top 25 markets/30 voices" test, the impact on the market of these stations must be considered under the more rigorous case-by-case analysis. *See Polich, supra*, 66 R.R.2d at 1563-64. The 15 New Haven County stations serve a metropolitan portion of the ADI, the core of the ADI market served by Station WTIC-TV. Indeed, at least four of the New Haven County radio stations receive significant audience shares in Hartford County, with two of the stations receiving better shares in Hartford County than in New Haven County. Where an additional 15 stations beyond the 25 voices already counted in the market are licensed to an adjacent Metro county within the ADI served by Station WTIC-TV, the Hartford/New Haven ADI is at least as competitive and diverse as other ADIs meeting the "top 25 markets/30 voices" test.[61]

187. Even absent the practical equivalency of the Hartford/New Haven ADI to other ADIs that meet the "top 25 markets/30 voices" test, the Applicants' request for a waiver of the one-to-a-market rule should be granted because the public interest benefits of the combination of the Station and the Ten Eighty radio stations and the high level of cable penetration within the market justify the grant of the waiver. In the *HDO*, the Commission stressed that, in this case, it was particularly interested in the public interest benefits resulting from the combination and the level of cable penetration in the market. 5 FCC Rcd. at 1647. The Applicants have demonstrated substantial public interest programming benefits that result from the combination of Station WTIC-TV and the Ten Eighty radio stations, and given the extremely high level of cable penetration in the market, a waiver of the one-to-a-market rule is warranted. *Second Report, supra*, 4 FCC Rcd. at 1753.

188. First, the Applicants have demonstrated that the combination of Station WTIC-TV and the Ten Eighty radio stations have provided access to funds and operational efficiencies that have permitted the Station to commence a nightly local newscast and other special local news programming that is competitive with the three network affiliates in the market. The Station also is now able to provide a Spanish translation of its nightly newscast. For many months, the newscast was the only local 10:00 a.m. newscast available in the market broadcast with a Spanish language translation. Under the combined ownership with the Ten Eighty radio stations, Station WTIC-TV is one of only three UHF television stations in the country operating on channels 50 through 69 that provide a local newscast and one of only two stations in the United States known to provide a Spanish language translation of local nightly newscasts.

189. The Applicants have provided detailed evidence demonstrating the benefit of the combination in providing its unique news programming. Initially, given the cash flow of the Ten Eighty radio stations, Station WTIC-TV has had access to capital that supported hundreds of thousands of dollars of initial costs and annual operating losses associated with the provision of the news. Additionally, the Ten Eighty radio stations and Station WTIC-TV have jointly developed and operated NEWS, a state-of-the-art weather facility unprecedented in its market and unprecedented for an independent UHF television station.[62] Finally, the Station receives in excess of $500,000 worth of operating efficiencies from the combined operation with the Ten Eighty radio stations, including joint subscriptions to wire services, use of the radio stations' audio feed, use of the radio stations' technical and physical assets, and availability of cross-promotion.[63]

190. Second, the cable penetration of the Hartford/New Haven ADI, which reached 82% in February of 1991, is the highest level of cable penetration in any of the top 50 markets in the United States. With 82% of the relevant market receiving at least 35 channels of cable television service, many of the concerns underlying the FCC's one-to-a-market rule are alleviated. *See Second Report, supra*, 4 FCC Rcd. at 1753. Moreover, the presence of significant alternative video delivery sources is confirmed by the level of out-of-market viewing in the Hartford New Haven ADI. Both Arbitron and Nielsen research figures demonstrate that a greater percentage of viewers in the Hartford/New Haven ADI watch out-of-market television signals than in any other market in the country.[64] Arbitron has determined that at least twelve non-market video signals have a significant presence in the Hartford/New Haven ADI. *Id.*[65] Given the significant alternative video sources available in the market and the extensive public interest benefits that have resulted from the combination of the Station and the Ten Eighty radio stations, the FCC's September 1986 decision granting the waiver of the one-to-a-market rule should be reaffirmed. *See HDO*, 5 FCC Rcd. at 1753; *Tulsa 23*, 5 FCC Rcd. 727 (1990) (waiver granted based on provision of news, competitive nature of market and financial distress); *Great American Television*, 4 FCC Rcd. 6347 (1989) ("*Great American*") waiver granted based on policy favoring continuation of efficiencies in providing news).

191. In addition to the public interest benefits resulting from the combination and the extremely competitive and diverse nature of the broadcast media marketplace in the Hartford/New Haven ADI, at least four other factors analyzed under the 5-part test support a grant of the Applicants' waiver request.

192. First, while Station WTIC-TV is operated at full-power and from a desirable location, Channel 61 is not a particularly desirable frequency allocation. High-band channels, including those above channel 50, are more expensive to operate on and generally receive less viewersip than more desirable television channels. Given the extensive costs of operating Channel 61 in a matter that will compete with VHF stations and other lower-band UHF stations, the combination of the Ten Eighty radio stations and Station WTIC-TV is valuable in ensuring the survival of an independent television presence on a high-band channel in Hartford. *Tulsa 23*, 5 FCC Rcd. at 728.

193. Second, the proposed combination was, and is, essential to the financial survival of Station WTIC-TV. From its inception through the end of its first two years

of the operation of the Station, Arch lost approximately $12,000,000. At that time, Arch was continuing to lose money, almost $6,000,000 per year. By himself, even with arms-length assistance from his family, Arnold Chase could not continue to support the Station's operation. For this reason, the purchase of the Station by CBI was necessary to the continued operation of the Station, thus warranting a grant of the waiver. *Tulsa 23*, 5 FCC Rcd. at 728.[66]

194. Third, the existence of a large number of newspaper sources in the market supports the grant of the waiver. *See Second Report, supra*, 4 FCC Rcd. at 1753. There are 16 daily newspapers published and circulated within the Hartford/New Haven ADI, including at least 5 published in Hartford County. Additionally, there are 37 weekly newspapers published within the ADI, including five separately owned and operated publishers of such weekly newspapers in Hartford County. Waivers of the one-to-a-market rule have been granted in markets with a lesser concentration of newspaper publications. *See Tulsa 23*, 5 FCC Rcd. at 729. [67]

195. Since the adoption of Note 7 to Section 73.3555 in December of 1988, the Commission has granted requests for waivers of the one-to-a-market rule in at least seven separate instances based on its analysis of the five factors presented in the "case-by-case" test. *See, e.g., Tulsa 23*, 5 FCC Rcd. 727 (1990); *Dennis J. Kelly, Esq.*, 5 FCC Rcd. 507 (1990) ("*Jonesboro*"); *Polich, supra*, 66 R.R.2d 1562 (1989); *Kyles Broadcasting, Ltd.*, 5 FCC Rcd. 5846 (1990); *Perry Television, Inc.*, 5 FCC Rcd. 1667 (1990). In the case most clearly parallel to the Applicants' waiver request, the Commission granted a waiver permitting the owner of AM and FM radio stations in Tulsa, Oklahoma to acquire an independent UHF television station operating on Channel 23 also licensed to Tulsa. *See Tulsa 23*, 5 FCC Rcd. at 729. The Commission's grant of the waiver was based primarily on the demonstration that the television station was losing money and that the proposed combination would result in cost savings to the station that would permit the improvement of station facilities and the development of public interest programming. The present circumstances present a stronger case for a grant of a waiver than did the case made in *Tulsa 23*. In that case, the Tulsa radio combination demonstrated that the profitability of the radio station operations and efficiencies in operating the televison station would provide the ability to upgrade the television station's technical facilities and to improve and expand the television station's local news, public affairs and public interest programming. Here, the combination resulted in the commencement of a news operation rather than the upgrade of an existing news operation. The Tulsa applicants also demonstrated that the television station continually had operated at a net loss, but the loss there was significantly less than the losses suffered by Arnold Chase and Arch. *Tulsa 23*, 5 FCC Rcd. at 727-28. While the Tulsa applicants demonstrated that the Tulsa ADI television market was the 54th largest ADI market with 25 separate "voices," *Tulsa 23*, 5 FCC Rcd. at 728-29, the Applicants have shown that the Hartford/New Haven ADI is the 23rd largest ADI market with a similar number of "voices" and 10 to 15 other broadcast stations providing primary service to the metropolitan portion of the market. Finally, while the Tulsa ADI had a 53% cable penetration rate, the Hartford/New Haven ADI has the highest level of cable penetration in the top 50 markets, 82%. *Id.*[68]

196. The designated issues are resolved in favor of the Applicants. It is clear that David Chase, Cheryl Chase Freedman, and Chase Enterprises were not real-parties-in-interest in Arch's application for the construction permit for the Station and that David Chase, Cheryl Chase Freedman, and Chase Enterprises did not prematurely assume control of Arch. The Chase family, Chase Enterprises and Arch did not abuse the Commission's processes in connection with the filing and prosecution of the construction permit and transfer of control applications. Also, the Applicants have demonstrated that a waiver of the one-to-a-market rule is warranted. For all these reasons, IT IS ORDERED THAT the Transfer of Control Application and the License Renewal Application ARE GRANTED.[69]

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

FOOTNOTES

[1] As required by Section 73.3539 (a) of the FCC's rules, 47 C.F.R. §73.3539 (a), an application to renew the license of the Station was filed on December 1, 1988. *HDO*, 5 FCC Rcd. at 1642. The instant proceeding thus also considers the pending renewal application of the Licensee. *Id.*

[2] At the time of the filing of the transfer of control application in October of 1985, Arch was the licensee of the Station and Arnold L. Chase owned all of the stock of Arch. Joint Exs. 17-6, 17-7. Arnold Chase thus originally proposed to sell all of his Arch stock to CBI. *Id.* After the transaction initially was consummated pursuant to prior Commission consent, Arch assigned its license to operate Station WTIC-TV to the Licensee through a *pro forma* transaction approved by the Commission in which Arch was dissolved and a subsidiary of CBI was renamed Arch. *See* Public Notice, Report No. 20801, released March 2, 1990. "Arch" henceforth refers to the licensee of the Station wholly-owned by Arnold Chase prior to the consummation of the proposed transfer of control.

[3] Subsequent to the filing of the transfer of control application, the commission's grant of that application, and the Applicants' consummation of the proposed transfer of control, the Commission amended the one-to-a-market rule and revised the standard for evaluating requests for waivers of that rule. *See* 47 C.F.R. Section 73.3555 & Note 7; *Amendment of Section 73.3555*, 4 FCC Rcd. 1741, *on recon.*, 66 R.R.2d 1115 (1989).

[4] The Commission also ordered that its *Decision* constitutes a Notice of Apparent Liability for forfeiture for violation of Section 310 (d) of the Communications Act of 1934, as amended, and Section 73.1015 of the Commission's rules.

[5] The Bureau conducted extensive discovery in connection with the remanded issues, including a motion for production of documents which resulted in the production of approximately 25 boxes of documents from the Applicants. The Bureau took depositions of 14 people and interviewed an additional 18 people. The Bureau also conducted on-site inspections of the facilites of the Station, including its studios, offices and transmitter site. Astroline did not conduct any discovery, produce any documents, submit any evidence at hearing, or even appear at the hearing in this proceeding.

[6] Arnold Chase had been interested in television engineering and operation since an early age. Joint Ex. 1 at 2.

[7] Arnold Chase also informed Roger Freedman, his brother-in-law and Ms. Freedman's husband, that he was going to apply for Channel 61. Joint Ex. 4 at 2. Arnold never asked Roger Freedman to become involved in Arch's application and Mr. Freedman never discussed the potential viability of the venture with Arnold. *Id.*

[8] The decision to hire the Updike firm was based on a recommendation from the Schnader firm to Arnold Chase. Joint Ex. 1 at 5.

[9] Mr. Dorshaug was a retired engineer who had worked for Ten Eighty during Arnold's tenure at Station WTIC-FM. Joint Ex. 1 at 6. Mr. Dorshaug was no longer employed by Ten Eighty at the time he assisted Arnold with Arch's application. *Id.*

[10] Citibank also had an independent relationship with other Chase family members. Joint Ex. 1 at 7.

[11] Although Ms. Smith decided not to propose to participate in the management of the Station on a day-to-day basis, Arnold and Ms. Smith agreed that Ms. Smith would participate in Arch's governance as a director. Joint Ex. 1 at 8-9.

[12] Arch's application proposed that pursuant to executed stock subscription agreements, Arnold Chase would own 94% of Arch and Mr. Pinkton, Ms. Smith and Mr. Grasso would own the remaining 6% of Arch's stock. *See* Joint Ex. 1 at 11; Joint Ex. 17-1. Mr. Pinkston, Ms. Smith and Mr. Grasso had not purchased that stock or contributed capital to Arch when Arch's application was filed and did not purchase stock or contribute capital subsequently. *Id.*

[13] Randall Pinkston replaced Ms. Freedman as Vice President of Arch and James Grasso replaced her as Secretary of Arch. *Id.*; Joint Ex. 1-2. Mr. Pinkston, Mr. Grasso and Ms. Smith all were named directors of Arch. *Id.*; Joint Exs. 1-2, 17-1.

[14] Arnold decide to use the new site on Rattlesnake Mountain because he believed that use of the site had become essential to the competitive strength of Arch. Joint Ex. 1 at 13. Arnold believed that the competitive situation in the Hartford/New Haven ADI had changed dramatically during the four years in which Arch had prosecuted its application. *Id.* During the pendency of Arch's application, one television station licensed to Waterbury, Connecticut that had been a secondary NBC affiliate operating from a height of approximately 100 feet with an Effective Radiated Power ("ERP") of 50,000 watts was sold to a group that dropped the secondary NBC affiliation and raised the tower height of the transmitting antenna to 1200 feet above sea level. *Id.* at 13-14. Additionally, during that time, another independent station in the Harftford/New Haven ADI that had broadcast religous programming in the late 1970's and early 1980's was planning to change its format to conventional independent programming. *Id.* at 14. Whereas in 1979, Arnold believed that Arch would be the only commercial independent station in the Hartford/New Haven ADI, in late 1983, it was apparent Arch would be the third independent television station entering the market. *Id.* Arnold thus believed that it was essential for Arch to increase its coverage area, and without consulting with his family, determined that Arch should build a tall tower on Rattlesnake Mountain and operate with 5 megawatts ERP. *Id.*

[15] Mr. Titus worked for Ten Eighty at the time Arnold Chase served as Program Director of Station WTIC-FM but also operated an independent engineering firm. Joint Ex. 1 at 26-27.

[16] After Arnold's approval, checks routinely were processed for signature or stamp by authorized signatories, including Cheryl Freedman and Roger Freedman. Joint Ex. 1 at 30; Joint Ex. 8 at 3; Joint Ex. 12 at 1. Chase Fiscal's account generally was used as a source of liquid funds to permit the Chase family to keep cash on-hand in a limited number of accounts. *Id.* After Chase Fiscal or Mountain Development paid an invoice, the Chase family limited partnership would reimburse Chase Fiscal or Mountain Development. *Id.*; Joint Ex. 8 at 4.

[17] Subsequent to the FCC's grant of the Transfer of control application, beginning in February of 1987, $2,214,188 was provided to Arch in loans from Woodgreen Corp., or its successor Delaware National Financial Corporation ("DNFC"), a company owned and funded primarily by David Chase. Joint Ex. 1 at 35; Joint Exs. 1-19, 1-20.

[18] When Arnold's personal staff accountant borrowed funds from David Chase or CFA, David Chase's personal staff accountant prepared a check payable to Arnold and Arnold's staff accountant deposited the check in Arnold's personal account. Joint Ex. 1 at 38-39. The staff accountant also prepared a promissory note for signature or added the borrowing to an existing grid note index schedule. *Id*at 39; Joint Ex. 5 at 10-11. The staff accountants kept a record of borrowings, including interest schedules. *Id.*; Joint Ex. 1-24; Joint Ex. 6 at 5-6. As a cash control, Roger Freedman, Cheryl Chase Freedman or authorized accountants with signature stamps routinely would sign or stamp Arnold's personal checks. Joint Ex. 1 at 39; Joint Ex. 3 at 10; Joint Ex. 4 at 7; Joint Ex. 5 at 11; Joint Ex. 6 at 6. After Arnold established Arch's separate offices, he rarely signed his personal checks because he was absent from the Chase Enterprises offices where these checking accounts were kept. *Id.* While Cheryl Freedman and Roger Freedman or the accountant with their signature stamp would have access to Arnold's personal fund request at the time they signed his personal check, they did not review the fund requests for substance but merely to ensure that Arnold had approved the fund request. *Id.*; Joint Ex. 3 at 11; Joint Ex. 4 at 7-8. As check signatories, neither Ms. Freedman or Mr. Freedman had any discretion to refuse to sign Arnold's personal check once they determined that Arnold had authorized the check's issuance. Joint Ex. 2 at 13; Joint Ex. 3 at 11; Joint Ex. 4 at 8; Joint Ex. 5 at 10-11; Joint Ex. 6 at 5-6.

[19] This funding process was not unique to Arnold or to his funding of Arch, but was common to the way the Chase family funded the payment of all of their personal and business expenses. Joint Ex. 1 at 40; Joint Ex. 3 at 10; Joint Ex. 5 at 10. The funding process ensured personal liquidity, accounting simplicity and consistency of investment. *Id.*; Joint Ex. 5 at 10-11. Additionally, there were *bona fide* tax and estate planning reasons for this process. *Id.*; Joint Ex. 5 at 10-11.

[20] Although Cheryl Freedman erroneously was authorized by an Arch corporate resolution dated September 20, 1984 to sign Arch's checks, Joint Ex. 1-26; Joint Ex. 3-2, Arnold instructed that the mistaken authorization be rescinded when he discovered that the Updike firm had mistakenly included her on the resolution after a review of Arch's pre-filing corproate minutes rather than the more recent post-filing corporate minutes. Joint Ex. 1 at 41; Joint Ex. 3 at 11. Cheryl Freedman never signed any of Arch's checks pursuant to the erroneous resolution. *Id.*; Joint Ex. 3 at 11. Ms. Freedman mistakenly executed the erroneous bank card because it was inadvertently sent to her and included with many other documents that she needed to sign around the time of the Citibank financing. Joint Ex. 3 at 12.

[21] The majority of ventures established and maintained by Chase Enterprises compiled and maintained accounting records at the offices of Chase Enterprises. Joint Ex. 1 at 42. Ten Eighty's accounting records and check registers were maintained at the offices of Ten Eighty and Roger Freedman and his staff at Chase Enterprises had access on a routine basis to Ten Eighty's financial and accounting records, as well as input into their compilation and substance.

[22] Roger Freedman and members of his staff met with Arch's business manager Susan Craig after she had been offered a position at Station WTIC-TV by Arnold and Bruce Mayer. Joint Ex. 4 at 24; Joint Ex. 7 at 5; Joint Ex. 12 at 3; Joint Ex. 13 at 1. The conversation with Roger Freedman was brief, and in the nature of an exit interview because Ms. Craig was leaving Ten Eighty, where she had been employed for several years. *Id.*; Joint Ex. 13 at 1. Mr. Freedman also discussed the Chase family limited partnerships structure with Ms. Craig because she would be required to deal with the partnerships in her capacity at Arch. *Id.* Mr. Freedman always maintained to Ms. Craig that Arnold Chase was the sole owner of Arch and that the radio stations and television station could not be jointly owned or operated until such time as FCC approval was obtained. *Id.* While Ms. Craig met with several other Chase Enterprises employees to discuss her role at Arch as it was affected by the Chase family limited partnerships, these meetings were not interviews that affected her employment. Joint Ex. 13 at 3; Joint Ex. 13 at 1-2.

[23] At some point after Arnold had retained, with absolutely no involvement on Roger Freedman's part, Bruce Mayer as general manager of Arch, Mr. Mayer suggested to Arnold that the Chase family join with Mr. Mayer in developing a new television station on Channel 61 in Bay City, Michigan. Joint Ex. 4 at 13; Joint Ex. 7 at 6; Joint Ex. 12 at 3. At Arnold's suggestion, Roger Freedman met with Bruce Mayer on several occasions concerning this possible venture, which was discussed wholly apart from his employment at Arch. *Id.*; Joint Ex. 5 at 2; Joint Ex. 7 at 6. The only discussions about Arch at meetings concerning the Bay City construction permit were statements that Arch or Station WTIC-TV matters could not be discussed. *Id.*; Joint Ex. 5 at 2; Joint Ex. 7 at 6. After Mr. Mayer's employment was terminated at Station WTIC-TV in September of 1985, pursuant wholly to discussions between Arnold Chase and Mr. Mayer without any involvement on Roger Freedman's part, Mr. Mayer was hired at Chase Enterprises to pursue the Bay City venture. *Id.*; Joint Ex. 7 at 6. When Chase Enterprises later decided not to pursue the Bay City venture, Mr. Mayer and Roger Freedman terminated Mr. Mayer's employment at Chase Entrprises. *Id.*; Joint Ex. 12 at 3. While Mr. Freedman was involved in the relationship between Mr. Mayer and Chase Enterprises, he had no relationship to Mr. Mayer's employment or activities at Station WTIC-TV. *Id.*

[24] Contracts not signed by Arnold were signed by senior management of the Station under his direction. Joint Ex. 1 at 49-50.

[25] In reviewing the budgets for 1985 and 1986 during 1985 and later in 1986, Roger Freedman indicated that he believed program expenses were too high. Joint Ex. 13 at 3. Arnold Chase continued to make all decisions regarding the level of program commitments made by the Station, and in no event made changes based on Roger Freedman's comments. *Id.*

[26] Only after the FCC granted its consent to CBI's acquisiton of Arch did Arnold receive significant comments on the program liabilities and commitments of Station WTIC-TV from Roger Freedman. Joint Ex. 1 at 52. Prior to that time, no one at Chase Enterprises was reviewing the substance or extent of Arch's program commitments. *Id.*

[27] Mr. Farber also provided assistance to Chase Enterprises concerning its insurance coverage. Joint Ex. 1 at 52-53; Joint Ex. 12 at 6-7.

[28] Arch also benefitted from an umbrella liability policy which covered David Chase as the general partner of the landlord of One Corporate Center, Arch's studio building. Joint Ex. 1 at 54. Arch paid its proportionate share of the umbrella policy, and on one occasion, when David Chase erroneously paid the entire premium for the policy, Chase Enterprises billed Arch for its portion of the premium and Arch reimbursed David Chase. *Id.*; Joint Ex. 1-34.

[29] At the time, Arnold Chase was aware of the uncertainty of the law concerning waivers of the one-to-a-market rule. Joint Ex. 1 at 59. Arnold believed that the FCC's decision in *Metromedia* was not final, but subject to appeal. *Id.* Arnold also was aware that the Commission subsequently had denied another request for a waiver of the one-to-a-market rule. *Id.* For these reasons, and because his experience in constructing and operating Station WTIC- TV was still beginning, Arnold did not proceed hastily with any decision to seek a waiver of the one-to-a-market rule. *Id.*

[30] These three stations are Station WPLR(FM), Station WIOF(FM), and Station WWYZ(FM). Applicants Ex. 3-14 (A-C).

[31] Station WIOF(FM) earns a 3.5% share in New Haven County and a 5.5% share in Hartford County, while Station WWYZ(FM) earns a 5.8% share in Hartford County and 4.5% share in New Haven County. Applicants Ex. 3-15.

[32] These stations include Station WWLP, on NBC affiliate; Station WGGB-TV, on ABC affiliate; and Station WGBY-TV, a PBS affiliate. Applicants Ex. 3-5 (A- C); Applicants Ex. 3-6.

[33] These television stations include Stations WNBC, WNYW, WABC WWOR, WCBS, WPIX and WNET from New York, Newark or Secaucus to the South, Station WEDW from Bridgeport to the Southeast, and Stations WSBK, WWLP, WGGB and WGBY from Boston and Springfield to the North. Applicants Ex. 3-6. The licensees of these stations include NBC Inc., FOX Capital Cities/ABC, MCA Inc., Tribune, CBS Inc., and Gannett. *Id.* The cable originated channels include Cable News Network, Nickelodeon, ESPN, Turner Network Television and the USA Network. *Id.*

[34] An additional 11 out-of-market stations with 10 separate owners penetrate the New Haven Metro. Applicants Ex. 3 at 7. These stations include stations licensed to Danbury, Westport, Bridgeport, and Brookfield, Connecticut, Worcester, Massachusetts and New York City, New York. Applicants Ex. 3-19.

[35] For example, Station WTIC-TV has interrupted its regular programming to cover weather emergencies, including, in one instance, an alert to local residents concerning the existence of a tornado. Applicants Ex. 1 at 7. Station WTIC-TV also interrupted its regular programming in November of 1990 to cover the kidnapping of a young girl in the Hartford area and recently provided many news up-dates on the war in the Gulf.

[36] The Station constructed its news studio by purchasing and installing lighting, acoustic, and electric systems, as well as sets. Applicant Ex. 7. Station WTIC-TV also purchased furniture, typewriters, computer disk drives and monitors for the studio, newsroom and production room. *Id.* The Station also purchased cameras, tripods, panels and other photographic and video equipment; mixers, microphones, and other audio equipment; tape machines, racks, monitors and other production equipment; antennas, satellite dishes and wire services for video and data reception; various vehicles, batteries, chargers, remotes and other field equipment; and encoders, power supplies and colorgraphic equipment. *Id.* at 7-8; Applicants Ex. 1-4.

[37] These contractors include part-time on-air personalities, a news editor, a news director, a news producer, and assignment desk assistants. Applicants Ex. 1 at 8.

[38] The weather equipment consists of Doppler Radar weather equipment, a standby generator, weather satellite dishes, numerous weather computers and modems, weather data and display monitors, remote display consoles, printers, lightning

display systems, transmitters, by-pass switches, encoders, antennas, wave guides, receivers and other equipment. Applicants Ex. 1 at 9.

[39] While NEWS currently is attempting to market its service to broadcast stations outside of the Hartford/New Haven ADI and other businesses within Station WTIC-TV's market, in 1990 less than 7% of NEWS's revenue came from sales to businesses other than Stations WTIC-TV, WTIC(AM) and WTIC-FM. Applicants Ex. 1 at 10-11. Nevertheless, NEWS provides emergency and daily weather data to a variety of public utilities, civic associations and government agencies as a public service.

[40] In March of 1990, CCI undertook a reorganization which included a communications group borrowing at the parent corporation level to fund group broadcast operations, including the operation of Station WTIC-TV. Applicants Ex. 2 at 5-6. CCI borrowed $142,000,000 from Chase Manhattan Bank as part of this group borrowing, which in addition to the Ten Eighty radio stations, included television stations in Atlanta, Memphis, Denver and Indianapolis. *Id.* at 6.

[41] The management personnel are attracted to CCI by the large number and diversity of the CCI broadcast stations. Applicants Ex. 1 at 17.

[42] During the first year of NEWS's development, Ten Eighty even assumed a slightly greater percentage of the burden of paying for the operation of NEWS, by providing 69% of NEWS's total revenues. Applicant Ex. 1 at 17.

[43] At times, for example, Station WTIC has used the radio stations' news database to access school closing information during inclement weather. Applicants Ex. 1 at 22.

[44] For example, during drive time and evening broadcasts, the radio stations have promoted at no charge the "Arsenio Hall Show" that has been carried on Channel 61. Applicants Ex. 1 at 23.

[45] The average amount spent on news annually by stations in ADIs 26-50 is $37,000. Applicants Ex. 3 at 12.

[46] Finally, Station WTIC-TV's ability to "stretch out" its program payments also resulted from the program supplier's prospects of selling their product to other television stations owned by CCI. Applicants Ex. 2 at 8. The benefits of CCI's group purchase of programming continues at Station WTIC-TV today. *Id.* As as a result of group evaluations and purchases of programs, Station WTIC-TV can buy programming with longer pay-out periods and no down payments. *Id.* At the time of CCI reorganization in March of 1980, certain programming obligations of television stations in the CCI group again were renegotiated to include longer pay out periods. *Id.* at 8-9. Station WTIC-TV has used the savings on its commercial programming to increase the amount of funds spent on news and public affairs programming. *Id.*

[47] For example, Station WTIC-TV now shares the cost of its labor counsel, tax counsel, corporate counsel, program contract counsel, litigation counsel and FCC counsel with the licensees of other Chase broadcast stations. Applicants Ex. 1 at 25.

[48] The other two high-band UHF independent producing news are Station WSCV, Channel 51, Miami, a Spanish language station, and Station KUSI, Channel 51, San Diego. Applicants Ex. 3 at 10; Applicants Ex. 3-27.

[49] Independent stations saddled with heavy debt and without deep corporate pockets find it difficult to justify the cost of extensive news operation. Applicants Ex. 3 at 14; Tr. at 192-93. For example, in Indianapolis, Indiana, the 26th ranked ADI, Station WTTV-TV, Channel 4, recently ceased providing news. *Id.*

[50] Channels 50 and above even garner a much lower average share of the viewing audience than other UHF facilities. Applicants Ex. 3 at 15; Applicants Exs. 3-34, 3-35. The average share of an independent station operating on channel 14-49 in the top 50 markets in 3.4%, while the average share of stations operating on channels 5-69 is 1.2%. *Id.*; Applicants Exs. 3-34, 3-35.

[51] Control can be either *de jure* or *de facto* control. A party will have *de jure* control where its legal ownership rights provide it with the right to govern the actions of the FCC applicant, permittee or licensee. *See Seven Hills Television Co.*, 64 R.R.2d 274, 290 (Rev. Bd. 1987). A party without *de jure* control will have *de facto* control of an applicant, permittee or licensee if it governs, in actuality, the broadcast affairs or the applicant, permittee or licensee. *See Id.* at 290-94.

[52] *See also Cannon's Point Broadcasting Company*, 93 F.C.C.2d 643, 654 (Rev. Bd. 1983); *Badlands Broadcasting Co.*, 36 R.R.2d 1719 (Rev. Bd. 1976); *Morris's, Inc.*, 28 R.R.2d 1723 (Rev. Bd. 1973); *Community Broadcasting Co.*, 16 F.C.C.2d 891 (Rev. Bd. 1969).

[53] Cheryl Freedman originally contemplated owning an interest in Arch many months prior to the filing of Arch's application, but terminated all contact with Arch several months prior to the filing of Arch's application when she was advised of the one-to-a-market rule. Ms. Freedman's involvement in Arch was extremely minor and ceased months before the filing of Arch's application, and thus no adverse inference can be drawn from the passive interest she had in Arch prior to learning of the one-to-a-market rule. *See HDO*, 5 FCC Rcd. at 1644, 649 n.11 (appropriate time frame for analyzing real-party-in-interest issue commences at the time of filing of Arch's application).

[54] "[I]f the control questions are resolved favorably to the applicants, then to the extent that financial arrangments exist or existed between them, Chase Broadcasting would be considered in essentially in the same position as any other lender or lessor." *HDO*, 5 FCC Rcd. at 1650 n.23.

[55] Arnold Chase established an insurance coverage package for the Station's personnel that varied from the insurance coverage provided to employees of the radio stations despite the fact that Arnold's personal insurance planner placed Arch's coverage with a medical plan that include other Chase family businesses.

[56] Accountants at Chase Enterprises did perform certain routine tasks for Arnold Chase and Arch with respect to financial statements and tax returns. These services were performed for Arnold primarily because his accountants at Chase Enterprises had familiarity with the related-party transactions required to be reported in these forms. *Id.* Arch also was charged for these services, which involved no discretionary action, at a market rate. In such circumstances, and where Arch's FCC counsel indicated that such ministerial services could be provided to Arch by Chase Enterprises accountants, no adverse inferences concerning the control of Arch are warranted.

[57] Given her ownership in the Chase family limited partnerships, Cheryl Chase Freedman also participated in the Citibank loan to the extent it was necessary to obtain funds to develop the master antenna tower facility operated by the Chase family limited partnerships and to purchase the equipment leased by the Chase family limited partnership to Arch. The Applicants received the opinion of counsel that such a borrowing, and the participation of Cheryl Chase Freedman in the borrowing was permissible under the FCC's rules. As discussed above, where the underlying lease arrangements were *bona fide* business transactions undertaken on arms-length terms, no adverse infer-

ence concerning the control of Arch can be drawn from Cheryl Freedman's participation in the Citibank loan. *See HDO*, 5 FCC Rcd. at 1650 n.23.

[58] "The fact that the liability for that loan is part of the consideration paid for the station does not compel a finding that a transfer of control has occurred." *Bee Broadcasting, supra*, 3 FCC Rcd. at 4327-28. Under the Commission's attribution rules, "a loan to a licensee or permittee does not confer a cognizable interest in the creditors, 'because there is no direct influence or control which pertains to them.'"

[59] First, in assessing the benefits of the proposed combination, the FCC considers the economies of scale and cost savings that result in better program services or technical facilities, such as news, public affairs and other non-entertainment programming. *See Second Report, supra*, 4 FCC Rcd. at 1746-47. Second, in examining the types of facilities involved, the FCC considers such factors as whether the proposed combination involves a UHF or VHF television station or an AM and FM radio station, as well as the size and class of the stations involved. *Id.* at 1753. Third, the Commission has indicated that applicants that already own a number of media outlets in the relevant market will face a higher hurdle than those applicants with few media outlets. *Id.* Fourth, in reviewing the financial difficulties of stations involved in proposed combinations, the Commission considers evidence concerning efforts to sell the station. *See Second Report, supra*, 4 FCC Rcd. at 1763. The Commission also relies on documentation of past financial losses and predictions of projected losses. *Id.* at 1753, 1760 n.103. Finally, in reviewing the nature of the relevant television market, the Commission emphasizes the number of separate broadcast outlets and "voices" existing after the proposed combination, as well as the degree of cable penetration and the availability of other nonbroadcast media. *Id.* at 1753.

[60] The ADI arguably has 27 separate and independent voices, because Channel 18, licensed to Hartford, and Channel 59, licensed to New Haven, are licensed within the Hartford/New Haven ADI. Findings, 105, 107. Under the "top 25 markets/30 voices test, the Commission considers "all full-power TV stations *licensed* to the relevant ADI television market and *operating* AM and FM radio stations licensed to the relevant TV metropolitan market." *Second Report, supra*, 5 FCC Rcd. at 1646 (emphasis added). Where the FCC limited its use of the adjective "operating" to radio stations, it is arguable that non-operational, licensed television stations could be counted, bringing the number of voices within the ADI up to 27. *Id.*

[61] As additional support for the diversity and competition found within the Hartford/New Haven ADI, the Applicants have demonstrated that there are at least 25 other independent licensees of radio stations within the ADI.

[62] The joint ownership and operation of the broadcast stations allows the Ten Eighty radio station to assume approximately two-thirds of the financial burden of paying for the $700,000 in initial start-up costs of NEWS and the $150,000 in annual operating costs of NEWS.

[63] Additionally, as a result of the increased news production facilities and personnel available at the Station, Station WTIC-TV has significantly increased and improved its public affairs programming and increased the amount of civic affairs activities conducted by the Station. *Id.* 128-32.

[64] The percentage of out-of-market viewing in the market ranges between 34% and 59%, depending on the day of the week.

[65] The Applicants also have shown that at least an additional 4 video services currently are operational in the Hartford/New Haven ADI as the results of the operation of MDS systems and television translators.

[66] Arnold Chase never offered the Station for sale to a party other than CBI, in large part because he knew that a third party would not develop the significant news operation that the Applicants have establsihed and in other part because he knew that such an effort would not have resulted in an offer sufficient to compensate him for his losses. Where the 5-part test contemplating an analysis of sales efforts to third parties was not adopted until after the FCC had approved the transfer of control of Arch and that transfer of control had been consummated, *compare Second Report, supra*, 4 FCC Rcd. at 1753, *with Arnold L. Chase, supra*, 61 R.R.2d at 135, the Applicants should not be prohibited from maintaining the *status quo* because of an after-the-fact change in the standard for waivers of the one-to-a-market rule.

[67] Fourth, and finally, the Applicants have demonstrated that there has been no harm to the competitive balance of the Hartford media market as a result of the consummation of the proposed combination pursuant to prior FCC consent.

[68] The Tulsa UHF station, like Station WTIC-TV, was forced to compete with several VHF network affiliates and other independent stations. *Tulsa 23*, 5 FCC Rcd. at 728. Moreover, the Tulsa ADI was served by 13 daily newspapers and 26 weekly newspapers, while the Hartford/New Haven ADI is served by 16 daily newspapers and 37 weekly newspapers. *Id.* at 729; Findings, 117-18.

[69] In the event exceptions are not filed within thirty (30) days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective fifty (50) days after its release pursuant to Section 1.276 (d) of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-269

In re Applications of

DOROTHY O. SCHULZE and DEBORAH BRIGHAM
A General Partnership
File No. BPCT-850320KG

BLANCO COMMUNICATIONS, LTD.
File No. BPCT-850320LC

For a Construction Permit for a
New Television Station at
Blanco, Texas

APPEARANCES

A. Wray Fitch, III, on behalf of Blanco Communications, Ltd.; and *Donald E. Martin* on behalf of Dorothy O. Schulze and Deborah Brigham; and *Lee J. Peltzman* and *Barbara M. Barron* on behalf of Witness Opal Chadwell.

SUPPLEMENTAL INITIAL DECISION
OF
WALTER C. MILLER

Issued: December 12, 1991; Released: December 19, 1991

INTRODUCTION

1. The Trial Judge released his Initial Decision on October 22, 1986. *See* FCC 86D-59. There he denied Blanco Communications, Ltd.'s (BCL's) application (BPCT-850320LC). Schultze and Brigham's (S and B's) application (BPCT-850320KG), and granted Opal Chadwell's (Chadwell's) application (BPCT-850103KK).

2. In so doing, he concluded that both BCL and S and B lacked the character to be Commission licensees. More specifically he found that S and B principal, Dorothy O. Schultze, had made misrepresentations to and lacked candor with the Commission. He further found that BCL's principal, Sidney Paul DuBose had also made misrepresentations to and lacked candor with the Commission. *See* FCC 86D-59 *supra.*, Issues 3, 4, 5 and 6.

3. Conversely the Trial Judge concluded that Opal Chadwell had not misrepresented the facts to the Commission about the availability of the site that she had specified in her original application. So, and since she was the only basically qualified applicant, he granted her application. The Review Board affirmed. 2 FCC Rcd 5502 (Rev. Bd. 1987).

4. The Commission remanded for a limited purpose. *See* FCC 89-7 released January 31, 1989. They found nothing wrong with the denial of BCL's and S and B's applications on character grounds. They expressly said: "... We see no basis on the present record developed under those issues to modify the conclusions of the ALJ and the Review Board . . ." "However" said the Commission, "we conclude that unresolved questions exist concerning Chadwell's financial qualifications."[1] The Commission then went on to delineate several financial credibility questions that had been raised before them,[2] and pointed out that Chadwell may have falsely certified her financial qualifications or that she may have lacked candor in her presentation to the Commission. But although the Commission had raised several character credibility questions, they only specified a financial issue:

> "R-1: To determine whether Opal Chadwell has sufficient funds to meet her estimated costs of construction and operation."

5. In furtherance of the Commission's remand, the Trial Judge released a Further Prehearing Order (FCC 89M-422 released February 8, 1989). There, in addition to the financial issue, he specified a false financial certification issue and a misrepresentation/lack-of-candor issue against Chadwell. He added those issues so that the Commission could get evidentiary answers to the questions raised by their remand order.

6. As a result of FCC 89M-422, the following two issues were specified for a remanded hearing in addition to the financial issue set out in paragraph 4 *supra.*:

> "R-2: To determine whether, when Opal Chadwell filed her application on January 3, 1985, she falsely certified her financial qualifications."
>
> "R-3: To determine whether Opal Chadwell has submitted the sworn statements of T. F. Burger, Jr. and/or Georgia Dixon in bad faith or otherwise lacked candor in asserting the value of her assets."

7. The Trial Judge also set out a procedural schedule for the remanded hearing. And as part of that schedule, he directed that remanded discovery be initiated before March 10, 1989, and completed by May 10, 1989.

8. On the March 10, 1989 initiation deadline both S and B and BCL launched timely discovery. Each served motions for production of documents on Chadwell, and each signified that they would depose Opal Chadwell along with five other non-party individuals the Commission had mentioned in their remand order. The depositions were scheduled for April 25-26, 1989.

9. Mrs. Chadwell stonewalled discovery. She neither opposed nor commented on the deposition notices, and she neither opposed or commented on S and B's and BCL's motion to produce. So, on March 31, 1989, the Trial Judge granted the unopposed production requests. *See* FCC 89M-1032 and FCC 89M-1033. He ordered Chadwell to produce the pertinent financial documents on or before April 10, 1989. She didn't.

10. Mrs. Chadwell also failed to show up for her April 25, 1989 deposition. But, in addition, she also contacted the other five non-party individuals (para. 8 *supra.*) and told them that they didn't need to appear for their depositions. They didn't even though all of them had been legally subpoenaed.

11. Meanwhile on April 21, 1989, S and B moved to have Chadwell compelled to produce the documents, and on April 25, 1989, BCL followed suit. Again Chadwell stonewalled. She neither opposed nor even commented on the motions to compel. Those motions were granted. *See* FCC 89M-1403 released May 10, 1989, and FCC 89M-1416 released May 11, 1989. Chadwell was ordered to produce the pertinent financial qualification documents before May 22, 1989. She didn't.

12. S and B moved to dismiss Opal Chadwell's application for failure to prosecute. Again Chadwell stonewalled. She neither commented on nor opposed S and B's motion. So on June 2, 1989, the Trial Judge dismissed Chadwell's application for Channel 52, Blanco, Texas. *See* FCC 89M-1568. And since S and B and BCL had already been denied, and those denials had withstood appeal (*See* para. 4 *supra*.), he returned Channel 52 in Blanco, Texas to the TV Processing Line. In that way other applicants could apply for the channel.

13. S and B and BCL sought reconsideration, and BCL argued strenuously that since the Trial Judge had dismissed Chadwell's application for failing to prosecute, no findings of fact or conclusions of law had been made on Chadwell's credibility and the questions that the Commission had raised in FCC 89-7 back on January 31, 1989 (paras. 4-5 *supra*.) had never been resolved. [3]

14. The Commission remanded again, but this time on an even more limited basis. *See* FCC 90-197, released May 24, 1990. They were apparently concerned with S and B's and BCL's arguments that then recent non-record happenings had undermined Chadwell's credibility vis-a-vis BCL principal, Sidney Paul DuBose. *See* para. 2-3 *supra*. [4] The Commission concluded ". . . that the question of whether or not recent events undermine Chadwell's credibility vis-a-vis DuBose should be referred to the ALJ. The ALJ heard the witnesses and is therefore in the best position to determine in the first instance whether recent events altered their credibility. In this regard Chadwell's failure to prosecute also occurred directly before the ALJ."[5]

15. So, said the Commission, BCL ". . . has justified pursuing the matter of Chadwell's credibility to a limited extent." They noted that BCL hadn't had a chance to cross-examine Chadwell about possible financial misrepresentations and her abuse of process, and further noted that they did not ". . . think it fair to leave matters solely under Chadwell's control."[6]

16. The Commission then specifically directed the Trial Judge: (1) to give BCL the opportunity to cross-examine Chadwell at hearing about her non-record financial showing and the reasons she failed to prosecute her application; (2) to let BCL depose Chadwell and other relevant witnesses; and (3) to let BCL subpoena relevant documents which could be introduced into evidence to impeach Chadwell's credibility.[7]

17. Finally, the Commission specified that "[t]he ALJ should then issue a supplemental initital decision containing his findings and conclusions;" and that "[t]he supplemental initial decision will be subject to review by the Board, which, like the ALJ, will have the advantage of its previous review of the record."[8]

18. Pursuant to those directives (paras. 14-17 *supra*.), the Trial Judge released a Second Further Prehearing Order on June 7, 1990 (FCC 90M-1553). The Remand II hearing conference was held on October 5, 1990, Remand II evidentiary sessions were held on November 19-21, 1990 and February 4, 1991; and the Remand II evidentiary record was closed on February 4, 1991. *See* FCC 91M-468.

19. BCL and witness Opal Chadwell each filed Proposed Findings of Fact and Conclusions of Law on April 1, 1991, and Reply Briefs on April 16, 1991.

FINDINGS OF FACT

20. During the appellate phase of the proceeding Opal Chadwell represented that she had available funds of $1,423,403 to cover her estimated costs of $1,412,390. The available $1,423,403 consisted of three components: (1) $217,087 in liquid assets; (2) her claimed equity (79.4%) in Blanco Cablevision, Inc. of $646,316; and (3) her homestead (about 45 acres of real estate in Hayes County, Texas) ostensibly worth $560,000. FCC 89-7, para. 4.

21. Mrs. Chadwell made no attempt to support either her $646,316 equity in the cable company, or her $560,000 real estate claim through formal appraisals. Instead, she submitted a sworn statement from a T. F. Burger, Jr. and a sworn statement from a Georgia Dixon. Burger, the President of U.S. Television Systems, Inc. purportedly offered to purchase Blanco Cablevision, Inc. for $814,000. Ms. Dixon, the co-owner of Swim-Spa of Georgia purportedly offered to purchase the 45 acres of real estate (and the homestead) for $560,000.

22. The Commission wasn't satisfied with Chadwell's showing. They ask her to supply additional information. *See* FCC 88I-045 released May 5, 1988. They dubbed the Dixon and Burger affidavits as "rather insubstantial." They suggested that Chadwell either substantiate the offers or provide formal appraisals of her cable company and her homestead property.

23. Chadwell responded by submitting an appraisal from a Jim McCrocklin. McCrocklin put a value on her Hayes County homestead of $408,000. Since that still left her short of her original $560,000 contention, she also submitted a letter from a stonemason, Ray T. Johnson. Johnson purportedly verified the presence of limestone on the homestead worth over $150,000.[9]

24. Chadwell also submitted an appraisal by Communications Marketing Group, Inc. They concluded that the cable system was worth between $600,000 and $650,000. Chadwell also submitted a separate appraisal for the real estate associated with the cable system. That appraisal showed her cable real estate to be worth $195,000.

25. Still the Commission was troubled. They pointed out: (1) that Chadwell couldn't simply assume that her homestead had an increased value of $150,000 because of the limestone deposits; (2) that BCL had supplied data that indicated that the market value of the 45 acre homestead was $3,300 per acre not the $7,000 per acre claimed by Chadwell's appraiser; (3) that Rev. Samuel A. Greene, Jr. had sworn that in 1983 or 1984 Earl Chadwell (Opal's husband) had tried to exchange the homestead for property then listed at only about $200,000; and (4) that BCL had submitted tax records that raised questions about Chadwell's claim.

26. The Commission also questioned Mrs. Chadwell's valuation of her cable system. They pointed (1) to other data that indicated at $2,000 per subscriber, the 240 subscriber system would be worth only $480,000, a far cry from $814,000 evaluation; and (2) to a sworn declaration

from a former employee, Eddie Cortez, that between 1985 and 1987 Mrs. Chadwell had offered to sell the cable system to a third party for $300,000.

27. *The Homestead Evaluation.* Mrs. Chadwell claims that her homestead, in 1984, consisted of 45 acres, a rock and cedar home with two baths, three bedrooms, and a 3,010 square feet. At the hearing it developed that it was not a rock and cedar home at all, but a double-wide mobile home with a total square footage of 2,324 square feet.[10] This 2,324 square foot figure is based on tax records, and takes into account two post-1984 additions to the mobile home.

28. As of 1984 rock siding had not been completed, although Chadwell's appraiser, Jim McCrocklin's appraisal assumed that it had. In fact, even in 1988 the process of rocking the outside of the house hadn't been completed.

29. Mrs. Chadwell applied for a residential homestead exemption in 1986. There she herself described her house as a "a mobile home, roof and rooms added to mobile home." When she was confronted with that exemption at the hearing she said it wasn't accurate. (Tr. 2848). Ms. Chadwell says that she provided erroneous information for the exemption so she could save a few dollars on taxes. (Tr. 2849). She admits she knew she was making false statements even though the form indicated that providing false information violated criminal statutes and could result in severe penalties (BCL Remand Ex. 1. Attach 3; Tr. 2875-2876).

30. Turning to the 45 acres of land, Ms. Chadwell claimed that as of 1984 "[t]he then going rate for land in this area [is] about $8,000 per acre."[11] But Rev. Sam Greene, Jr. who at one time was the largest real estate developer in Texas and who still conducts real estate appraisals disputes that claim. He says that the Chadwell homestead in 1984 was worth $3-3500 an acre. (Tr. 3019, 3024, 3026, 3027).

31. Greene says that there was some property in the area in the $7-9,000 per acre range, but that these properties had "tremendous amenity packages that were provided by speculative land developers" which the Chadwell property didn't have. Mrs. Chadwell's appraiser, Jim McCrocklin admits that there was no water on the property, and that the property wasn't suitable for subdividing.

32. As previously noted (para. 23 *supra.*) Mrs. Chadwell represented to the Commission that the value of the limestone deposits on her property exceeded $150,000. She based this on an appraisal from Ray T. Johnson, a stonemason.

33. At the hearing she said that she doesn't know whether Johnson is a trained appraiser; she never discussed with him whether there was any demand for limestone; and she has never discussed with anyone the cost of extracting the limestone or shipping costs.[12]

34. Chadwell's appraiser, Jim McCrocklin believes that any quarrying activity on the property would reduce the value of the property which he places at $408,000 by at least 15 percent. It is McCrocklin's view that the best and highest use for her homestead is a recreational/residential use-a use incompatible with quarrying operations. However, and as previously noted (para. 31 *supra.*), McCrocklin concedes that there is no water on the property and it isn't available for subdividing.

35. Another incident occurred sometime in 1983-84 that tends to cast doubt on Mrs. Chadwell's assertion that her homestead was worth $560,000. There were discussions between Earl and Opal Chadwell on the one hand and Rev. Sam Greene on the other about a property trade. The Chadwells would trade the 45-acre Chadwell homestead in Wimberly, Texas for a house and property in the Whispering Hills subdivision in Comal County, Texas, that Rev. Greene owned in trust for the church with which he is affiliated.

36. The Chadwells and Rev. Greene differ as to how those discussions came about. Earl and Opal Chadwell say that Greene approached them, and proposed the trade. They say that Greene wanted the trade because the Whispering Hills was close to being foreclosed (Earl Chadwell Dep. 67; Tr. 2687).

37. Greene says he was approached about the trade by Opal Chadwell. He says that she told him that she was no longer happy living in a mobile home and that she needed a more fitting property in which to entertain. (Tr. 3021). Greene further states that the Whispering Hills home was never in any danger of being lost, repossessed, or foreclosed; it was encumbered at the time with only a small mortgage. (Tr. 3030, 3105).

38. Greene says the Chadwells suggested a trade several times, and were anxious to trade. He was not. He didn't want to trade his property for property he believed was worth significantly less. (Tr. 3024). Greene had the Whispering Hills property listed for sale at $200,000, and he in fact sold it for $190,000. The net gain on the sale was $145,000 since the house was remodeled at an expense of $45,000. In any event the $200,000 listing is substantially lower than $560,000 even *assuming* that the Chadwells and Greene had made a tax-free trade.

39. *The Cable System.* Originally Mrs. Chadwell backed up her $814,000 cable evaluation by swearing that "I received an oral offer from Mr. T. F. Burger, Jr., President of U.S. Television Systems, Inc. for the purchase of Blanco Cablevision for $814,000. The offer was confirmed by a letter dated December 3, 1984."

40. The one-paragraph confirming letter signed by T. F. Burger, Jr., President of U.S. Television Systems, Inc. reads (BCL Remand Ex. 7, Att.4):

> "Please accept this as my offer to buy Blanco Cablevision, Inc. for $814,000. This offer is for any and all assets used or useful in the operation of the cable system, and contingent on your being awarded the full power television station, Channel 52, Blanco, Texas."

41. At the hearing it developed that Burger never intended to buy Blanco Cablevision. Opal Chadwell testified that she understood that Mr. Burger "had a man that was willing to furnish the financing." She further observed that she was "not really sure where the money was coming from." (Tr. 2752).

42. U.S. Television Systems designs and buildings cable systems. Burger doesn't recall the oral offer he made to Opal Chadwell (see para. 39 *supra.*). He said he had an investor who was interested in evaluating and purchasing cable systems. However, the investor was to provide the funds, not Burger or U.S. Television Systems, Inc. The investor was not a shareholder, owner, or officer in U.S. Television Systems. (Tr. 3118; 3150).

43. Burger never provided Mrs. Chadwell with a financial statement on the corporation's ability to make the purchase, and Mrs. Chadwell never asked for any such information. (Tr. 3119-3120). U.S. Television Systems Inc. never intended to purchase the cable system.

44. Moreover, BCL developed evidence at the hearing that clearly indicates that Burger's December 3, 1984 letter to Mrs. Chadwell was really nothing more than an accommodation. None of the details underlying the purported $814,000 purchase price had been worked out. T. F. Burger testified that the investor who was going to provide the money would be the proposed owner, and that there was to be a price adjustment at the time of sale if market conditions did not support a $3,000 per subscriber purchase price. (Tr. 3151).

45. In fact Burger wasn't even sure that a $3000 per subscriber multiple was the basis for the $814,000 figure. At his deposition Burger swore that the purchase price was based on a $1,500 per subscriber multiple. (Tr. 3125 with Tr. 3142). He never reviewed any of the cable system's books to determine the number of subscribers, but merely took Opal Chadwell's word that there were 271 subscribers.[13] (Tr. 3148).

46. Moreover, the so-called parties do not agree on exactly what the $814,00 figure encompassed. Mr. Burger says the purchase prince included the cost of expanding the system into an area known as the Indian Hills Subdivision. In fact Burger indicated that any costs the purchaser incurred in expanding into Indian Hills would be deducted from the $814,000 purchase price paid to Mrs. Chadwell. (Tr. 3139).

47. Opal Chadwell, on the other hand, says that the $814,000 purchase price did not include the costs of expanding the system into Indian Hills. (Tr. 2740, 2742). But Earl Chadwell., Opal's husband, testified that the $814,000 did include the cost of expanding the system into Indian Hills, which he estimated would be several hundred thousand dollars. (Dep. Tr. 56, 57).

48. Based on the foregoing (paras. 39-47 *supra*.). the intermediate findings are warranted that T. F. Burger's so-called December 3, 1984 $814,000 offer was no offer at all but a mere accommodation; that Opal Chadwell knew from the outset that's all it was; and that it was disingenuous of her to present that letter to the Commission as a *bona fide* accurate offer for her cablevision system.[14]

49. *The Eddie Cortez Affair*. In their first remand order (FCC 89-7 *supra*.) the Commission (at para. 19), and in discussing the dispute regarding the value of Mrs. Chadwell's cable system said this in part:

> "We also note that Blanco [BCL] has provided a sworn declaration by Eddie Cortez stating that sometime between 1985 and 1987 Chadwell offered to sell the cable system to a third party for $300,000. However, the value of this statement may be diminished by the fact that Cortez appears to be a disgruntled former employee."

50. The Eddie Cortez Declaration the Commission referred to (BCL Remand Ex. 1, Att. 1) contains the following pertinent passage:

> "I worked for Blanco Cablevision full-time for about two years. I left the company in 1987.
>
> . . .
>
> One day while I was working for Opal, she asked me if I thought Senator Kauffman[15] might be interested in purchasing her cable company. She told me to offer it to him for $300,000, and if Kaufmann bought it, she would pay me $25,000. . . . I did tell him that Opal wanted to sell her cable company for $300,000 but it was obvious that he was not interested so we never got into much detail."

51. At the hearing Mrs. Chadwell denied that she ever offered the cable system to Senator Kauffman and that she ever offered Eddie Cortez a $25,000 commission if he sold the cable system. (Tr. 2872). She claims that one day Eddie mentioned that Mr. Kauffman had a lot of money and was "picking up" homes in Marble Falls, Texas (Tr. 2838). Cortez purportedly asked Ms. Chadwell if she would sell the cable system to Mr. Kauffman, and she indicated that she wasn't interested in a "fire sale;" i.e., she wasn't interested in somebody just wanting to pick up a deal. (Tr. 2828).

52. But then (at the hearing) Ms. Chadwell went on to level a character attack on Eddie Cortez. She clearly wanted to justify the Commission's observation ". . . that Cortez appears to be a disgruntled former employee."[16] Opal Chadwell says that Eddie Cortez worked as a contract laborer for Blanco Cablevision, but he never worked a full year, and he never worked at the cable system for two years. (Tr. 2803-2805, 2812). She presented a list of payments she purportedly made to Mr. Cortez.

53. She says that in 1985 she owned a house in Johnson City, Texas. She received a call from Sam Greene asking if Eddie could rent her Johnson City house. She agreed that he could. (Tr. 2818).

54. She says that sometime later Greene called her again. He purportedly told her that Eddie had left the house, left his girl friend behind, and had "hauled a lot of [Opal Chadwell's] furniture and furnishings and taken it with him." (Tr. 2819-2820).

55. Ms. Chadwell says that Rev. Greene "was quite upset that Eddie would do this kind of thing, and insisting that I do something about it. He [Greene] wanted me to turn him into the Sheriff's Department and have him brought back and make him bring the things back." Greene purportedly said "somebody needs to do something about this."

56. Mrs. Chadwell said she didn't want to do anything because it is "a small town," and she didn't " . . . care to get involved . . . " But she claims that after two or three more phone calls from Rev. Greene she finally agreed to have Eddie Cortez arrested . . . " Cortez was, in fact, arrested at Opal Chadwell's bidding and spent a brief time in jail before he was bailed out.

57. Based on Eddie Cortez' and Rev. Sam Greene's sworn testimony, here is what really happened. Eddie Cortez, a young Hispanic, become interested in communications in general and cable in particular. At that time he was single and ". . . had an income coming in from selling land on weekends." So he first associated himself with Blanco Cablevision during their construction phase. With the Chadwells permission, Cortez followed the construction crew around town and helped install the cable. He wasn't paid. (Tr. 2879-2880).

58. From there he became employed by Blanco Cablevision on and off for about five years, the last of those years on a full-time basis. He left the company in 1987. During those years, even when he was full-time, Cortez wasn't a paid employee. Opal Chadwell occasionally would give him $25 "for gas money." Once he borrowed money to make truck payments. Cortez was shown the list of payments Opal Chadwell purportedly made to Cortez. He said, yes, he'd been given several checks in large amounts (*e.g.* for $180). He was instructed to cash these checks at the bank and return the cash less $25, to Ms. Chadwell. He did just that. (Tr. 2886).

59. During those five years, Cortez wasn't concerned with the lack of pay. One reason was that Opal Chadwell promised him full-time employment at her full-power television station in Blanco in exchange for working at Blanco Cablevision without pay. And he says, "I had income coming in from selling land on weekends. I did not need to be paid by them so it was worth it to work Monday through Friday for them to have a job in the TV station." (Tr. 2884).[17] As Rev. Sam Greene says, Eddie Cortez viewed employment with the Chadwells as an opportunity, and noted "Eddie is a giver to the point of fault." (Tr. 3053-3054).

60. During the time he was employed at Blanco Cablevision, Eddie Cortez maintained the cable system, picked up and delivered TV sets, repaired TV sets, adjusted the equipment at least once a week, and adjusted the headend rack in Opal Chadwell's office. (Tr. 2941-42). He spent about half his working hours in the cable system offices. (Tr. 2941).

61. But he also installed antenna systems, took out the garbage, cut the grass, and worked on the bucket truck. The Chadwells knew that anytime they called, Eddie would be available. (Tr. 2962, 2966). As Rev. Greene puts it "Mrs. Chadwell had come to rely on Eddie. He washed her cars, he ran her errands."

62. Contrary to Mrs. Chadwell (Finding 53 *supra.*) Rev. Greene never asked Opal Chadwell if Eddie could rent the Johnson City house. Opal herself asked Eddie to rent it. At the time Cortez was living in San Antonio. By moving to Johnson City, Mr. Cortez would be able to be on his non-paying job at the cable office more promptly; i.e., by 9:00 a.m. (Tr. 2920).

63. After Eddie rented the house, Mrs. Chadwell called Rev. Greene to discuss the situation. (Tr. 3040). Rev. Greene assisted in making rent payments. At the time Eddie rented the house, the Chadwells had between 50,000-70,000 worth of TV equipment stored in it. (Tr. 3041).

64. During the time Mr. Cortez rented the Chadwell's house in Johnson City he was living there with his girl friend who is now his wife. She was pregnant. The baby was born December 26, 1986. (Tr. 2889, 3045, 3081). It was at that time that Cortez told Earl and Opal Chadwell that since he had a wife and child, he couldn't afford to continue working for no pay at Blanco Cablevision, that he needed paying employment. (Tr. 2888).

65. At the time the real estate market was slow (see para. 57 *supra.*). So he told the Chadwells that he had landed a job in Dallas, Texas laying cable, and that he intended to go there to work since the job paid $200 a day. The Chadwell's told him that if he left, he "would be sorry" (Tr. 2888).

66. While Eddie Cortez was in Dallas, Opal Chadwell called Rev. Greene. She said that she and Earl had gone into the Johnson City house an had noticed a desk, a chair, and perhaps a file cabinet were missing. (Tr. 3044, 3090). Mrs. Chadwell called Rev. Greene repeatedly very upset with Eddie, and she was distressed that Eddie had apparently removed the furniture. She felt that "he had left her high and dry without any notice." (Tr. 3046).

67. When Cortez returned from Dallas he was arrested for allegedly stealing $1,000 worth of office furniture from the Chadwells' Johnson City house, the house that he was renting. It was Mrs. Chadwell that had him arrested.

68. The furniture and furnishings (see para. 54 *supra.*) turned out to be a used army desk. Earl and Opal Chadwell had given him the desk in partial payment for a cable extension that he had helped install. (Tr. 2890, 2893).[18] He had had the desk for over a year before his arrest. In fact he had had the desk in his San Antonio apartment before he moved into the Johnson City house. (Tr. 2892).[19]

69. After he was arrested, Eddie Cortez' fiancee [wife] called Rev. Greene. She told him that Eddie had been arrested, and wanted him to post bail. (Tr. 3047-3048). Rev. Greene provided the bail money to Eddie's fiancee who arranged for his release. (Tr. 3095). The grand jury "no billed the case," and the charge was dropped. (Tr. 2890). The Justice of the Peace advised Mr. Cortez that it was all "a big misunderstanding."

70. In any event, and contrary to Opal Chadwell's sworn testimony (paras 54-56 *supra.*), Rev. Greene never asked Opal Chadwell to have Eddie Cortez arrested; and Rev. Greene *never* told Opal Chadwell that because of his theft of her furnishings that Eddie Cortez needed to be taught a lesson.

71. *Abuse of process*. As previously noted (paras. 15-16 *supra.*) in their Second Remand Order, the Commission was concerned that BCL hadn't had a chance to cross-examine Chadwell about her abuse of process and the reasons she had failed to prosecute her application.

72. Findings have already been made on Opal Chadwell's successful efforts to stonewall discovery after the first remand (see paras. 7-12 *supra.*). BCL adduced some additional findings at the second remanded hearing.

73. Opal Chadwell was timely noticed for depositions, along with five nonparties; (1) Earl Chadwell; (2) Jim McCrocklin; (3) Georgia Dixon; (4) T. F. Burger; and (5) Ray Johnson. Subpoenas were issued and served on the five nonparties that commanded their appearance for depositions on April 25 and 26, 1989. None of the deponents appeared.

74. Lynn Nolan is an employee of Dorsey and Mills Court Reports - the firm scheduled to handle the remanded depositions. She testified that she received a call from Ray Johnson's wife the day before his scheduled deposition. Mrs. Johnson told Ms. Nolan that Opal Chadwell had advised Ray Johnson that it wasn't necessary for him to appear for his deposition (BCL Remand Ex. 6).

75. Opal Chadwell says that she didn't attend her deposition because she wasn't represented by counsel. She doesn't know why Georgia Dixon failed to attend her deposition. (Tr. 2765).

76. She says she talked to her husband, Earl, and told him that she wasn't going to attend the depositions since she had no counsel. And ostensibly Earl said he would consider whether or not to attend. (Tr. 2766). He didn't attend.

77. Mrs. Chadwell asserts that she didn't advise the other deponents that they needn't appear. (Tr. 2770). She says Ray Johnson and Fred Burger called her and she told them that she had no intention of appearing at her deposition. (Tr. 2788). Chadwell says that both Johnson and Burger then said "If you're not going, then I don't have to go." Mrs. Chadwell then says that she pointed out that that conclusion wasn't necessarily true and that "they would have to make their own determination." (Tr. 2789).

78. Earl Chadwell's version differs somewhat. He says that Opal never even discussed the depositions with him, and that she never advised him that she had no intention of attending. Earl says he didn't attend because he had no counsel and "Opal knew why I wasn't going." (Earl Chadwell Dep. Tr. 66, 67).

79. T. F. Burger says that Opal Chadwell "said that she thought that a deal had been cut -- to settle the deal and she wasn't going . . . she told me she wasn't going and whatever I did was whatever I wanted to do." (Tr. 3156).[20]

ULTIMATE FINDINGS OF FACT
And
PRELIMINARY CONCLUSIONS OF LAW

1. The Commission gave Blanco Communications Limited (BCL) the chance to cross-examine witness Opal Chadwell about certain financial arguments she made *before* the first remand and about the reasons she failed to prosecute her application *after* the first remand.

2. It can hardly be said that BCL aggressively pursued the remedies the Commission afforded them (Footnote 19 *supra.*). But they were nevertheless successful. They established that witness Opal Chadwell (then applicant Opal Chadwell) both misrepresented to and lacked candor with the Commission on certain significant financial representations she made to the Commission.

3. She claimed that T. F. Burger, Jr. (U.S. Televisions, Inc.), had offered to purchase her cable company, Blanco Cablevision, Inc., for $814,000. She offered a letter dated December 3, 1984 from Burger to that affect.

4. That letter proved to be a bogus accommodation. Burger never intended to buy Blanco Cablevision. His company, U.S. Television, Inc. designs and builds cable systems. It doesn't buy them. It never intended to buy Mrs. Chadwell's system. Burger says he had an investor at the time who was interested in evaluating and purchasing cable systems. But the so-called investor believed that there was to be a price adjustment at the time of sale if market conditions didn't support a $3,000 per subscriber purchase price. So the $814,000 wasn't firm in any sense of the word.

5. Burger never took any concrete steps to determine what Chadwell's cable system was actually worth. He wasn't even sure whether the price per subscriber was to be $1,500 or $3,000. He never even looked at Blanco Cablevision's books to determine the number of subscribers; he just took Mrs. Chadwell's word that there were 271.

6. Burger never provided Chadwell with a U.S. Television, Inc. financial statement, and Chadwell never asked for any. In fact the record shows that the purported parties involved didn't even know exactly what assets were included in the so-called $814,000 purchase price. There was absolutely no meeting of the minds. For Burger to refer to the $814,000 figure as "my offer to buy" is the epitome of disingenuity.

7. The record reflects that Mrs. Chadwell's 240 subscriber system is probably worth between $300,000-$480,000. *See* Finding 26 *supra*. Opal Chadwell knew all of this. She knew her cable company wasn't worth $814,000; she knew that Burger's letter was not an offer; and she knew that she shouldn't try to deceive the Commission otherwise.

8. Similarly, Opal Chadwell had represented to the Commission that, in determining whether she was financially qualified the Commission could accept her representation that her 45-acre homestead was worth $560,000. It was probably worth closer to $150,000-$175,000.

9. Mrs. Chadwell arrived at her distorted inflated figure through what can only be described as a complete lack of candor. For example, she described the house as a rock and cedar home with 3,010 square feet. It turned out to be a double-wide mobile home with a total square footage of 2,324 square feet.

10. When she was confronted with local tax records where she herself had described her house as a "mobile home, roof and rooms added to a mobile home," she said she had lied. She said she had made false statements to the taxing authorities so she could save some money on taxes. But that testimony begs the real questions. The real question is whether she was lying then, or whether she is lying now.

11. Mrs. Chadwell says that her 45 acres are worth about $8,000 an acre. The record shows that it was probably worth closer to $3,500 an acre. Her claim that she has more than $150,000 in limestone deposits on her land is so fanciful, and misleading as to border on the ridiculous. Even her own appraiser, Jim McCrocklin, could only place a $408,000 value on the 45-acre homestead - a far cry from her $560,000 assertion.

12. Admittedly, the line between conscious and unconscious bias on the one hand, and lack of candor on the other is oftentimes blurred. But the record facts and circumstances underlying Chadwell's presentation to the Commission belie any suggestion that Chadwell's claims are a product of bias--even conscious bias. No, the record clearly sustains BCL's claim that Opal Chadwell's financial contentions lacked candor and in all too many instances were overt misrepresentations.

13. Chadwell's propensity to overshade the facts is best illustrated by her unconscionable attack on the character of Eddie Cortez. (Findings 49-70). Her conduct toward this young Hispanic male can only be described as spiteful and vindicative. Cortez had served Mrs. Chadwell faithfully and without pay for over five years. She used him. (*See* Findings 57-61 *supra.*). He washed her cars, he ran her errands. Then the time came for Cortez to move on, and secure a paying job. This greatly distressed Mrs. Chadwell. She warned him not to leave, that if he left he "would be sorry."

14. Cortez left. He took a job in Dallas that paid $200 a day. When he returned, Opal Chadwell had him arrested on a trumped-up burglary charge. Then, when the in-

cident was raised at this hearing, she gave testimony that was misleading and lacked candor, testimony designed to hide her spiteful and vindictive nature.

15. So it's no wonder that Mrs. Chadwell abused the Commission's processes by stonewalling discovery (Findings 7-12, and 71-79 *supra*.). She realized that if a hearing were held the financial representations she had made to the Commission would be revealed as false and misleading. She also realized that her attempts to have Eddie Cortez' sworn declaration dismissed as the product of "a disgruntled former employee" (Findings 49-50 *supra*.) would not stand up, that instead she would reveal herself as a malicious and vindictive person. So she tried to head off the hearing the Commission had called for.

FINAL CONCLUSIONS

16. So given the chance, BCL has been able to show that witness Opal Chadwell has made false and misleading financial misrepresentations to the Commission, and that she has abused the Commission's processes in an effort to cover up those misrepresentations.

17. It is time then to assess whether these more recent financial misrepresentations ". . . undermine Chadwell's credibility vis-a-vis [Sidney Paul] DuBose . . . " It is concluded that they do not. It is a *non sequitur* to assume that because Opal Chadwell misrepresented her *financial* qualifications to the Commission during the administrative appellate process in 1988, she must have also lied about the availability of her *transmitter site* at the original hearings in 1985-1986. Nor is there any discernible nexus between the Trial Judge's original adverse demeanor findings on Sidney Paul DuBose (*See* FCC 86D-59 *supra*. at Findings 7-26 and Conclusions 5-12), and the record we have developed on witness Opal Chadwell at this second remand.

18. In FCC 86D-59, the Trial Judge found and concluded that BCL principal Sidney Paul DuBose had made misrepresentations to and lacked candor with the Commission. These misrepresentations related to the availability or lack thereof of Opal Chadwell's original transmitter site.

19. The Review Broad affirmed those findings and conclusions. *See* 2 FCC Rcd 5502 (Rev. Bd. 1987).

20. The Commission then reviewed the DuBose findings and conclusions. They expressly stated that "We see no basis on the present record . . . to modify the conclusions of the ALJ and the Review Board . . . "

21. Nothing that has been developed at this remanded hearing impacts on the original DuBose findings and conclusions and the two affirmances of those findings and conclusions. The net result of this hearing is that (and assuming that Opal Chadwell were still an applicant) we now have three prevaricators instead of two.[21] Stated another way, now *none* of the applicants and former applicants are fit to be a Commission licensee.

SO, unless an appeal is taken from this Supplemental Initial Decision, or the Commission reviews it on their own motion, the application of Dorothy O. Schultze and Deborah Brigham (BPCT-850320KG) REMAINS DENIED; the applications of Opal Chadwell (BPCT-850103KK) REMAINS DISMISSED;[22] and the application of Blanco Communications Limited (BPCT-850320LC) IS AGAIN DENIED.[23]

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

FOOTNOTES

[1] There was no financial issue in the case at the time the Commission heard argument in the case, although all three applicants had submitted numerous non-evidentiary financial type documents to the Commission on the subject.

[2] These questions were based on *non-record* documents that the Review Board and ultimately the Commission had requested and obtained during the administrative appellate process.

[3] The short answer to these BCL contentions should have been a resounding "so what?" When Chadwell refused to go to trial, and stonewalled discovery, the Trial Judge properly dismissed her application. Her refusal to prosecute and her abuse of Commission's discovery processes are almost *res ipsa loquitur*. There is no doubt in the Trial Judge's mind that if Chadwell could have satisfactorily answered the questions the Commission posed in FCC 89-7 *supra*., she would have done so. Her failure to prosecute and stonewalling discovery speaks for itself.

[4] Chadwell and DuBose had taken diametrically opposite positions on whether Chadwell's original transmitter site was available. This led the Trial Judge to add character issues against both of them. *See* FCC 85M-4590 released November 22, 1985. After taking evidence on the site availability question, he ultimately resolved it in Chadwell's favor.

[5] Chadwell subsequently pointed out that her credibility is irrelevant to BCL's (DuBose's) basic qualifications. *See* FCC 90M-2056 released July 16, 1990. The Trial Judge agreed, but indicated that he was *duty-bound* to follow through on the second remand order.

[6] What in heaven's name, are the "matters solely under Chadwell's control?" Chadwell had stonewalled discovery and refused to prosecute. So the Trial Judge dismissed her application. Any "control" she may have had vanished with that dismissal. There has never been a time when "matters [were] solely under Chadwell's control."

[7] Why we need to impeach an applicant's credibility once the application in question has been dismissed remains a mystery.

[8] In FCC 90-197 *supra*, the Commission, *inter alia*, set aside its own previous order, FCC 89-7 (see para. 4 *supra*.) to extent that it denied BCL's application; and they vacated the Trial Judge's order, FCC 89M-1568 (see para. 12 *supra*. to the extent that it declares this proceeding terminated and returns Channel 52 to the TV processing line.

[9] Chadwell certified her financial qualifications on December 2, 1984. So the valuations we are concerned with here are based on market conditions just before or on December 2, 1984.

[10] Even Earl Chadwell admits the house doesn't have 3,010 square feet but only "about 2,600 square feet" (Dep. Tr. 61).

[11] Opal's husband, Earl Chadwll, believes the homestead property was worth about $4-6,000 per acre.

[12] Rev. Sam Greene says that limestone deposits aren't unique and are prevalent throught the area.

[13] The 1987 Broadcasting/Telecasting Yearbook shows only 250 subscribers.

[14] Nor does the record support the claim that Opal Chadwell owns a 79.4% equity interest in Blanco Cablevision, Inc. (*See* para. 20 *supra*.). The 1987 Broadcasting Yearbook shows the Blanco Cablevision Corp.'s ownership (page D-235) as "Opal Chadwell, 50%; Earl L. Chadwell, 50%."

[15] There was a time when Eddie Cortez sold real estate for Senator Kauffman on weekends and worked parttime for Blanco Cablevision (the Chadwells) during the week.

[16] Chadwell's version of Eddie Cortez and his background differs substantially and materially from both that of Cortez and that of Rev. Sam Greene. Greene knows Cortez very well since he has been his legal guardian since Eddie was 17 years old. Cortez' version of events, as corroborated by Greene, will be credited. *See infra*.

[17] Both Eddie Cortez and Opal Chadwell told Sam Greene that Eddie was promised a job at her television station if he agreed to work at the cable office. (Tr. 3055).

[18] It's perplexing. Why would Eddie Cortez steal a used army desk when there was apparently $50,000-70,000 worth of TV equipment there for the taking?

[19] Eddie Cortez values the desk if bought new at $120 to $150. Rev. Sam Greene values it new at perhaps $200. In any event substantially below the alleged $1,000 figure.

[20] Although the Commission gave BCL all sorts of hearing rights and privileges, it cannot be said that BCL speedily and rigorously pursued those rights. *See e.g.* FCC 90M-2673 released August 24, 1990; FCC 90M-3074 released September 28, 1990; FCC 91M-866 released March 7, 1991.

[21] As the Review Board has observed, "it is truly better to have an empty house than a bad tenant." *Port Huron Family Radio, Inc.*, 4 FCC Rcd 2532 at 2540 (1989).

[22] *See* FCC 91-367 released November 27, 1991.

[23] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, this Initial Decision will become effective 50 days after its public release. *See* 47 CFR 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-629

In the Matter of

Amendment of Section 73.202(b), RM-7031
Table of Allotments,
FM Broadcast Stations.
(LaFayette, Georgia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 9, 1991; Released: December 19, 1991

By the Assistant Chief, Allocations Branch:

1. Pursuant to the request of Radix Broadcasting, Inc. ("Radix"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 571 (1990), proposing the allotment of Channel 298A to LaFayette, Georgia, as the community's first local FM service. Radix filed comments restating its interest in the allotment of Channel 298A to LaFayette. Wildwood Broadcasters ("Wildwood"), B. Edward Tuten ("Tuten"), and Virginia Ann Sattler ("Sattler") filed counterproposals. The counterproposals are unacceptable for consideration.[1] RA-AD of Trenton, Inc. ("RA-AD"), permittee of Station WBDX(FM), Channel 274A, Trenton, Georgia, filed a motion for extension of time to file comments.[2] Radix filed reply comments.[3] After the record closed Sattler filed a request for expedited relief, and a statement for the record.[4]

2. In her counterproposal Sattler states that she holds a construction permit for Station WJRX(FM), Channel 300A at East Ridge, Tennessee. Due to new zoning regulations she has been denied access to a transmitter site. She claims that the allotment of Channel 298A to LaFayette would further deny her access to the only area that offers a transmitter site for an East Ridge station because the allotment would be short-spaced to available sites. Sattler also contends that the proposed reference point for the LaFayette allotment is located in the city reservoir. Therefore, she argues that the LaFayette proposal specifies an unsuitable transmitter site and should be dismissed as a defective proposal.

3. A Commission engineering analysis has determined that the applicable reference point for LaFayette is on dry land and not in a reservoir, as Sattler alleges. However, we have also determined that by placing a slightly greater site restriction on the LaFayette allotment than that proposed in the *Notice*, we can remove any short-spacing to the East Ridge allotment. In any event, we note that Sattler is now licensed to operate Station WJRX(FM) at East Ridge

4. We believe the public interest would be served by allotting Channel 298A to LaFayette, Georgia, as it will provide the community with its first local service. Channel 298A can be allotted to LaFayette in compliance with the minimum distance separation requirements of the

---

[1] These counterproposals were filed after October 2, 1989, and therefore must comport with the mileage separation requirements adopted in MM Docket No. 89-375, 4 FCC Rcd 6375 (1989); *See also Lancaster, Wisconsin, Clinton and Manchester, Iowa, and Morrison, Illinois*, 6 FCC Rcd 6113 (1991), *pet. for recon. filed on other grounds.*

Wildwood requests the allotment Channel 298A to Wildwood, Georgia, as that community's first local transmission service. A Commission engineering analysis conducted when this counterproposal was filed indicates that the counterproposal is short-spaced to Station WYHY(FM), Channel 298C1, Lebanon, Tennessee, and Station WJRX(FM), Channel 300A, East Ridge, Tennessee. Wildwood's counterproposal is unacceptable for rule making. We note that Wildwood also states an expression of interest in the LaFayette allotment, and we will consider its comments to the extent that it expresses this interest.

Tuten requests the allotment of Channel 298A to Tunnel Hill, Georgia, as that community's first aural transmission service. An engineering analysis indicates that the counterproposal is short spaced to the vacant but applied for Channel 298A, Roswell, Georgia, and to Station WJRX(FM), Channel 300A, East Ridge. Therefore, Tuten's counterproposal is unacceptable for rule making.

Sattler, permittee of Station WJRX(FM), Channel 300A, East Ridge, requests the substitution of Channel 300C3 for Channel 300A at East Ridge and the modification of its authorization accordingly. To accomplish this upgrade, Sattler also requests the allotment of Channel 274A in lieu of Channel 298A to LaFayette, the substitution of Channel 254A for Channel 274A at Trenton, Georgia, and the modification of the authorization of Station WBDX(FM), Channel 274A, Trenton, accordingly. An engineering analysis indicates that the allotment of Channel 274A at LaFayette is short-spaced to a construction permit for Station WCKS(FM), Channel 274A, Fruithurst, Alabama. In addition, Channel 254A at Trenton is short-spaced to vacant but applied for Channel 251A at Signal Mountain, Tennessee, to Station WSB(FM), Channel 253C, Atlanta, Georgia, and to Station WQMT(FM), Channel 255A, Chatsworth, Georgia. Furthermore, Sattler's proposal would also require the permittee of Station WBDX(FM), Channel, 254A, Trenton, Georgia, to relocate its transmitter site. It is Commission policy not to require a station to involuntarily relocate its transmitter site. Absent a statement from the permittee or licensee agreeing to the proposal, the Commission will not consider the relocation of a transmitter site to accommodate another facility. *See Mt. Morris and Savanna, Illinois, Belle Plaine, Maquoketa, Webster City and Winterset, Iowa*, 4 FCC Rcd 5485 (1989), *recon. denied*, 5 FCC Rcd 2683 (1990). Therefore, Sattler's counterproposal is unacceptable for rule making. We note that Sattler also states its opposition to the LaFayette proposal, and we will consider its comments to the extent that it addresses this issue.

[2] On April 4, 1990, RA-AD's motion for extension of time was denied. *See* 5 FCC Rcd 2570 (1990).

[3] Radix' reply comments need not be considered to the extent that they address the unacceptable counterproposals.

[4] The Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment period. Therefore, in accordance with Section 1.415(d) of the Commission's Rules, we shall not accept the unauthorized pleadings. In any event, Sattler's pleadings need not be considered due to the dismissal of the counterproposals.

Commission's Rules with a site restriction of 5.3 kilometers (3.3 miles) east of the community,[5] in order to avoid a short spacing to Station WENN(FM), Channel 299C, Birmingham, Alabama, and Station WJRX(FM), Channel 300A, East Ridge, Tennessee.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 3, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
LaFayette, Georgia	298A

6. The window period for filing applications will open on **February 4, 1992,** and close on **March 5, 1992.**

7. IT IS FURTHER ORDERED, That the counterproposals filed by B. Edward Tuten, Virginia Ann Sattler, and Wildwood Broadcasters, ARE DISMISSED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

---

[5] The coordinates for Channel 298A at LaFayette are North Latitude 34-42-31 and West Longitude 85-13-33. This site differs slightly from the site initially proposed in the *Notice* in order to avoid a short-spacing to the licensed site of WJRX(FM), Channel 300A, East Ridge, Tennessee. Because the petition that resulted in this allotment was filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's Rules with respect to Station WENN(FM), Channel 299C, Birmingham, Alabama, at coordinates 33-43-52 and 86-37-57 and Station WRJK(FM), Channel 300A, East Ridge, at coordinates 34-56-37 and 85-18-01.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

MM Docket No. 90-284

In the Matter of

Amendment of Section 73.202(b),	RM-7224
Table of Allotments,	RM-7301
FM Broadcast Stations.	RM-7487
(New Sharon and Albia, Iowa	
and Memphis, Missouri)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 10, 1991; Released: December 19, 1991

By the Assistant Chief, Allocations Branch:

1. This proceeding began with the issuance of a *Notice of Proposed Rule Making,* 5 FCC Rcd 3526 (1990), proposing the allotment of Channel 260C3 to New Sharon or Albia, Iowa, as either community's first local FM transmission service. In response to the *Notice,* First Christian Reformed Church ("First Christian"), proponent of the New Sharon allotment, filed comments stating its intention to apply for the channel if allotted to New Sharon. H&H Broadcasting Corporation ("H&H"), proponent of the Albia allotment, filed comments and a counterproposal.[1] First Christian and H&H filed reply comments. Boyer Broadcasting Company, Inc. ("Boyer"), licensee of Station KMEM(FM), Channel 244A, Memphis, Missouri, filed reply comments and an untimely counterproposal.[2]

2. In its comments, First Christian submits that Albia has an AM station, while New Sharon has no local aural transmission service. Therefore, under the third FM priority of first local service,[3] the New Sharon allotment should be preferred over Albia. In addition, First Christian states New Sharon has a population of 1,225. [4] New Sharon was incorporated in 1873 and has a council-mayor government. New Sharon has two schools, eight churches, two parks, a medical clinic, two dozen local civic organizations, nearly 100 retail businesses and many additional home industries.

3. H&H's counterproposal proposes the allotment of Channel 260C3 to New Sharon and Channel 244C3 to Albia in order to provide both communities with their first local FM transmission service. In order to allot Channel 244C3 at Albia, H&H proposes the substitution of Channel 246A for Channel 244A for Station KMEM(FM) in Memphis, Missouri, and the modification of its license accordingly. H&H states its willingness to reimburse Station KMEM(FM) for all reasonable expenses required for the change in frequency. Boyer, in its reply comments, expresses its objection to moving to another Class A channel, but offers no reasons for its objection.

4. In their reply comments, First Christian and H&H support the counterproposal which provides an alternative that would provide both communities with their first local FM transmission service. Both reaffirm their interest in Class C3 allotments at New Sharon and Albia.

5. A Commission engineering analysis indicated that Channel 246A would be short-spaced to the proposed allotment for Station KTDI, Channel 247C2, Huntsville, Missouri (RM-7490), filed in MM Docket No. 90-527. *See* 5 FCC Rcd 6590 (1990). However, we determined that Channel 263A can be substituted for Channel 244A at Memphis in lieu of Channel 246A. Therefore, we issued an *Order to Show Cause,* 6 FCC Rcd 5213 (1991)(*"Order"*), ordering Boyer to show cause why its license should not be modified to specify operation on Channel 263A in lieu of Channel 244A. In response to the *Order,* Boyer filed comments. H&H and First Christian filed replies to Boyer's comments.[5]

6. In its comments, Boyer submits that there is no technical impediment associated with the change of Station KMEM(FM) from Channel 244A to Channel 263A. However, Boyer argues it will "incur economic harm" by the proposed change, and opposes the change absent reimbursement. Boyer notes "H&H's willingness to reimburse it for reasonable costs incurred and has no objection to the change if either or both petitioners provide reimbursement. However, Boyer requests a 60-day delay to confer with both petitioners regarding a reimbursement agreement, or that any final order be conditioned upon the payment by First Christian and H&H of expenses incurred in the change.

7. In its reply, H&H argues there is no reason for a 60-day delay since it is well established that the party granted a construction permit for the Albia channel would be responsible for reimbursement expenses to Boyer, citing to *Circleville, Ohio,* 8 FCC 2d 159, 163 (1967). H&H reiterates its willingness to reimburse Boyer for reasonable costs for Station KMEM(FM)'s change in frequency. H&H argues, however, that it has no assurance

---

[1] Public Notice was given September 5, 1990, Report No. 1825 (RM-7487).

[2] Boyer proposes the substitution of either Channel 263C3 and/or Channel 282C3 for Channel 242A at Memphis and the modification of its authorization for Station KMEM(FM) accordingly. Boyer's counterproposal was submitted in reply comments and is, therefore, untimely. *See* Commission Rule 1.420(d) and paragraph 3(a) to the *Notice*. Accordingly, Boyer's counterproposal will not be considered in this proceeding. However, we will consider Boyer's proposal in a separate *Notice of Proposed Rule Making*.

[3] The allotment priorities set forth in *Revision of FM Assignment Policies and Procedures,* 90 FCC 2d 88 (1982), are:

(1) First full-time aural service;

(2) Second full-time aural service;

(3) First local service;

(4) Other public interest matters.

[Co-equal weight given on priorities (2) and (3)]

[4] Population figure taken from the 1980 Census.

[5] The *Order* did not specifically provide for the filing of responsive comments. However, in the absence of any objections, we will consider these comments because they are directly responsive to issues raised by Boyer.

of receiving a construction permit for Channel 244C3 at Albia, as a filing window for the channel has not opened. Hence, no negotiations can take place until a construction permit is awarded. H&H concludes that Boyer's request is premature and should be denied.

8. In its reply, First Christian argues that the relief Boyer requests circumvents established Commission procedures set forth in *Gouverneur and Ogdensburg, New York,* 45 RR 2d 763, 764 (1979). Thus, determination of reimbursements costs can only be made "eventually, at the conclusion of both the rulemaking and subsequent application proceedings, at which time the beneficiary of the channel change can be determined." First Christian concludes that Boyer's request for present relief should be denied.

9. Based on the information above, we believe that each of the petitioners has shown that the public interest would be served by a grant of their requests. Further, we find that each of the allotment requests can be accommodated and thus comparative consideration of the competing proposals is not necessary. A Commission engineering analysis reveals that Channel 244C3 can be allotted to Albia in lieu of Channel 260C3, thereby permitting the allotment of a Class C3 channel to each community. Therefore, we will allot Channel 244C3 at Albia and Channel 260C3 at New Sharon, since this action would provide both Albia and New Sharon with their first local FM transmission service. In order to obtain the allotment at Albia, we will also change Station KMEM(FM), Memphis, Missouri, from Channel 244A to Channel 263A. Channel 244C3 can be allotted to Albia in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[6] Channel 260C3 can be allotted to New Sharon with a site restriction of 17.4 kilometers (10.8 miles) south to avoid short-spacings to the construction permit for Station KFMH, Channel 259C1, Muscatine, Iowa, and Station KLYF, Channel 262C, Des Moines, Iowa.[7] Channel 263A can be allotted to Memphis at Station KMEM(FM)'s licensed site.[8]

10. Pursuant to Commission policy, reimbursement of Station KMEM(FM) by the ultimate permittee of Channel 244C3, Albia, for the reasonable costs of changing its frequency will be required and governed by *Circleville, Ohio, supra.* We believe any delay to negotiate a reimbursement agreement is premature at the allotment stage, as at this time, no applications have been filed for the Albia channel. However, once a permit has been granted, we expect parties to negotiate in good faith, subject to Commission review in the event of disagreement. *See Mayfield and Wickliff, Kentucky,* 48 RR 2d 1232 (1981). Finally, we note that Station KMEM(FM) need not take steps to change frequency until it is assured that it will receive payment. *See Churchville and Luray, Virginia,* 5 FCC Rcd 1106 (1990), *recon. denied,* 6 FCC Rcd 1313 (1991).

11. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 3, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Albia, Iowa	244C3
New Sharon, Iowa	260C3
Memphis, Missouri	263A

12. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Boyer Broadcasting Company, Inc. for Station KMEM(FM), Channel 244A, Memphis, Missouri, IS MODIFIED to specify operation on Channel 263A in lieu of Channel 244A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KMEM(FM)'s license, BLH-820412AN, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-820412AN, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

13. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the following:

Boyer Broadcasting
Company, Inc.
P.O. Box 135
Memphis, Missouri 63555

Eugene T. Smith, Esq.
715 G Street, S.E.
Washington, D.C. 20003

14. The window period for filing applications for Channel 244C3 at Albia, Iowa, and for Channel 260C3 at New Sharon, Iowa, will open on **February 4, 1992,** and close on **March 5, 1992.**

15. IT IS FURTHER ORDERED, That the proposal filed by H&H Broadcasting Corporation (RM-7301) IS DISMISSED.

16. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

17. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. Questions relating to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

---

[6] The coordinates for Channel 244C3 at Albia are North Latitude 41-04-42 and West Longitude 92-48-12.

[7] The coordinates for Channel 260C3 at New Sharon are North Latitude 41-18-49 and West Longitude 92-40-20.

[8] The coordinates for Channel 263A at Memphis are North Latitude 40-29-59 and West Longitude 92-09-58.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-279

In the Matter of

Amendment of Section 73.202(b), RM-7808
Table of Allotments,
FM Broadcast Stations.
(Belle Plaine, Kansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 11, 1991; Released: December 19, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 5619 (1991), issued in response to a petition filed by Belle Plaine Broadcasters, Inc. ("petitioner"). The *Notice* proposed the allotment of Channel 224C3 to Belle Plaine, Kansas, as that community's first local service. Petitioner filed comments reaffirming its interest in the allotment of Channel 224C3 at Belle Plaine. No other comments were received.[1]

2. We believe the public interest would be served by alloting Channel 224C3 to Belle Plaine, Kansas, as it will provide the community with its first local service. Channel 224C3 can be allotted to Belle Plaine, Kansas, in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 17.5 kilometers (10.9 miles) southwest of the community.[2] The site restriction will prevent a short spacing with Station KOEZ, Channel 221C1, Newton, Oklahoma and Station KBEZ, Channel 225C1, Tulsa, Oklahoma.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 3, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Belle Plaine, Kansas	224C3

4. The window period for filing applications will open on **February 4, 1992,** and close on **March 5, 1992.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

---

[1] Sheldon Communications, Inc., proponent of a petition for rule making in MM Docket 91-276, Belton, Texas, inadvertently referenced this proceeding in its comments for Belton. The comments have not been considered in this proceeding.

[2] The coordinates for Channel 224C3 at Belle Plaine are 37-20-15 and 97-27-56.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-278

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Minneapolis, Kansas)	RM-7809

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 11, 1991; Released: December 19, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 5580 (1991), proposing the substitution of Channel 224C2 for Channel 224A at Minneapolis, Kansas, and modification of the construction permit for Station KILS, Channel 224A, accordingly. The *Notice* was issued in response to a petition filed by Belinda S. Ohlemeier ("petitioner"). Petitioner filed comments restating her interest in the allotment at Minneapolis. No other comments were received.

2. We believe the public interest would be served by substituting Channel 224C2 for Channel 224A at Minneapolis, Kansas, in order to provide the community with a wide coverage area station. As indicated in the *Notice*, Channel 224C2 can be allotted to Minneapolis consistent with the Commission's spacing requirements at petitioner's specified site.[1] We will authorize a modification of petitioner's construction permit for Station KILS, Channel 224A, to specify operation on Channel 224C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 3, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Minneapolis, Kansas	224C2

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station WILS, Minneapolis, Kansas, IS MODIFIED to specify operation on Channel 224C2 in lieu of Channel 224A, subject to the following conditions:

> (a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.
>
> (b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.
>
> (c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Belinda S. Ohlemeier, permittee of Station WILS, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

---

[1] The coordinates for Channel 224C2 at Minneapolis are 39-00-52 and 97-37-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-508

In the Matter of

Amendment of Section 73.202(b),	RM-6975
Table of Allotments,	RM-7268
FM Broadcast Stations.	
(Gilchrist and Crystal Beach, Texas)[1]	

REPORT AND ORDER

Adopted: December 11, 1991; Released: December 19, 1991

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making* in this proceeding, 4 FCC Rcd 8145 (1989) (*"Notice"*), issued at the request of James Owens, d/b/a Gilchrist Community Broadcasting Co., Inc. ("GCB"). The *Notice* proposed that Channel 268C3 be allotted to Gilchrist, Texas, as that community's first local transmission service. A counterproposal was timely filed by Harbor Broadcasting Inc. ("Harbor"), proposing that Channel 268C3 be allotted to Crystal Beach, Texas, as that community's first local transmission service.[2] Harbor filed reply comments in response to the public notice accepting its counterproposal. No comments were filed by GCB or any other party expressing a continuing interest in the proposed Gilchrist allotment.

2. As stated in the *Notice,* a showing of continuing interest is required before a channel will be allotted. It is the Commission's policy to refrain from making an allotment to a community absent an expression of interest. Therefore, since no expression of interest in the allotment of Channel 268C3 at Gilchrist, Texas, was filed by GCB or any other party, we shall dismiss GCB's proposal to allot Channel 268C3 to Gilchrist, Texas. *See, e.g., Joshua Tree, California,* 54 FR 18557, May 1, 1989, *Senatobia, Mississippi,* 3 FCC Rcd 4000 (1988), and paragraph 2 of the Appendix to the *Notice.*[3]

3. With the dismissal of GCB's petition, the only proposal before us is Harbor's counterproposal to allot Channel 268C3 to Crystal Beach, Texas. This community is listed in the 1980 U.S. Census with a population of 776 persons and is incorporated. *See 1991 Rand McNally Commercial Atlas* at 520. As a result, its community status can be presumed. *See Revision of FM Assignment Policies and Procedures,* 90 FCC 2d 88, 101 (1982) and cases cited *supra* at note 3.

4. We believe that the public interest would be served by allotting Channel 268C3 to Crystal Beach because this would provide the community with its first local aural service. Channel 268C3 can be allotted to Crystal Beach in compliance with the Commission's minimum distance separation requirements with a site restriction of 14.2 kilometers (8.8 miles) east of Crystal Beach.[4]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 3, 1992,** the FM Tables of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Crystal Beach, Texas	268C3

6. The window period for filing applications for Channel 268C3 at Crystal Beach will open on **February 4, 1992,** and will close on **March 5, 1992.**

7. IT IS FURTHER ORDERED, That the petition for rule making (RM-6975) filed by James Owens, d/b/a Gilchrist Community Broadcasting Co., Inc., IS DISMISSED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Belford V. Lawson, III, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

---

[1] The community of Crystal Beach, Texas, has been added to the caption.

[2] Public notice of Harbor's counterproposal was given on February 6, 1990, Report No. 1807.

[3] Even if GCB or any other party had timely filed comments expressing a continuing interest in the allotment of Channel 268C3 to Gilchrist, Texas, we could not make the allotment because there is an insufficient factual basis for determining that Gilchrist is a community for allotment purposes. In this regard, we note that the *Notice* in this proceeding did not raise a community issue because GCB had indicated in its petition that Gilchrist is listed in the U.S. Census and because community status is generally presumed if a community is listed in the U.S. Census or is incorporated. However, we subsequently determined that Gilchrist is not listed in the 1980 U.S. Census and is not incorporated. *See 1991 Rand McNally Commercial Atlas* at 522. As a result, additional information would have been necessary to determine that Gilchrist has the social, economic, cultural, or governmental indicia to qualify it as a community for allotment purposes. *See, e.g., Oak Grove, Florida,* 5 FCC Rcd 3774 (1990); *Hannibal, Ohio,* 5 FCC Rcd 3315 (1990), *Statenville, Georgia,* 5 FCC Rcd 2685 (1990); *Columbia, California,* 5 FCC Rcd 2003 (1990); and *Beaver Springs, Pennsylvania,* 4 FCC Rcd 5373 (1989).

[4] The coordinates for Channel 268C3 at Crystal Beach are 29-30-25 and 94-30-17.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-651

In the Matter of

Amendment of Section 73.202(b), RM-7544
Table of Allotments,
FM Broadcast Stations.
(Bald Knob and Clarendon, Arkansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 11, 1991; Released: December 19, 1991

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 6 FCC Rcd 267 (1991), issued in response to a petition filed by Capps Radio Company ("petitioner"), licensee of Station KKSY(FM), Bald Knob, Arkansas, proposing the substitution of Channel 296C3 for Channel 296A at Bald Knob, and modification of its license accordingly. Additionally, the *Notice* proposed the substitution of Channel 281A for Channel 297A at Clarendon, Arkansas, and modification of the construction permit issued to B and H Broadcasting Company ("B&H") for Station KXRC(FM), as requested by petitioner to accommodate its proposal. Petitioner filed supporting comments in response to the *Notice*. B&H filed comments and a counterproposal.[1] as well as reply comments. No other comments were received.

2. As stated in the *Notice*, the site petitioner specified for requested Channel 296C3 at Bald Knob is located 22.8 kilometers (14.2 miles) southwest of the community. Since the Commission, in rule making proceedings, assumes compliance with the city-grade coverage requirements of Section 73.315 of the Commission's Rules if the site restriction does not exceed 23.2 kilometers (14.4 miles), petitioner provided engineering studies indicating that with an average terrain of 244 feet (74.3 meters), Station KSSY(FM) could operate at 25 kW with an antenna height above average terrain of 100 meters. According to petitioner, that combination would extend the 70 dBu contour of Channel 296C3 a distance of 24.5 kilometers (15.2 miles) towards Bald Knob.

3. Although the prediction of city-grade coverage based upon an analysis of the actual terrain characteristics along specific radials could be used for this proposal,[2] since the specified site for Channel 296C3 is located at the outer limits for a Class C3 operation, petitioner was requested to provide a map demonstrating that compliance with the requirements of Section 73.315 of the Commission's Rules could be met from its specified site. Additionally, petitioner was requested to provide additional information evidencing that affirmative measures had been taken to obtain a commitment from the owner of the proposed site that it would be able to purchase or lease the intended site, and to obtain FAA approval for a tower at that location.

4. In response to the *Notice*, petitioner advises the site specified in its proposal calculated that the city grade contour would extend one mile beyond the Bald Knob city reference coordinates. However, petitioner subsequently discovered that the city limits of Bald Knob have been extended slightly to include a small strip of land to the north. As a result, petitioner advises that the entire city limits are not within the 70 dBu contour of its specified site. Therefore, petitioner reevaluated its proposal and determined that the reference site could be relocated to an area 23 kilometers (14.3 miles) southwest of the community.[3] Petitioner advises that the average terrain elevation at the amended site is 84.9 meters. Further, petitioner states that on a bearing of 53 from its revised site, the 70 dBu signal would extend 25.2 kilometers.[4] Since it is assumed that a Class C3 allotment will provide a 70 dBu contour over the entire community where the transmitter is located no greater than 23.2 kilometers (14.4 miles) from the farthest boundary of the community, petitioner asserts that its proposal would

---

[1] B&H's counterproposal is substantively and procedurally defective and was not placed on public notice. B&H requests the substitution of Channel 297C3 for Channel 297A at Clarendon and modification of its construction permit to specify operation on the higher powered channel. In order to accommodate its request, B&H requests the modification of Station KKSY(FM) at Bald Knob to nonadjacent Channel 289C3, without indicating the availability of an additional equivalent Class C3 channel. However, Station KKSY(FM) could not have been modified as suggested by B&H in the event competing expressions of interest were received for Channel 289C3. *See Fort Bragg, CA*, 6 FCC Rcd 5812 (1991). Moreover, B&H's counterproposal failed to state its commitment to reimburse Station KKSY(FM) for the costs associated with the requested modification, as required by Commission policy. *See Lonoke, AR*, 6 FCC Rcd 4861 (1991), and cases cited therein. B&H's counterproposal would also require the petitioner to relocate its site for Station KKSY(FM) at Bald Knob to accomodate its proposal at Clarendon. Absent a statement from an affected permittee or licensee, it is Commission policy not to require a station to involuntarily relocate its transmitter to accomodate another proposal. *See Claremore, OK*, 2 FCC Rcd 5921 (1987), *recon. and rev. denied*, 4 FCC Rcd 2181 (1989).

B&H's counterproposal also neglected to include a certificate of service indicating compliance with the requirements of Sections 1.401(d) and 1.420 of the Commission's Rules, as well as paragraph 4 of the Appendix to the *Notice*. B&H subsequently attempted to cure the service and reimbursement requirements in its reply comments. However, the noted deficiencies in B&H's counterproposal are sufficient grounds to reject its proposal. Therefore, B&H's comments, counterproposal, and reply comments have not been accepted.

[2] *See Woodstock and Broadway, VA*, 3 FCC Rcd 6398 (1988).

[3] Coordinates at the revised site for proposed Channel 296C3 at Bald Knob are 35-11-10 and 91-46-13.

[4] Petitioner states that it based the average terrain and contour distance calculations on the NGDC 30 second terrain database and the Commission's F(50,50) curves (Section 73.333, respectively.

comply with the requirements of Section 73.315(a) of the Commission's Rules if Channel 296C3 is allotted at its revised site.[5]

5. A staff engineering analysis has determined that although the petitioner's engineering study is technically accurate, a terrain profile graph reveals that a terrain obstruction exists within the city limits of Bald Knob itself, which has the potential to cause shadowing of the 70 dBu signal to the northeastern section of the community. Specifically, the terrain within the Bald Knob city limits is of such a nature that a hypothetical antenna with a radiation center 100 meters above average terrain at the petitioner's revised site would be unable to provide the entire community with an unobstructed 70 dBu signal. Under these conditions, approximately 40% of Bald Knob would be unable to receive primary shadow-free city-grade coverage from the petitioner's revised transmitter site. We have determined that, at the petitioner's revised site, the average terrain elevation is 85.1 meters (279 feet) above mean sea level ("AMSL"). In order to provide line-of-sight coverage over the entire community, as required by Section 73.315 of the Commission's Rules, the radiation center of the antenna must be 365.1 meters AMSL. Therefore, a tower of 280 meters (918 feet) above the elevation of average terrain would be required at the petitioner's revised site.[6] Since the maximum height above average terrain for Class C3 facilities is 100 meters (328 feet), in this instance the ERP must be correspondingly reduced below the minimum specified for its class. *See* Section 73.211(b)(2) of the Rules. As a result, petitioner's proposed operation would be limited to 3.19 kW ERP. We find, therefore, that petitioner's showing is defective and cannot support its claim that a Class C3 station at its revised site would provide a shadow-free signal over Bald Knob. Since petitioner has failed to demonstrate the existence of a site that can provide line-of-sight service to the entire community, the proposal must be denied. *See e.g., Creswell, Oregon,* 3 FCC Rcd 4608 (1988), *recon. denied,* 4 FCC Rcd 7040 (1989) (an allotment will not be made in the absence of a reasonable assurance that a suitable site area exists from which a station could operate in accordance with the Commission's Rules).

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That the petition for rule making filed on behalf of Capps Radio Company (RM-7544) IS DENIED.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

---

[5] Petitioner's calculations of its proposed facility assume an ERP of 25.1 kW (14.0 dBk) and an antenna height above average terrain of 118 meters (387 feet) along the 53^0 radial.

[6] The ground level at the petitioner's revised site is 70 meters (230 feet) AMSL. Thus, in order to clear the terrain obstruction in Bald Knob, the tower must be 295.1 meters (968 feet) AGL at that site.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

MM Docket No. 90-373

In the Matter of

Amendment of Section 73.202(b), RM-7287
Table of Allotments,
FM Broadcast Stations.
(Cusseta, Georgia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 11, 1991; Released: December 19, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of Gary P. Albarez ("Albarez"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 5175 (1990), proposing the allotment of Channel 267A to Cusseta, Georgia, as the community's first local FM service. Albarez filed comments stating his intention to apply for the channel if allotted. William Culpepper ("Culpepper"), formerly an applicant and now permittee of Channel 267C2 at Chauncey, Georgia, filed opposing comments.[1]

2. Culpepper in his comments states that he will be required to amend his application for Channel 267C2 at Chauncey if this proposal is adopted, because the site proposed in his application is less than 165.6 kilometers from the coordinates proposed for Cusseta. Culpepper states that he has been informed by the Federal Aviation Administration ("FAA") that the proximity of the tower site proposed in his application to the Eastman Dodge County Airport is a hazard to air navigation. Culpepper notes that since the airport is only 5 kilometers south of its proposed site and Station WKTM's existing facility at Soperton, Georgia, would prevent it from moving to the east or northeast, it would have to move west or northwest to obtain a site meeting FAA criteria, and also permit construction of a maximum Class C2 facility station on Channel 267C2 at Chauncey. Culpepper contends that a move of his site west or northwest would be prohibited by the proposal to allot Channel 267A to Cusseta, because there would be no space available in which to find a site that would meet FAA approval.

3. Culpepper also contends that the geographic coordinates for the Cusseta allotment describe a site located approximately seven kilometers inside the closest boundary of the Fort Benning Military Reservation. Culpepper argues that there are no transmitter sites available off the base for a Channel 267A allotment at Cusseta from which such a station could meet the mileage restriction to the Chauncey allotment and the Commission's requirement that such a station provide city grade service to its community of license.

4. We have examined Culpepper's engineering statement and our analysis confirms that both the coordinates proposed in the *Notice* and the coordinates originally requested by petitioner for Cusseta would be on Fort Benning property. We have conducted an engineering analysis in an attempt to determine if there is an alternate channel available for allotment to Cusseta, or an alternate site for Channel 267A. We find that there are no fully spaced alternate sites for Channel 267A that would not be on the air force base. The underlying requirement for an allotment is the reasonable expectation that a useable site is available in compliance with the minimum spacing requirements. We will not allot a channel where a properly spaced site is technically infeasible. Although the Commission generally presumes in rule making proceedings that a technically feasible site is available, that presumption is rebuttable. *See San Clemente, California,* 3 FCC Rcd 6728 (1988), *appeal dismissed sub. nom. Mount Wilson FM Broadcasters, Inc. v. FCC*, 884 F.2d 1462 (D.C. Cir. 1989). We do not consider land on a military base to constitute an available site, as we believe it doubtful that permission would be granted for a transmitter site on a military base. Albarez has failed to rebut Culpepper's claim, and has provided no assurance of site availability. Therefore, since we are unable to find a fully spaced site that is not located on Fort Benning property, we will deny Albarez's petition.[2]

5. IT IS FURTHER ORDERED, That the Petition for Rule Making filed by Gary P. Albarez, IS DENIED.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

---

[1] Culpepper's construction permit (BPH-891206MI) has been conditioned on the outcome of this proceeding.

[2] Accordingly, we need not discuss Culpepper's site concerns.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Radio Tower at
Latitude 35^0 27'11" N
Longitude 86^0 08'20" W
(Manchester, Tennessee)

Owned by David Stiles
dba Procom Towers
Hixson, Tennessee

Order to Dismantle Tower

ORDER

Adopted: October 28, 1991; Released: December 19, 1991

By the Commission:

I. INTRODUCTION

1. By this action the Commission directs the owner of the above-captioned tower, located in Manchester, Tennessee, to dismantle the tower because it is not marked or lighted as required by the Commission's Rules and the Federal Aviation Administration (FAA) has declared the tower to be a hazard to air navigation. The Commission, therefore, orders the owner to dismantle and remove the tower pursuant to Section 303(q) of the Act, 47 U.S.C. § 303(q).

II. BACKGROUND

2. The tower is 755 feet above average ground level and was formerly licensed to FM Broadcast Station WKQD, now WHVK. It has not been used as a transmitter tower by the station since April 30, 1990, when the station began authorized operation from a tower at a different location. At some undetermined time prior to September 21, 1990, the local electrical company ceased supplying power to the tower site. There are no other licensees using the tower for radio transmission.

3. Section 303(q) of the Act, 47 U.S.C. § 303(q), states, in pertinent part, "In the event that the tower ceases to be licensed by the Commission for the transmission of radio energy, the owner of the tower shall maintain the prescribed painting and/or illumination of such tower until it is dismantled, and the Commission may require the owner to dismantle and remove the tower when the administrator of the Federal Aviation Agency determines that there is a reasonable possibility that it may constitute a menace to air navigation."

4. On September 21, 1990, the Federal Aviation Administration (FAA) Flight Service Station in Nashville, Tennessee, issued a Notice to Airmen (NOTAM) concerning the tower. A NOTAM is a special written advisory to aircraft pilots regarding a hazard, potential hazard, or other matter of which they should be aware. The NOTAM in this instance contains a statement that a, "helicopter almost hit this tower last night." On September 27, 1990, the Commission's Atlanta Field Office sent a letter to the owner of the tower, Procom Towers (Procom) requesting to be advised of actions taken to maintain lighting of the tower. Having received no response to this letter, a Commission field investigator in the vicinity on November 27, 1990, inspected the tower and found it to be unlighted and unpainted. A further letter was sent on December 1, 1990, insisting on a response to the previous letter. On December 13, 1990, a citation was issued meeting the requirements of Section 503(b) of the Act in anticipation of a forfeiture proceeding. On that same day a telephone call was received from Procom advising of financial inability to restore lighting to the tower. A series of telephone calls and facsimile messages ensued during which Procom advised of its efforts to provide some lighting to the tower, although not the type prescribed by the Commission.

5. The FAA issued a letter on April 4, 1991, determining the tower to be a hazard to air navigation and advising the former licensee that it must be painted and lighted. The tower owner has been informed of the FAA determination. The Commission again inspected the tower on April 16, 1991, and found that it was unpainted with a continuously burning white light at the top and a continuously burning red light one-third of the way down. This lighting is not in accordance with lighting requirements prescribed by the Commission or Section 17.29 of the Commission's Rules which requires a beacon and two lamps at the top, beacons within the tower at the one-third and two-thirds levels, and lamps on the outside corners of the tower at the one-sixth, one-half, and five-sixths levels.

III. DISCUSSION

6. The facts are undisputed. The FAA has determined that the tower is a hazard to air navigation. It is not marked and lighted as required by the former station license, the Commission's Rules, or FAA recommendations. There are no licensees on the tower and have not been for a considerable amount of time. The owner of the tower has not complied with its responsibility under the Act to maintain the tower lighting and has indicated it will be unable to do so in the future. In these circumstances, the tower constitutes a continuing danger to air safety and should be dismantled. Therefore, we hereby exercise the authority granted to us under Section 303(q) of the Act and direct the owner to dismantle and remove it.

IV. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED THAT the owner of the tower structure 755 feet above average ground level at latitude 35^0 27'11" N and longitude 86^0 08'20" W dismantle and remove it within 60 days.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy,
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-331

In re Applications of

Montgomery County Media Network, Inc., et al., d/b/a IMAGISTS	File No. BPCT-841129KF
CARMEN MATIAS and ANDREW N. WIMBISH, Jointly	File No. BPCT-841129KK
WOOD BROADCASTING COMPANY	File No. BPCT-841129KW
G - A COMMUNICATIONS, INC.	File No. BPCT-841129LE

For Construction Permit for
New UHF Television Station,
Conroe, Texas

Appearances

James L. Oyster, Esq. on behalf of Montgomery County Media Network, Inc. et al, d/b/a Imagists; *Ann C. Farhat, Esq.* and *Howard W. Simcox, Esq.* on behalf of Carmen Matias and Andrew N. Wimbish, Jointly; *Mark N. Uhlfelder, Esq., Mark F. Corriea, Esq., Howard G. Stavit, Esq.* and *Philip V. Jackmauh, Esq.* on behalf of Wood Broadcasting Company; *Donald E. Martin, Esq.* and *Spencer W. Weisbroth, Esq.* on behalf of G-A Communications, Inc.; and *Robert A. Zauner, Esq.* on behalf of the Mass Media Bureau.

DECISION

Adopted: November 27, 1991; Released: December 23, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Member ESBENSEN:

1. Now before the Review Board are the *Supplemental Initial Decision*, 6 FCC Rcd 2963 (1991) (S.I.D.), and the *Initial Decision*, 3 FCC Rcd 6710 (1988) (I.D.), of Administrative Law Judge Edward Luton (ALJ). Also before us are the Exceptions of G-A Communications, Inc. (G-A) to the S.I.D., a "Statement in Support" of the S.I.D. filed by Carmen Matias and Andrew N. Wimbish (Matias/Wimbish), and replies thereto filed by the Commission's Mass Media Bureau (Bureau) and Matias/Wimbish. All the remaining captioned parties filed Exceptions and appropriate replies to the I.D.

2. The proceeding below was ultimately heard on the following (renumbered) issues (I.D., at paras. 1-2, 5-6):

> 1. To determine whether the applications of G-A Communications, Inc. and Carmen Matias and Andrew N. Wimbish, Jointly are consistent with the minimum mileage separation requirements of Section 73.610 of the Commission's Rules and, if not, whether circumstances exist which would warrant a waiver of the Rule.
>
> 2. To determine with respect to each of the applicants, whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.
>
> [3]. To determine whether Wood Broadcasting Company is financially qualified to construct and operate its proposed television station in Conroe, Texas.
>
> [4]. To determine whether G-A has failed to disclose a real party-in-interest to its application.
>
> [5]. To determine the effect of the evidence adduced under [4] above on the basic qualifications of G-A to be a Commission licensee.
>
> [6]. To determine the areas and populations which would receive television service of 64 dBu (Grade B) or greater intensity, together with the availability of other Grade B television services in such areas, for the purpose of determining whether a comparative preference should accrue to any of the applicants.
>
> [7]. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> [8]. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

3. Subsequent to our initial review of the record and the hearing of oral argument (on March 3, 1989), the Board was compelled to remand this proceeding on the following basic qualifications issue specified against G-A. *See Imagists*, 4 FCC Rcd 3749, 3752 (Rev. Bd. 1989):

> [9]. To determine whether JoAnn Garcia lied to, misrepresented facts to, or lacked candor with the Commission in the Blanco, Texas comparative television (Channel 52) proceeding (MM Docket No. 85-269), *Opal Chadwell*, 1 FCC Rcd 120 (ALJ 1986) (*Initial Decision)*, 2 FCC Rcd 5502 (Rev. Bd. 1987), (*Decision), on review*, 65 RR 2d 1498 (1989); and, if so, the effect thereof on the basic qualifications of G-A Communications, Inc. to be a Commission licensee.

4. In remanding this proceeding, the Board noted that the ALJ had resolved Issues [4] and [5], *supra*, in G-A's favor in the I.D. (at paras. 140-143). Nevertheless, we recounted that (4 FCC Rcd at 3749):

> [T]he real-party-in-interest issue herein had its genesis in the earlier proceeding of *Opal Chadwell*, 2 FCC Rcd 5502 (Rev. Bd. 1987), *remanded on other grounds*, 65 RR 2d 1498 (1989). There, applicant Dorothy O. Schulze and Deborah Brigham, A General Partnership (Schulze and Brigham) faced an issue to determine whether it misrepresented or had lacked candor in reporting the television broadcast applications of Schulze. In response to the specific allegation that Schulze had failed to report her ownership interest in the instant G-A application for Channel 55 in Conroe, Texas, Schulze and Brigham relied, in part, in the declaration of JoAnn Garcia, president and sole voting stockholder of G-A. Garcia testified in the *Opal Chadwell* proceeding that she did not previously know Schulze, and had never contemplated having her as a party to G-A's application. However, the ALJ in that proceeding disbelieved the testimony of both Schulze and Garcia, as well as that of Richard Ozan, the brother of both Schulze and G-A's purported sole non-voting (80% equity) stockholder, Elizabeth Anderson. Instead, the *Opal Chadwell* ALJ disqualified Schulze and Brigham for misrepresentation, finding (*inter alia)* that Ozan had filed a number of television applications -- including the instant G-A application -- using various females as false fronts. In reaching that determination, the *Opal Chadwell* ALJ specifically found that Garcia's testimony about her own participation in the instant G-A application was a "web of lies." *Opal Chadwell*, 1 FCC Rcd 120, 126 (ALJ 1986). Subsequently the Board affirmed the ALJ's disqualification of the Schulze and Brigham applicant, holding that the "case turns on the patently misleading testimony presented by Schulze . . . and Garcia concerning their purported extensive participation in the preparation and prosecution of the applications and the absence of any meaningful participation by Richard Ozan." *Opal Chadwell*, 2 FCC Rcd at 5509.

5. Before returning this proceeding to the ALJ, the Board requested the parties to file supplemental briefs addressing the question of the applicability of the doctrine of collateral estoppel to the real-party-in-interest issue. *See Memorandum Opinion and Order*, 4 FCC Rcd 2609 (Rev. Bd. 1989). The applicability of this doctrine was negatively resolved in our remand *Order*, 4 FCC Rcd at 3751, and we there further observed:

> Despite the established inapplicability of collateral estoppel here, we must now address the residual question of whether Garcia did, in fact, lie as a witness in the *Opal Chadwell* proceeding; and, if so, what effect such misrepresentation has upon G-A's basic qualifications to be a licensee. *See generally Character Policy Statement*, 102 FCC 2d 1179, 1188-1191, 1195-1196, 1210-1211, 1227-1229 (1986). In the Conroe I.D., paras. 107-125, 140-143, the ALJ reviewed the testimony of Garcia and former G-A counsel, Thomas L. Root. In essence, Garcia testified that she was the sole active "real party" behind G-A's application, and that Richard Ozan (brother of G-A's purported limited partner Elizabeth Anderson) had no role whatsoever in prosecuting the application. Root testified that he did not recall whether or not he had certain conversations with Garcia, Ozan, and Anderson, and he claimed he did not recall the content of those conversations and various other important matters concerning the application. The ALJ found Garcia's testimony "believable," and resolved the real-party-in-interest issue favorably to G-A. *Id.*, para. 143. Garcia's Conroe testimony was essentially replicative of the testimony she gave in the *Opal Chadwell* proceeding, which testimony was found in that *Initial Decision* to be a "web of lies." and wholly refuted by contrary testimony given by Root, Ozan, and Ron Baptist. *Opal Chadwell*, 1 FCC Rcd at 124-126. The Commission cannot blithely ignore an obvious negative "predicative judgment[ ] relating to an applicant's propensity to deal honestly with the Commission and to comply with our rules and policies." *Character Policy Statement*, 102 FCC 2d at 1232. Therefore, we shall remand this proceeding to the presiding ALJ on an issue to determine whether, in the *Opal Chadwell* proceeding, Ms. Garcia lied as a witness; and, if so, the effect thereof upon G-A's basic qualifications to be a licensee. Because, as noted above in paragraph 2, the *Opal Chadwell Decision* found that Richard Ozan ran an "application mill" of which the instant G-A application appeared to be a product, and the existence of the "mill" was reconfirmed at oral argument by G-A's current counsel, we invite the Commission's Mass Media Bureau to participate fully in the remanded proceeding in order to protect the integrity of the Commission's processes. *See generally Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301) (Gen. Docket No. 88-328), Report and Order*, FCC 89-110, released April 20, 1989; *Inquiry Into Alleged Abuses of the Commission's Processes*, 3 FCC Rcd 4740 (1988).

In his S.I.D., the ALJ resolved Issue [9] against G-A and found that applicant unqualified to be a Commission licensee. It is to that issue, and the application of G-A, that the Board first turns.

G-A COMMUNICATIONS, INC.

6. The hearing on the remanded issue was held on November 7, 1989. The sole witnesses called by G-A were JoAnn Garcia, Dr. Emil Farge,[1] and Perla Rosse-Racine.[2] These latter two were called only as character witnesses on behalf of Garcia.

7. In his S.I.D., the ALJ recounted that Garcia testified that she first became aware of the opportunity to file an application for Conroe during a party that she attended at the home of one Elizabeth Anderson. Tr. 1771. Garcia claimed that she thereafter telephoned the Commission to learn more about the channel, and was purportedly told that a lawyer might be necessary, and that an applicant would have to acquire certain equipment to put the station on the air. Tr. 1776. Garcia testified that she thereafter received an application form and instructions for its use from the Commission as a result of her call. Upon receiving these materials, Garcia sought help from Anderson concerning completion of the form, and she also sought Anderson's help in obtaining legal counsel. Subse-

quently, Anderson provided Garcia with the name of Thomas L. Root, whose name Anderson had obtained from her brother, Richard Ozan. S.I.D., paras. 11, 13.

8. Richard Ozan (also the brother of Dorothy Schulze, a principal in the Conroe, Texas proceeding), has had an interest in television allotments in Texas as investment vehicles for his sisters, and this interest was further expressed to Ronald Baptist and Thomas Root. Matias/Wimbish Exh. 2A; Tr. 2043-45. Baptist, who also testified earlier in the Conroe, Texas, proceeding on June 5, 1986, there described himself as a "middle man" who merely found broadcast applicants for attorneys and engineers in exchange for a payment. Matias/Wimbish Exh. 11A; Tr. 2198. Baptist testified that he would "line up a job," and then "sub out the work," usually to Thomas Root with whom he worked "99% of the time." Matias/Wimbish Exh. 11A; Tr. 2198. Baptist also said that he received "cutoff lists" which specified filing deadlines for television applications in various markets. Matias/Wimbish Exh. 13A; Tr. 2225. Further, when Baptist received a "cutoff list," he would either forward the list to Ozan, or telephone Ozan and describe the available markets and the filing deadlines. If an application was filed for a particular market, Baptist would receive a payment of $2,000.00. Matias/Wimbish Exh. 12A; Tr. 2216. Through Baptist, Ozan learned of the Conroe (and San Antonio, Texas) channels and told his sisters (Anderson and Schulze) about them. Matias/Wimbish Exh. 2A; Tr. 2041. He advised his sisters to "get someone that they were comfortable with and was a competent person to go into partnership of sorts." Tr. 2042. Baptist also testified that he worked with Ozan on applications for Conroe, Texas; San Antonio, Texas; Fort Worth, Texas; Memphis, Tennessee; Charleston, South Carolina; Castle Rock, Colorado; Omaha, Nebraska; and Tolleson, Arizona. Baptist testified that Ozan was the only person he ever received payment from with respect to his work on any of these applications. Matias/Wimbish Exh. 12A; Tr. 2209, 2213-14; Exh. 14A; Tr. 2232-33; S.I.D., paras. 20-24.

9. In any event, Garcia testified that she personally telephoned Thomas Root in September or October of 1984 to inquire about the steps needed to be taken in pursuing the Conroe, Texas frequency. Tr. 1754. She claimed that it was not her purpose to, nor did she, hire Root at that time. Tr. 1779. Consequently, she claimed, Root's fees were not discussed, and she was "not even sure" that she would pursue the Conroe application. Tr. 1779-81. However, it must be recalled that in the *Blanco, Texas* proceeding, Garcia explicitly testified that she had, in fact, hired Thomas Root in September or October of 1984 during the first telephone call she claimed she made to him. G-A Exh. 11; Tr. 1738; S.I.D., paras. 14, 17.

10. In the instant proceeding, even though Root purportedly had *not* been hired by her, Garcia claimed that in approximately early October 1984 Root sent her an application, a questionnaire, and a cover letter "asking me to -- look at them and answer any questions that I could to the best of my ability, and to send it back to him." Tr. 1780. These materials did not include a retainer agreement; in fact, at the time she received these materials, Garcia claimed that she remained uncertain about whether she would pursue the Conroe application. Nevertheless, Garcia testified that she filled the forms out and returned them to Root's office. Tr. 1781. When she sent the completed forms to Root, she did so with the expectation that he would incorporate the information she provided into a "legal document" of some kind, and that Root would charge her for such services (but she had no idea of how much those charges would be). Tr. 1781-82.

11. Garcia then claimed that on the morning of November 27, 1984, she received a prepared application from Root for her signature containing the information she had provided. She reviewed the application and discovered that it contained "certain mistakes," and called Root that same day to discuss these "mistakes." After having done so, and after having received Root's affirmative assurances, she signed the application and returned it to Root. G-A Exh. 11; Tr. 1740-45. At some indistinct point, Garcia apparently concluded that she had in fact hired Root because, she testified, she subsequently fired him when she discovered that Root had failed to file an engineering amendment which she had signed and returned to him for filing. G-A Exh. 4, p. 22; G-A Exh. 11; Tr. 1771-2. Subsequently, upon the recommendation of Anderson's brother, Richard Ozan, Garcia hired G-A's current counsel (Donald Martin) in September 1985. G-A Exh. 4, p. 5; S.I.D., paras. 15-17.

12. Garcia also testified that it was her idea to set up the G-A corporation with voting and non-voting stock, and that she alone decided what the equity division should be between herself and Anderson. Tr. 1755, 1788-89, 1815. The division of equity was based upon the estimated value of Garcia's time against Anderson's promise to contribute the necessary funds. Tr. 1810-11. Thus, in G-A's application, Garcia is represented as owning 100% of G-A's voting stock. The application further discloses that the applicant corporation would issue non-voting stock, 80% of which would be issued to Anderson. Garcia is identified as the G-A's president, secretary and treasurer. Tr. 1788-89, 1810-11; G-A Exh. 4, p. 12.

13. However, the ALJ determined that the earlier testimony of Ozan and Root in this proceeding differed markedly from Garcia's version of the events. The ALJ noted that in early November 1984, Ozan informed Root that he knew of two persons who wanted to apply for the Conroe (and San Antonio) allotments. Root responded by a letter to Ozan dated November 7, 1984, transmitting to Ozan two blank applications as well as applicant questionnaires. Root instructed Ozan to have the questionnaires completed by "each of the proposed shareholders," and to have the application executed by "the President." Root also required that a check for $1,000.00 was to be returned with each signed application. Root advised Ozan about establishing an applicant checking account, making sure that each applicant was incorporated prior to the application filing date, and that in order to achieve "maximum integration credit," compliance with local corporate requirements must be maintained. During his testimony in the *Blanco* proceeding, Ozan testified that the blank applications he received from Root were to be used for Conroe and San Antonio because the filing deadlines were rapidly approaching. Matias/Wimbish Exh. 4A, Tr. 2071, 2073; S.I.D., para. 25.

14. Upon receiving Root's letter, Ozan said he either photocopied it and sent copies to each of his sisters, or he telephoned them and read the letter to them. In any event, the letter prompted Schulze to send Root the requested $1,000.00 retainer to "get the relationship going" for San Antonio. Ozan further expressly acknowledged a payment obligation to Ronald Baptist for his work performed on both the Conroe and San Antonio applica-

tions; Ozan viewed it as "an obligation that had been incurred on behalf of my family to Ron Baptist." Matias/Wimbish Exh. 5A; Tr. 2077; S.I.D., para. 26.

15. According to Ozan, the determination to have his sister, Anderson, become a non-voting shareholder in the Conroe applicant was based on advice received from Root, and that he knew when he received Root's November 7, 1984 letter that his sisters would be non-voting stockholders in the Conroe and San Antonio applications. Their minority partners would purportedly "run the corporation," and Ozan was aware that the reason the applications were structured this way was solely to enhance the applicants' integration preferences for minority participation. Matias/Wimbish Exh. 4A; S.I.D., para. 27.

16. Root testified in this proceeding on May 2, 1988 (and had also appeared as a witness in the *Blanco, Texas*, proceeding in 1986). In the instant proceeding, Root testified that in late 1984, he met with Ozan and Baptist in Washington to discuss the preparation of broadcast applications. Tr. 1424-25. Root and Baptist had worked together on various broadcast projects since 1982, with Baptist sometimes acting as a "consultant," and sometimes as an applicant. Tr. 1428. According to Root, Baptist introduced Root to Ozan at the meeting and indicated that Ozan had retained Baptist to work on some applications. Tr. 1468, 1494. Root also testified that in early 1984, Ozan informed him that two new applicants had decided "to go forward" in San Antonio and Conroe, Tr. 1432, and Ozan requested Root to begin the preparation of the necessary applications. Tr. 1433. In the *Blanco* proceeding, Root testified that Ozan supplied him with the information necessary to complete the application by telephone, Tr. 1485, 1509, and Root did not recall having acted upon the instructions of anyone other than Ozan in preparing the G-A application. Tr. 1513-14. Thus, prior to the filing of the G-A application, Root considered Ozan, rather than G-A, to be his client. Tr. 1500. Root said that he looked to Ozan for payment for his legal services, Tr. 1496-97, and could not recall how the application was sent to Garcia for her signature, and could not recall whether he ever sent her a blank application. Tr. 1437-38; S.I.D., paras. 27-30.

17. Also in the *Blanco* proceeding, Root testified that the ownership structure of G-A was decided upon in discussions he had with Richard Ozan. More specifically, it was Root's suggestion that the corporation issue non-voting stock, Tr. 1505-07, and Root testified that the information concerning the organization of the Conroe applicant came exclusively from Ozan. Tr. 1509. Also, Root testified that he ceased his representation of G-A because a broadcast station owner in Ohio, whom Root had previously represented, was a principal in another of the Conroe, Texas applications, and Root did not feel "comfortable" representing a competing applicant. Tr. 1470. Root suggested to Ozan that other counsel be retained to represent G-A and recommended G-A's current counsel, Donald Martin. Tr. 1471. Root testified that he had no recollection of Garcia firing him, and that he would have remembered such an event had it occurred. Tr. 1518-1520.

18. Given the significance of the foregoing, and the substantial conflicts in testimony, the ALJ's conclusions and specific credibility determinations are of major import (S.I.D., paras. 34-45; footnotes omitted):

> This case was remanded by the Review Board for a determination of whether JoAnn Garcia, the sole voting stockholder of G-A Communications, Inc., lied to, misrepresented facts to, or lacked candor with the Commission in testimony she gave as a witness in the *Blanco, Texas*, proceeding. Her testimony in the *Blanco* proceeding was similar to the testimony she provided in this proceeding.
>
> In the instant proceeding, as in the *Blanco* proceeding, Garcia testified that she was the primary mover behind the G-A application. She testified that it was she who initiated the process by telephoning the Commission and obtaining copies of the application form and other filing information. Garcia also claims that she was the person who determined that she would hold 20% of G-A's equity and Elizabeth Anderson the remainder. She also claims that it was she who hired G-A's attorney Thomas Root, and that it was she who fired him upon becoming disenchanted with with his services.
>
> The testmony given in the *Blanco* proceeding by Root, Ozan and Baptist is irreconcilable with that given by Garcia. Their *Blanco* testimony indicates that it was Ozan's decision to file certain television applications, for his sisters, among them *Conroe* and *San Antonio, Texas* ; that Ozan relied on Baptist to inform him of impending filing deadlines for various television markets; that Baptist's fee for providing that information was paid by Ozan; that Ozan informed Root of Ozan's interest in securing applications for Conroe and San Antonio; that Root advised Ozan to use a two stock corporate structure for the applications in order to achieve the best comparative case; that Root obtained the information necessary to prepare the application from Ozan; and, well after the application was filed, Root informed Ozan that he could no longer provide legal representation to G-A because of a conflict.
>
> In his *Initial Decision* (*Blanco ID)*, 1 FCC Rcd 120 (1986), Judge Walter C. Miller rejected Garcia's testimony regarding the circumstances of the filing of the Conroe application as "sheer fabrication" and a "web of lies." Judge Miller found that Garcia testified falsely about having hired Root to prepare the Conroe applications; about conversations with and information she claimed to have given Root for the Conroe application; and about having fired Root upon becoming dissatisfied with his services. Judge Miller found that the motive for Garcia's false testimony was her desire to help Richard Ozan's sister Dorothy Schulze out of the predicament Schulze found herself in in the *Castle Rock* proceeding.
>
> Much of Ms. Garcia's claimed involvement and participation in the G-A application concerns supposed contacts she had with Mr. Root. In the *Blanco* proceeding, Garcia testified that she hired Mr. Root as G-A's attorney in late September or early October 1984 when, by telephone, she spoke with him for the first time. In her later *Conroe* testimony, Ms. Garcia claimed that she did *not* hire Root as G-A's attorney during that first contact, but merely sought

information from him about what she needed to do to file an application and about "what kind of investment this was going to take." Tr. 1780.

This conflict in Garcia's testimony is no insignificant matter. If Garcia's *Blanco* testimony on the point could be found to be true, her claims of subsequent contacts with Root concerning the preparation and prosecution of G-A's application might be somewhat more believable. However, Garcia's contradicting testimony about the matter raises the question, not otherwise answered on this record, of just when she believes she hired Mr. Root. If the claimed hiring simply "evolved," as Garcia's *Conroe* testimony seems to suggest, it happened with Ms. Garcia in appalling ignorance of the financial charge to her for that hire (and this, with her having earlier been told that attorneys were "expensive" to hire). It also happened with Mr. Root hiring himself out to someone without knowing what that "client" would be willing to pay. Indeed, Garcia does not claim that she paid Root any money in connection with this alleged hiring. She testified that "the Andersons' paid Root directly."

Although Ms. Garcia claimed that she hired Root at the time of her first contact with him, she did not bother to discuss Root's fee, even though she, presumably, had earlier been impressed by the advice that lawyers were "expensive." Although she was not even certain that she wanted to pursue an application at the time, she nevertheless "hired" Root at the time of that first contact. After that first contact and as a result of it, and without any further contact having been made in the interim, Garcia claims she received a package from Root containing a blank application form, a questionnaire, and a cover letter -- but no retainer agreement. Even at this time, she continued to be uncertain about whether she wanted to pursue an application.

While some of the foregoing testimony may possibly be viewed as consistent with Garcia's later claim made in the *Conroe* proceedding that she did *not* hire Root during that first contact, such a claim runs headlong into Garcia's prior claim, made in the *Blanco* proceeding, that she hired Root at the time of her first contact with him. Garcia's unexplained contradictory testimony fails to establish that Root was hired by her during the first contact she claims to have had with him. That Garcia *never* hired Root is consistent with the corroborated testimony of Root, Ozan and Baptist; her claim that at some indeterminate time, and in some unspecific way, she hired Root as G-A's attorney is consistent only with the possibility that she may have repeated the claim on more than one occasion. Of the two versions of the facts presented, only the version presented by Root, Ozan and Baptist is corroborated, not only internally -- as all three of those witnesses presented virtually the same story -- but by other record evidence as well.

Garcia's testimony that she telephoned Root and then hired him is not believed. If Root is to be believed (and he is), it was Ozan who hired Root to prepare the application, not Garcia. Root's version is supported by the fact that by letter of November 7, 1984, he transmitted to Ozan (not Garcia) two blank application forms and questionnaires for use in the preparation of applications for the Conroe and San Antonio markets. The letter stated advice on the preparation of those applications and set forth the amount of Root's expected fee. In the letter, Root also advised Ozan with respect to corporate formalities and the manner in which to preserve maximum integration credit. Plainly, in Root's mind, he was dealing with Ozan on the Conroe application, and the letter corroborates the Root/Ozan/Baptist testimony regarding the attorney-client relationship between Ozan and Root. Ozan's testimony specifically supports Root's. Ozan testified that when he received the package of information from Root, he passed the information on to his sisters, one of whom was G-A's nonvoting stockholder, Elizabeth Anderson. Garcia misrepresented the facts surrounding the hiring of Root in both the *Blanco* and the *Conroe* proceedings. Ms. Garcia's claim that she, after considering the amount of effort she would have to put into the project, independently determined that she would be G-A's sole voting stockholder with a 20% equity interest and Anderson would be the sole nonvoting stockholder with an 80% equity interest, is not believed. The ownership structure of G-A was determined by Root and Ozan acting in concert. Root testified that it was Ozan who wanted a corporation and that it was he, Root, who suggested that the applicant have nonvoting stock. Ozan confirmed Root's testimony by testifying that the decision to make his sister a non-voting stockholder in G-A was based on Root's advice. None of this involved Ms. Garcia. Given the inherent improbability of Garcia's testimony about the matter, and the contrary testimony of Root and Ozan, it is concluded that Garcia misrepresented when she claimed that she was responsible for determining the ownership structure of G-A.

Contrary to her testimony, Garcia did not fire Thomas Root; she never hired him and he was never hers to fire. In dealing with the G-A application, Root dealt through Ozan. If Root had determined to cease his representation of G-A, he would naturally be expected to inform Ozan of that decision. It is Root's testimony that that is what he did, while recommending G-A's present counsel to Ozan at the time of his resignation. Root's testimony on the point is credited here, and Garcia's is rejected as untruthful. Root's testimony is bolstered by the fact that G-A's present counsel is the counsel who Root says he recommended to Ozan when he resigned his representation of G-A.

19. The ALJ ultimately concluded that JoAnn Garcia misrepresented facts to the Commission in her Blanco, Texas and her Conroe, Texas testimony concerning her alleged role in the preparation and prosecution of the

G-A application. As a result, G-A was determined to be unqualified to be a Commission licensee. The ALJ noted (S.I.D., para. 47):

> JoAnn Garcia's misrepresentations were not insignificant and were deliberately made; she had clear motives for testifying falsely in both the *Blanco* and the *Conroe* proceedings. In the *Blanco* proceeding, one of the questions presented was whether Dorothy Schulze, a sister of Richard Ozan, had an interest in the G-A application. With the G-A application thus in question, Ms. Garcia, who presents herself as G-A's sole voting shareholder, had an interest in showing that she was a real-party-in-interest in that application. She sought to do this by claiming an active role in the preparation and prosecution of the G-A application, performing those tasks which would be expected of a corporation's sole voting shareholder. By necessity, she had to try to maintain the pose in her later *Conroe* testimony.

20. In its Exceptions, G-A claims that the ALJ erred by "ignoring" the preponderance of evidence which demonstrated that Garcia was "truthful" at all times in her representations made to the Commission. Additionally, G-A argues that the ALJ further committed error by concluding: (1) that Garcia's testimony was inconsistent; (2) that Garcia's *Blanco* and *Conroe* testimony were in conflict; and, (3) that the testimony of Root and Baptist was to be believed over that of Garcia. Finally, G-A claims that it was error for the ALJ not to draw conclusions concerning the testimony of Garcia's character witnesses; for considering the findings concerning G-A and Garcia in the *Opal Chadwell* proceeding, and admitting into evidence "irrelevant" testimony from that proceeding. Matias/Wimbish (the winner below), and the Commission's Mass Media Bureau fully support the ALJ's determination in the S.I.D. that G-A is unqualified to be a Commission licensee.

21. We hold that the ALJ's conclusions are appropriate and well-supported by the preponderance by record evidence. It is clear that Garcia was not "truthful" at all times in her representations made to the Commission, and the ALJ's carefully researched and explicated findings of fact reveal that Garcia's testimony was, indeed, inconsistent and in conflict in both the *Blanco* and instant proceeding. Furthermore, our remand *Order* specifically contemplated the comparison of Garcia's testimony in this and the *Opal Chadwell* proceeding, and thus it was not error for the ALJ to do so. Indeed, in remanding this proceeding, we specifically noted that Garcia's Conroe testimony was "essentially replicative" of her *Blanco* testimony. *See* 4 FCC Rcd at 3751. With respect to the ALJ's consideration of the prior Ozan/Baptist/Root testimony, the facts they presented go to the heart of the remand issue. Further, their testimony, as the ALJ found, is not only internally corroborated, it is supported by documentary evidence in this proceeding.

22. We have held that a mandatory element to find misrepresentation is a motive or intent to deceive. *Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 1137 (Rev. Bd. 1982), *modified*, 93 FCC 2d 127, 129 (1983); *Old Time Religion Hour, Inc.*, 95 FCC 2d 713, 723 (Rev. Bd. 1983), *recon. denied*, 96 FCC 2d 551 (Rev.Bd. 1984). In considering the conflicting testimony here, a motive to misrepresent is clear only with respect to Garcia, who, in an attempt to preserve the comparative posture of G-A lied about the extent of her involvement in order to create the impression that she was the sole driving force behind G-A's application, and was performing those tasks which could be expected of a corporation's sole voting shareholder. Conversely, there is no apparent motive to deceive underlying the testimony of Ozan, Root, and Baptist. Ozan, the brother of G-A's purported nonvoting and passive principal (Elizabeth Anderson), testified that he targeted a number of television markets that he thought would be good investments for his sisters, and testified candidly about his business relationship with Baptist and Root, including matters relating to the preparation of the Conroe application. His account of the facts was virtually the same as that expounded by Baptist and Root. Thus, if Ozan was lying (that is, if he had no involvement in the application process), there is no plausible reason for him to testify in a manner that would reflect involvement on his part. Such testimony would not benefit any of the applications in which his sisters were involved, nor would such testimony benefit Ozan personally. There is simply no apparent motive which would have been served by Ozan's presentation of such testimony. In the absence of such a motive, his testimony was correctly deemed by the ALJ to be more credible than that of Garcia.

23. The same may be said with respect to Root. Root testified in both the *Blanco* and *Conroe* proceedings that he had no recollection or written record of ever speaking with Garcia prior to the filing of the G-A application; that he dealt only with Ozan (who acted as a "consultant" to these various applicants); that Ozan ordered Root to begin the preparation of the G-A application; that Root advised Ozan as to the legal structure the applicant should adopt in order to maximize integration credit; and that Root looked to Ozan for payment. If, in fact, Root had dealt directly with Garcia in the preparation of the Conroe application, there is no apparent reason for Root not to acknowledge this relationship, rather than create a false story in which it appeared that he knowingly filed applications on behalf of an undisclosed real-party-in-interest. Given the absence of any motive for Root to fabricate such a story, the ALJ's conclusion that Root was more credible than Garcia must be sustained.

24. The Commission underscored in its *Character Policy Statement*, 102 FCC 2d 1179, 1209-11 (1986), that:

> We believe it appropriate to give misrepresentation specific consideration in the context of this *Policy Statement*. The act of willful misrepresentation not only violates the Commission's Rules; it also raises immediate concerns over the licensee's ability to be truthful in any future dealings with the Commission.
>
> * * *
>
> As we have stated, the trait of 'truthfulness' is one of the two key elements of character necessary to operate a broadcast station in the public interest. The Commission is authorized to treat even the most insignificant misrepresentation as disqualifying.

* * *

> We believe it necessary and appropriate to continue to view misrepresentation and lack of candor in an applicant's dealings with the Commission as serious breaches of trust. The integrity of the Commission's processes cannot be maintained without honest dealing with the Commission by licensees.

25. Further, the Board has often reiterated: The fundamental importance of truthfulness and complete candor on the part of applicants, as well as licensees, in their dealings with the Commission is well established. *Lebanon Valley Radio, Inc.*, 35 FCC 2d 243, 258 (Rev. Bd. 1972), *review denied*, 39 FCC 2d 1099 (1973), *rev' d on other grounds sub nom. Lebanon Valley Radio, Inc. v. FCC*, 503 F.2d 196 (D.C. Cir. 1974). *See also FCC v. WOKO, Inc.*, 329 U.S. 223, 227 (1946). Since the Commission must license thousands of radio and television stations in the public interest, it must therefore rely substantially on the completeness and accuracy of the submissions made to it. *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1139 (D.C. Cir. 1985); *RKO General, Inc. v. FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982). It is manifest that applicants before the Commission "have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate." *Id.* at 232.

Mid - Ohio Communications, Inc., 104 FCC Rcd 572, 598-599 (Rev. Bd. 1986), *review denied*, 5 FCC Rcd 940 (1990), *recon. denied in part and dismissed in part*, 5 FCC Rcd 4596 (1990), *aff'd by judgment*, *Mid - Ohio Communications, Inc. v. FCC*, No. 90-1433 (D.C. Cir. August 21, 1990).

26. Finally, we can find no basis for disregarding the ALJ's specific credibility findings. While we have, on infrequent occasions, overturned such findings, *see e. g., Richardson Broadcasting Group*, 5 FCC Rcd 5285, 5287 (Rev. Bd. 1990), *recon. denied*, 5 FCC Rcd 6364 (1990), *recon. aff'd* , 5 FCC Rcd 6964 (1990), the Board is generally enjoined to defer to the credibility findings of an ALJ. *See TeleSTAR, Inc.*, 2 FCC Rcd 5, 12-13 (Rev. Bd. 1987), *recon. granted in part and denied in part and review granted in part and denied in part*, 3 FCC Rcd 2860 (1988), *aff'd by judgment*, 886 F.2d 442 (D.C. Cir. 1989) (table), and it does so regularly where substantial evidence supports those findings. *See e.g., Cannon Communications Corp.*, 5 FCC Rcd 2695, 2700-2703 (Rev. Bd. 1990), *review denied*, 6 FCC Rcd 570 (1991), *recon. denied*, 6 FCC Rcd 3310 (1991); *Advanced Broadcast Technologies, Inc.*, 5 FCC Rcd 1960, 1964 (Rev. Bd. 1990), *aff'd* , 5 FCC Rcd 7651 (1990); *Adlai E. Stevenson IV*, 5 FCC Rcd 1588, 1589 (Rev. Bd. 1990); *Tri - State Broadcasting Co., Inc.*, 5 FCC Rcd 1156, 1169-1173 (Rev. Bd. 1990), *recon. denied*, 5 FCC Rcd 3727 (Rev. Bd. 1990), *review denied*, 5 FCC Rcd 6232 (1990); *Atlantic City Community Broadcasting, Inc.*, 6 FCC Rcd 925, 927 (Rev. Bd. 1991).

27. In sum, we affirm the ALJ with respect to the application of G-A. It has been conclusively demonstrated that its principal, JoAnn Garcia, misrepresented pertinent facts to the Commission in her pursuit of various broadcast frequencies. Thus, G-A is not qualified to be a Commission licensee, and G-A's application will be denied.

WOOD BROADCASTING COMPANY

28. The ALJ adversely resolved Issue [3] against Wood, concluding that Wood was not financially qualified to construct and initially operate its proposed facility. *See* I.D., paras. 134-138.

29. As originally structured, Wood was a general partnership consisting of three family members: Dr. Curtis A. Wood, Jr.; LouLee Wood (wife of Dr. Wood); and Gina Wood (their daughter). Each held a 33-1/3% interest. Dr. Wood, who had been proposed as full-time General Manager, died December 30, 1987. *Id.*, paras. 79-80. LouLee Wood claims that she will own Dr. Wood's interest following probate. Wood Exceptions, Attachment 1.

30. Wood intends to rely on Garland Wood, son of Dr. and Mrs. Wood as its source of funds. Garland Wood claimed that he and Dr. Wood had several discussions concerning financial assistance he would render if Wood was awarded the construction permit, and that he understood that Wood would need at least $1,500,000, or perhaps up to $3,000,000 (Tr. 259), to construct the station and to operate it for three months without revenue. Garland Wood indicated that he had personally committed himself to loan to the applicant the necessary funds, Wood Exh. 12; I.D., para. 88, and claimed that he intends to supply these funds from his personal financial holdings or, "if it proves to be more appropriate at the time," intends to use his "investment banking experience" to arrange for all or part of the necessary financing. *Id.*, para. 89.

31. To demonstrate his financial ability to loan $1,500,000 to $3,000,000 to Wood, in a financial statement dated May 1, 1986 (prepared almost two years subsequent to the filing and affirmative financial certification of Wood's application), Garland Wood claimed that he had assets slightly in excess of $3,000,000, including: "Securities," $150,000; "Cash," $460,000; "Vested Profit Sharing Account," $390,000; "Real Estate Property" *estimated* at $2,000,000; "Personal Property" *estimated* at $100,000; "Auto," $43,000; "Stone Street Fund," $10,000; and, "Personal Loan," $40,000. His liabilities, including "Mortgages," "Auto Loan," and "Credit Cards" were claimed to aggregate $168,000. Wood Exh. 12A; I.D., para. 90.[3]

32. The record also discloses that although Dr. Wood did not indicate to his son the basis for the sums that he was talking about, Dr. Wood's estimate of $1,500,000 to $3,000,000 appeared to rest only on his claim that he "teach[es] communications, and I do know something about what costs are involved in doing this type of thing" (Tr. 795). However, the ALJ determined that Garland Wood and his father did not discuss any terms of a direct loan from Garland Wood for the Conroe venture (Tr. 261), and no agreement was ever reached on specific terms of such financing (Tr. 863-864). Although Garland Wood indicated that he "might rely" on third parties to finance the proposed station, he did not, and does not, have any specific third parties in mind (Tr. 261-262). Additionally, Garland Wood does not know if the Wood application was filed before or after his initial conversation with his father regarding financing the proposed station (Tr. 262); but, in any event, there was no discussion with Garland Wood *prior to* the filing of Wood's application regarding financing (Tr. 793-794), or the precise amounts involved (Tr. 795). In addition, Garland Wood did nothing to assure himself that the Conroe venture was financially reasonable or viable (Tr. 264-265), and Garland Wood had not discussed his "net liquid

assets" with his parents. Indeed, Garland Wood specifically testified that he did not know what "net liquid assets" meant in connection with a Commission broadcast proceeding. Tr. 291-292; I.D., paras. 95-96. Wood claims that this latter finding is "totally irrelevant" because "whether or not Garland Wood knew what 'net liquid assets' means . . . [*his*] *ability to provide the necessary funds is not an issue in this proceeding.* " (Exceptions at p. 12; emphasis added).

33. Wood further claims (Exceptions at p. 9; emphasis added):

> It is of no significance . . . that Dr. Wood and his son Garland Wood did not discuss the precise terms of the loan [Garland] Wood had committed himself to make to Wood. [*Garland*] *Wood, a successful and experienced investment banker, testified that it would have been "premature and ... unnecessary" to discuss specific terms [of the proposed loan] at that time.* (Tr. 261).

However, Wood has not cited or referenced a single case, rule, policy, or other precedent in support of any of its so-called "exceptions."[4]

34. On recent numerous occasions, the Board has reiterated that, although an applicant need not have a binding written agreement to certify that it is financially qualified, *Las Vegas Valley Broadcasting Co. v. FCC*, 589 F.2d 594, 599-601 (D.C. Cir. 1978), the Commission does require a certification of such "reasonable assurance" of committed funding sufficient to construct the proposed facility and to operate for three months without revenue. The application form utilized by Wood (*see* FCC Form 301, Instructions, Section III) contained the following guidelines (emphasis added):

> An applicant for a new station must certify that it has *sufficient net liquid assets on hand or committed sources of funds* to construct the proposed facility and operate for three months, without revenue. In so certifying, the applicant is also attesting that it can and will meet all contractual requirements, if any, as to collateral, guarantees, and capital investments.

Additionally, Question 1, Section III, FCC Form 301, clearly states (emphasis added):

> 1. The applicant certifies that *sufficient net liquid assets are on hand or are available from committed sources* to construct and operate the requested facilities for three months without revenue.

See Scioto Broadcasters, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990), *review denied*, 6 FCC Rcd 1893 (1991), *recon. dismissed*, 6 FCC Rcd 4626 (1991); *see also JAM Communications, Inc.*, 4 FCC Rcd 3754, 3757 (Rev. Bd. 1989); *REM Malloy Broadcasting*, FCC 91R-90, released October 17, 1991.

35. In *Aspen FM, Inc.*, 6 FCC Rcd 1602, 1603 (1991), where an applicant had not reviewed a balance sheet or financial statement evidencing the proposed lenders' financial ability to meet his loan commitment, the Commission declared:

> [A]s the Commission indicated in *Northampton [Media Associates*, 4 FCC Rcd 5517 (1989), subsequent history omitted], the applicant must demonstrate that it had taken the necessary steps to ascertain that the lender, when not a financial institution, has sufficient financial resources to meet his loan commitment . . . .

In *Northampton Media Associates*, 3 FCC Rcd 5164 (Rev. Bd. 1988), *review denied*, 4 FCC Rcd 5517 (1989), *recon. denied*, 5 FCC Rcd 3075 (1990), *aff'd*, No. 90-1291 (D.C. Cir. July 12, 1991) (which none of the parties here cite or rely upon), the Commission, at 4 FCC Rcd 5518-5519, recounted the salient facts and circumstances concerning an applicant's affirmative financial certification. There, (1) the corporate applicant consisted of three shareholders (a husband and wife owning 80% equity) and a friend (Reid) with broadcast experience owning the remaining 20%; (2) a specific financial plan was developed, and it was determined that $38,836 would be required to construct and operate for three months; (3) the applicant relied exclusively on the personal resources of the 80% principals to fund the facility; (4) Reid affirmatively certified the applicant's financial qualifications and signed the application; (5) all three principals specifically "read and understood FCC Form 301" and found that sufficient "net liquid assets" were on hand; (6) the 80% owners "orally agreed to finance the application and assured Reid that they had sufficient resources to do so," but also indicated to Reid that they "did not have unlimited financial resources"; (7) when Reid signed the application he had not seen a balance sheet or other written evidence documenting the 80% owners' ability to meet their commitment, but had personal knowledge of them and of their reputation in the community; and (8) a balance sheet prepared later reflected that "*at the time of certification*" the 80% owners did, indeed, have sufficient assets.

36. In finding that applicant financially qualified, the Commission held (id.; emphasis added):

> As explained below, the reasonable assurance standard governing Cutter's application does not necessarily require contemporaneous written documentation.
>
> The question before us is whether, under the 1981 version of Form 301, such documentation must exist at the time of the certification or whether it may be subsequently generated to support an earlier certification. It is undisputed that the Commission did not change its substantive financial requirements when it adopted the financial certification procedure. *Revision of Form 301*, 50 RR 2d at 382 ¶ 6 ("[I]t should be reemphasized that we are not, in any way, modifying the underlying substantive financial criteria -- ability to construct and operate the proposed facility for three months"). *See also*

> *Certification of Financial Qualifications by Applicants for Broadcast Station Construction Permits*, 2 FCC Rcd 2122 (1987); *South Florida Broadcasting Co.*, 94 FCC 2d 452, 455 ¶ 6 (1983).
>
> Thus, a broadcast applicant filing in accordance with *Revision of Form 301* still must have reasonable assurance of having sufficient funds to construct the proposed station and operate it without revenue for three months before the applicant certifies its financial qualifications. In other words, the applicant may not certify its financial qualifications and then arrange financing . . . .
>
> [W]e conclude that, under the 1981 requirements governing certification cases like the one before us, reasonable assurance does not necessarily require that an applicant have the written documentation (which would have been required before the 1981 revision of FCC Form 301) when it certifies its financial qualifications. Although the supporting documentation must be produced upon the Commission's request, the applicant may prepare and submit it after certification, provided that the applicant actually had a reasonable assurance of adequate funds at the time of certification. In order to prove reasonable assurance of financial qualifications at the time of certification, the applicant must adduce probative evidence that, prior to certification, it engaged in serious and reasonable efforts to ascertain predictable construction and operation costs. To establish the availability of funds to meet these estimated expenses, the applicant must provide substantial and reliable evidence showing "sufficient net liquid assets on hand, or committed sources of funds to construct and operate for three months without revenue," as the 1981 version of Form 301 requires.
>
> Probative evidence necessarily includes something more than the self-serving, uncorroborated statement of the individual responsible for the certification that he had taken steps to secure the needed funds. For example, uncontroverted affidavits or testimony establishing an oral contract to lend money would suffice to demonstrate a committed source of funds. *Where the lender is not a financial institution but a person, as in this case, the applicant must show that the person proposing to lend the funds had the necessary financial resources at that time. In such a case, we believe that a balance sheet or other documentary evidence (such as a financial statement) demonstrating that, at the time of certification, that person had sufficient net liquid assets to meet his financial commitment to the applicant would be clear evidence to support the certification.*

37. Here, the applicant similarly relies upon an "oral" agreement from a non-principal family member for the significant funds to construct and operate. However, unlike the situation in *Northampton*, (1) a specific financial plan was not developed; (2) only a very broad range of required funds ($1,500,000 to $3,000,000) was discussed; (3) none of the principals, nor the individual who was to provide the funds, were familiar with the requirements of FCC Form 301, or even knew that "net liquid assets" meant; and (4) no balance sheet of Garland Wood as of the date of certification of Wood's application was ever prepared or submitted. Further, Wood concedes there were never any discussions of the precise amount of the loan, the terms of repayment, interest to be charged, or collateral requirements. Moreover, even assuming, *arguendo*, that these delicts would not remove Wood from the ambit of *Northampton*, Garland Wood's financial statement appears to be clearly insufficient to support his ability to make funds available. At best, his "liquid assets" appear to consist only of "Securities" ($150,000); "Cash" ($460,000); and "Vested Profit Sharing Account" ($390,000), or a total of only $1,000,000 (which must be offset by liabilities of $168,000). Thus, Garland Wood's "net liquid assets" fall far short of even the conceded minimal funds required ($1,500,000). And, even if all of Garland Wood's listed assets were considered, his total net worth would not be sufficient to reasonably conclude that the full necessary funding ($3,000,000) could be realized. *Kaye - Smith Enterprises*, 98 FCC 2d 675, 678 (1984), *rev. denied*, FCC 85-192, released April 19, 1985; *International Broadcasting Co.*, 3 FCC 2d 449, 451 (1966); *Cornwall Broadcasting Corp.*, 89 FCC 2d 704, 706 (Rev. Bd. 1982). Additionally, it is noted that Wood is adamant that it intends to rely solely on Garland Wood as its source of funds. Wood reiterates (Exceptions at para. 16; emphasis in original):

> Mr. Wood understood that he would make a "direct loan" and would rely upon his own resources. (Tr. 260-261). The [ALJ] distorts Mr. Wood's testimony by finding that Mr. Wood would use his own funds only "if necessary." The record clearly shows that Mr. Wood made the commitment to Wood based on use of his own funds and that he might approach third parties *only if it was appropriate at the time*. (Tr. 261).

We agree with the ALJ that Wood has not sustained its burden of proof under the financial issue; has not demonstrated that it is financially able to construct and operate as proposed; and must therefore be disqualified in this proceeding.

IMAGISTS

38. Imagists is a purported Texas limited partnership. The "general partner" is Montgomery County Media Network, Inc. (Montgomery), a Texas corporation. The "limited partner" of Imagists is Humanity Interested Services, Inc. (HIS), a non-profit tax exempt Texas corporation. At the time of hearing, Montgomery stock was wholly owned by Dr. Rhonda Saldivar, President (50%), and Alan William Rossing, Vice President/Secretary (50%). Montgomery's total capital contribution requirement was $1,000, with $500 each to be provided by Saldivar and Rossing. However, none of these sums has been tendered. I.D., paras. 25-28.

39. The shares of profits or other income accruing to Imagists are proposed to be distributed as follows: Montgomery, 1%; HIS, 99%. I.D., para. 29.

40. Saldivar and Rossing both claim full-time 100% integration credit, and both seek preferences as minorities. Both are area or local residents. However, the ALJ ultimately determined that Imagists was a sham applicant, entitled to less than 1% ownership integration into management credit.[5] In so doing, he determined the following (to which Imagists, as will be discussed, *infra*, has generally *not* excepted) (I.D., paras. 151-156):

> The driving force and controlling principal behind Imagists is Charles Johnson, executive director of the limited partner, HIS. Charles Johnson is the minister of the Evangelistic Temple in Conroe, Texas. (Tr. 171). Under the name of Evangelistic Temple, Mr. Johnson was the original petitioner to have Channel 55 allocated to Conroe. (Tr. 172). Without consulting either Saldivar or Rossing, Johnson decided that Imagists would be structured as a limited partnership. (Tr. 121). In the Articles of Incorporation filed for the general partner, Montgomery County Media Network, Charles Johnson was named as its sole director (Tr. 108), and is still identified as its resident agent. (Tr. 108). The address shown on Imagists' FCC application is "200 Avenue J, Conroe, Texas, 77301," which is the location of the offices of HIS. (Tr. 94). In Imagists' Certification of Limited Partnership, the address shown for the general partner is a post office box rented and used by HIS.
>
> Charles Johnson's involvement in the prosecution of the Imagists application is to be contrasted with lack of involvement of Saldivar and Rossing. Both Rossing and Saldivar were invited to join the applicant after Imagists' structure had already been decided upon. Neither Rossing nor Saldivar took part in the preparation and filing of the application or in the hiring of Imagists' communications counsel, consulting engineers, or FAA consultant. (Tr. 92-3, 134-5). Rossing and Saldivar did not know one another prior to the filing of the application. (Tr. 127). Saldivar was invited to join by Charles Johnson's brother, also a director of HIS. (Tr. 89). Rossing was invited to join by Charles Johnson after Johnson learned that Rossing was an American Indian. (Tr. 165). Rossing agreed to help out in whatever way Johnson saw fit, although he had no idea of what his involvement might be and was not told that he would be involved in a managerial capacity at the station.
>
> While Saldivar and Rossing have each served as secretary of Montgomery County Media Network, neither has prepared any minutes of its corporate meetings. (Tr. 97-8, 147). The minutes are prepared by the secretary for HIS. (Tr. 97-8). The original minutes are retained by Charles Johnson. (Tr. 148-9). The positions Rossing and Saldivar are to have at the proposed station were decided upon in a conference phone call between Rossing, Saldivar, Charles Johnson and communications counsel. That decision was made in January 1986, a year and two months after the Imagists application was filed. Neither Saldivar nor Rossing played any part in securing FAA tower approval, which was handled by Charles Johnson's son, Dowen, the Assistant Executive Director for HIS. (Tr. 111).
>
> Dr. Saldivar, president of the general partner, did not know what a public inspection file was (Tr. 101-2), did not know how many shares of stock she was entitled to (Tr. 108), and did not know whether money provided by HIS was to be considered a loan or a contribution to capital. (Tr. 113-4). Mr. Rossing did not know whether Imagists had a bank account (Tr. 152), did not know what the general partners' liability would be in a law suit (Tr. 158), and has never received correspondence directly from communications counsel. (Tr. 154).
>
> Viewed collectively, the foregoing facts wholly undermine Imagists' representation that it has and will function as a *bona fide* limited partnership. Saldivar and Rossing have done nothing more than loan their names and minority status to Charles Johnson for his use in obtaining a television station. The contention that Saldivar and Rossing will have exclusive managerial control of the station while Charles Johnson assumes a non-participating role is not believed.

41. In its Exceptions, Imagists does not substantially contest any of the specific findings and conclusions of the ALJ. Instead, it merely argues that where there is a non-profit entity in a Commission application (here, HIS is purportedly an educational institution), "the suppositions made in the business context are not applicable" for determining whether an applicant is a sham. Imagists also attempts to bolster its position by claiming that "Johnson would be a good applicant in his own right" and would be "100% locally owned with extensive civic and religious activities." Imagist Exceptions at p. 13. However, we note in passing that this argument ignores the fact that Johnson is already active in HIS (which operates a school in Conroe), and is its Executive Director. He is also Pastor of Evangelistic Temple of Conroe. I.D., para. 45. Further, no claim is made that if Johnson would have been the sole principal he would have sought full-time integration credit, or would have been entitled to a minority preference. Conversely, we believe that the ALJ's conclusion is directly on point: "Saldivar and Rossing have done nothing more than loan their names and minority status to Charles Johnson for his use in obtaining a television station." *See* para. 42, *supra*. Indeed, Dr. Saldivar did not know Johnson before being invited to participate in Imagists' application; and Rossing had not even spoken with Saldivar at the time the application was filed. I.D., paras. 33, 42.

42. We affirm the ALJ that Imagists is just another prototypical sham of the type found in such recent cases as *Evansville Skywave, Inc.*, 6 FCC Rcd 5373 (Rev. Bd. 1991). *See also Poughkeepsie Broadcasting Limited*, 6 FCC Rcd 2497 (1991); *Metroplex Communications, Inc.*, 5 FCC Rcd 5610 (1990), *aff'd per judgment sub nom. South east Florida Broadcasting Limited Partnership v. FCC*, No. 90-1482 (D.C. Cir. October 28, 1991). As a result, Imagists is entitled to no integration credit whatsoever. *Royc e International Broadcasting*, 6 FCC Rcd 2601 (1991).

CARMEN MATIAS and ANDREW N. WIMBISH

43. Section 73.610 (short-spacing) and air hazard issues (Issues 1 and 2) were designated against Matias/Wimbish. Subsequently, Matias/Wimbish submitted a petition for leave to specify a new, properly spaced site that was different from the site originally specified in its application. In this amendment, Matias/Wimbish specified a tower height of 1150 feet. Matias/Wimbish indicated, in a supplement to the petition for leave to amend filed April 17, 1986, that another applicant herein (Wood) had proposed the same site, and that FAA approval had been issued to Wood. Matias/Wimbish indicated its belief that it, too, would soon obtain FAA approval (Tr. 390-391). This amendment was accepted at hearing; however, Matias/Wimbish subsequently learned that, in fact, Wood had never obtained FAA approval for its 1150 foot proposal; rather, a height reduction (to 750 feet) was required. (Tr. 293). Thus, this May 14, 1986 amendment to reduce the proposed tower height was rejected by the ALJ. *See Memorandum Opinion and Order*, FCC 86M-2184, released July 8, 1986. The ALJ, noting that the May 14, 1986, amendment was required because of "careless and erroneous reliance on what it unjustifiably believed to be the proposal of a competitor," ruled that Matias/Wimbish had failed to demonstrate good cause for acceptance of its amendment. As a result, in a further *Order*, FCC 86M-2183, released July 8, 1986, the ALJ also denied Matias/Wimbish's May 14, 1986 Motion for Partial Summary Decision (where Matias/Wimbish had sought summary decision of the short-spacing and air hazard issues). I.D., paras. 47-48.

44. Subsequently, however, the ALJ revisited his prior actions concerning the Matias/Wimbish tower site amendment, and in his I.D. (at paras. 130-131) specifically held:

> By its May 14, 1986 petition, Matias/Wimbish sought only to reduce its antenna height to obtain FAA approval, and it should have been permitted to do so. The petition was rejected because Matias/Wimbish's "significant carelessness" in proposing a 1,150 foot tower in the blind hope that the FAA would approve that height was inconsistent with the notion of unforeseeability. That analysis was in error. Matias/Wimbish's "carelessness" had nothing to do with its ability to anticipate the FAA's later-expressed disinclination to approve a 1,150 foot tower. Nothing that Matias/Wimbish did, or failed to do, caused the FAA action to be foreseeable. Until the time of the FAA action, there was a reasonable possibility of FAA clearance (*Women's Broadcasting Coalition*, 59 RR 2d 730) and, consequently, no reason for Matias/Wimbish to have "foreseen" anything else.
>
> Good cause is otherwise shown for Matias/Wimbish's May 14, 1986 amendment. The amendment: (a) is not voluntary in nature; (b) confers no comparative advantage; (c) does not prejudice any party; (d) does not disrupt the proceeding; (e) does not require the addition of issues or parties; and (f) was diligently filed.
>
> *Memorandum Opinion and Order*, FCC 86M-2184 released July 8, 1986, is vacated; the Petition of Carmel Matias and Andrew N. Wimbish, Jointly, for Leave to Amend, filed May 14, 1986 is granted, and the amendment is accepted. *Order*, FCC 86M-2183, released July 8, 1986, is also vacated; the Motion for Leave to File Motion for Partial Summary Decision and Motion for Partial Summary Decision, both filed May 23, 1986 by Carmen Matias and Andrew N. Wimbish, Jointly, are granted, and the Section 73.610 issue designated against the applicant is resolved in its favor.
>
> The presiding officer officially notices Aeronautical Study No. 86-ASW-0898-OE submitted as Appendix A to the Reply of Matias/Wimbish to Oppositions to Petition for Leave to Amend filed on June 3, 1986. Therein, the FAA approved Matias/Wimbish's transmitter site location and tower height at 750 feet above ground level. The air hazard issue designated against Matias/Wimbish is resolved in its favor.

45. All the remaining captioned parties except to the ALJ's resolution of this matter. However, we agree that, under the particular circumstances here present, the ALJ's analysis is correct. We agree that until the entire FAA process had run its course, there remained at least a "reasonable possibility" of final FAA determination of no hazard at the site. *See Women's Broadcasting Coalition, supra.*[6] Issues 1 and 2 are resolved in favor of Matias/Wimbish.

46. With respect to the comparative aspects of Matias/Wimbish, the ALJ awarded 100% integration credit for both individual's promise to work full-time at the proposed facility. Their proposal was "substantially enhanced" by the minority status of both principals, and the fact that Matias is female. Wimbish lives in the proposed service area, and has been active in area civic activities; both Matias and Wimbish propose to move to Conroe. Wimbish also received a preference for past broadcast experience, and neither party has media interests. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965).

47. None of the captioned parties (save G-A) excepts to the ALJ's comparative evaluation of Matias/Wimbish. G-A argues that there was insufficient "documentation" of the partnership arrangement between the two principals and, as a result, Matias/Wimbish is entitled to no integration credit whatsoever. G-A Exceptions, pps. 17-22. In reply, Matias/Wimbish notes that (1) in its proposed findings of fact and conclusions of law filed with the ALJ on July 21, 1986, G-A averred that Matias/Wimbish "earn 100% full-time quantitative integration. Both partners have pledged to work at the station on a full-time basis . . . ."; (2) both principals testified at hearing that they each hold their respective interests and are each proportionately liable for all prosecution costs, and will share profits and losses accordingly, and partnership votes will be made on a 51%/49% basis. *See* Tr. 310-314, 341-342, 365-366, 369-370; (3) the principals have consistently reported to the Commission and the competing parties their structure and ownership interests; and (4) they intend to incorporate upon grant of the construction permit.

48. The ALJ also determined that there was a letter (dated Feburary 18, 1985) from Matias to Wimbish stating that they are general partners, describes their respective

shares, and expresses an agreement that both parties will leave current employment positions to devote full-time to the proposed station. *See* I.D., para. 49. This letter was not introduced into evidence, but was read into the record. *See* Tr. 311. At the same time at hearing, Matias confirmed that the principals had subsequently entered into a full partnership agreement dated February 18, 1985, and was executed by both Matias and Wimbish. *Id.* In light of the foregoing, G-A's exceptions will be denied.

CONCLUSIONS

49. Both Wood and G-A are disqualified. Imagists is a sham applicant, entitled to no integration credit whatsoever. As a result, the comparative coverage issue (Issue [6]) is of no moment with respect to G-A (and no new first service to a "white" area is proposed). As the only applicant entitled to any comparative preferences pursuant to the Commission's *Policy Statement*, Matias/Wimbish clearly prevails here and will be awarded the construction permit at contest.

50. ACCORDINGLY, IT IS ORDERED, That the applications of Montgomery County Media Network, Inc., et al., d/b/a Imagists (File No. BPCT-84129KF); Wood Broadcasting Company (File No. BPCT-841129KW); and G-A Communications, Inc. (File No. BPCT-841129LE) ARE DENIED; and,

51. IT IS FURTHER ORDERED, That the application of Carmen Matias and Andrew N. Wimbish (File No. BPCT-841129KK) IS GRANTED.[7]

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] Dr. Emil Farge, a resident of Houston, Texas, is an Associate Professor of Clinical Ophthalmology at Baylor College of Medicine. Tr. 1794. He testified that he has known JoAnn Garcia since the late 1970's or early 1980's, and that she worked as a secretary for five or six years in the same department as Dr. Farge at Baylor College. Tr. 1795. When asked about Garcia's reputation for truthfulness within the institution at Baylor College, Farge replied, "her reputation would be neither greater nor less than other colleagues who've been in my department." Tr. 1797. Farge acknowledged that he was only "slightly" aware of Garcia's reputation at the institution, and that he has had no reason to discuss her with his colleagues. Tr. 1798. He further testified that he only had occasion to see her at the institution a few times a year, when passing in the hall, meeting at the coffee machine, or when dropping off memoranda for one of Garcia's superiors. Tr. 1802, 1795-96, 1808-09. Farge had not seen Garcia around the medical school during the year and a half preceding the hearing. Tr. 1801. Farge did not know Garcia outside of the medical school, and testified that he was "no dear friend of this person, and I've never seen her socially. I don't know anything about her family life." Tr. 1802, 1804; S.I.D., paras. 7-8.

[2] The other witness to testify with respect to Garcia's character was Perla Rossi-Racine. Racine resides in Houston. Tr. 1833. As of the hearing date, Racine had known Garcia for two or three years. Tr. 1834, 1835. Racine met Garcia during their mutual association with the Houston International University, where they both sought to establish a foundation to assist students in obtaining housing. Tr. 1834. When asked about Garcia's reputation for truthfulness in the Hispanic community, Racine testified that "she's very honest and respectful and very professional." Tr. 1836. Racine testified that the basis for this statement was that Garcia was called to "take care of" three accounts normally handled by Racine while Racine was out of the country for a month and a half. Racine also testified that Garcia has also served as a ready volunteer on a variety of things. Tr. 1836. Racine said she would not doubt testimony given by Garcia under oath. Tr. 1837, 1841; S.I.D., para. 9. G-A faults the ALJ for not drawing any conclusions about both G-A character witnesses. Given the equivocal testimony of Farge and the limited testimony of Rossi-Racine, we find nothing in the record, based upon their testimony, to affect the ultimate conclusions here.

[3] The ALJ determined that Garland Wood's real estate holdings consisted of seven residential properties -- five in Manhattan and two in the U.S. Virgin Islands (Tr. 262). These properties are subject to four mortgages, totalling $140,000 (Wood Exh. 12A; Tr. 262-263). One of Garland Wood's properties is both his personal residence and a rental property, which he estimates to be worth $400,000 (Tr. 267). However, the record is bereft of any actual appraisals of these properties. Wood also estimated his personal property to be worth $100,000; but he similarly did not have it appraised (Tr. 268). The "Stone Street Fund" is a venture capital fund from which Garland Wood believes that he cannot withdraw funds (Tr. 269, 288). The $40,000 personal loan that is listed as an asset was fully outstanding as of the time of hearing (and repayment had not yet begun) (Tr. 269-270). I.D., paras. 91-92.

[4] Wood's "exceptions" consist of simple paragraph by paragraph responses corresponding to paragraphs of the I.D. As noted *supra*, Wood has not cited any authority whatsoever in support of any of its arguments. We only note that this practice was specifically abolished long ago, *see e. g., Hugh M. McBeath*, 103 FCC 2d 386 (Rev. Bd. 1986), *review denied*, FCC 86-292, released June 26, 1986, *citing*, *Adjudicatory Re - regulation Proposals*, 58 FCC 2d 865, 875 (1976) and 47 CFR § 1.276(a)(2). Nevertheless, the Board has fully considered Wood's submissions.

[5] On the "B cut-off" date, Montgomery had three shareholders (each purportedly owning a 1/3 interest): Saldivar, Rossing, and Frank Garza. Garza, originally proposed as President of Montgomery, resigned in December 1985. Thus, Saldivar and Rossing now each claim a 50% ownership interest.

[6] In addition to its challenges concerning the ALJ's reconsideration of the Matias/Wimbish May 14 amendment, Imagists excepts to the ALJ's acceptance of their original April 17, 1986 amendment curing the short-spacing deficiency. It argues that the Commission was overly lenient in even accepting Matias/Wimbish's application; that, in comparable cases, the Commission has rejected short-spaced applications unaccompanied by waiver requests, citing *North Texas Media v. FCC*, 778 F.2d 28 (D.C. Cir. 1985); and, that the ALJ should also have rejected the amendment here. Without addressing Imagists' remarks concerning the Commission or HDO, *see generally*, *Frank H. Yemm*, 39 RR 2d 1657 (1977), Imagists' reliance on *North Texas Media* is misplaced. There, the court upheld a Commission order denying a waiver request of the minimum distance separation rules where a suitable non-short-spaced site was available. Here, in contrast, Matias/Wimbish never sought a waiver, nor was it aware that the site was short-spaced to the reference point for another assigned television channel. Its con-

sulting engineer prepared the engineering portion of the application without indicating a short-spacing problem or other deviations from Commission requirements. Matias/Wimbish's Petition for Leave to Amend, filed April 14, 1986, at 1. Learning of the short-spacing allegation, Matias/Wimbish hired a new engineering firm. *Id.*, at 2. Wimbish, who is an African-American, determined that it would be prudent to have the engineering firm deal with the landowners in the rural Texas areas to obtain a new site. *Id.* However, he closely superintended their search for a site, contacting them twelve times by telephone and six times by letter. *Id.*, at 3. They spoke with at least six different landowners before securing the approval of two different landowners on adjoining parcels of property used for the site. Matias/Wimbish Supplement, filed April 17, 1986 (affidavit of consulting engineer). Matias/Wimbish's efforts are in direct contrast with those found in *Texas Communications Limited Partnership*, 6 FCC Rcd 5191, 5193 (1991), where a failure to inquire about the status of a site was fatal to a good cause showing. *See also Mableton Broadcasting Co., Inc.*, 5 FCC Rcd 6314, 6320-6321 (Rev. Bd. 1990) (applicant diligent where time was necessary to negotiate even though efforts ultimately were unsuccessful). Imagists' exception is denied. As for the May 14, 1986 amendment to reduce the proposed tower height to secure FAA clearance, the competing parties cannot seriously complain of the ALJ's ultimate action permitting the amendment. Arguably, Matias/Wimbish may have been slightly remiss in initially concluding that Wood's tower at a similar height and location had received FAA clearance, but the applicant quickly corrected its error less than 30 days after learning of its misunderstanding. Moreover, on July 10, 1986, two days after the original rejection of the May 14 amendment, the ALJ by *Order*, FCC 86M-2234 (as corrected), allowed Wood to amend its application to reduce its proposed tower height from 1145 feet to 745 feet. (G-A, too, was permitted to proffer its FAA clearance afterwards, *i.e.*, on July 18, 1986. I.D., para. 144.) *Cuban - American Limited*, 5 FCC Rcd 3781, 3782 (1990), cited by G-A as support for rejection of Matias/Wimbish's amendment is inapposite. There, the Commission upheld an ALJ's discretion to establish a time limit for perfecting site proposals. Here, the ALJ was more lenient, and indeed permitted G-A to submit its FAA clearance even after the close of the record. These additional exceptions are denied.

[7] The release of this document was delayed by the late reassignment to a different Board Member.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-168

In re Applications of

LT/COLONEL CYRUS V. EDWARDS	File No. BPH-851024MB
BOTT COMMUNICATIONS, INC.	File No. BPH-851028MG

For Construction Permit for a
New FM Station, Channel 236C
Shawnee, Oklahoma

APPEARANCES

Harry C. Martin and *Troy F. Tanner* on behalf of Bott Communications, Inc. *Colonel Cyrus V. Edwards, pro se*;[1] and *Norman Goldstein* for Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

Issued: December 10, 1991; Released: December 18, 1991

1. Two applicants remain in the quest for a new FM station at Channel 236C on 95.1 MHz in Shawnee, Oklahoma: Lt/Colonel Cyrus V. Edwards (Edwards) and Bott Communications, Inc. (Bott).

2. After the interlocutory cycle had run its course, we took evidence on five basic qualifying issues, the standard comparative issue, and the ultimate conclusionary issue. All five basic qualifying issues are against Lt/Colonel Edwards. The issues on which evidence was taken were:

> Edwards-1: To determine whether Lt. Colonel Cyrus V. Edwards is financially qualified to be a Commission licensee;
>
> Edwards-2: To determine whether Edwards, in BPH-851024MB, falsely certified that he was financially qualified, and if so, what effect that has on his qualifications to be a Commission licensee;
>
> Edwards-3: To determine whether Edwards violated 47 CFR 1.65 by waiting until July 19, 1990 before attempting to change his financial certification from "yes" to "no";[2]
>
> Edwards-4: To determine whether Edwards misrepresented facts or lacked candor when he represented to the Commission that he didn't intend to form a corporation and bring in additional investors, and if so whether Edwards is of fit character to become a Commission licensee;
>
> Edwards-5: To determine whether Cyrus V. Edwards has abused the Commission's processes in connection with his prosecution of BPH-851024MB, and if so, whether he is of fit character to be a Commission licensee; [3]
>
> Comparative: To determine which of the proposals would, on a comparative basis, best serve the public interest; and
>
> Ultimate: To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.[4]

3. Engineering comparative coverage evidence was also adduced under the standard comparative issue at the Chief, Mass Media Bureau's direction. *See* 55 F.R. 20525 published My 17, 1990, at para. 13.

4. We held the Prehearing Conference on August 17, 1990, the Evidentiary Admission Session on September 4, 1990 and the Phase I Hearing on September 24, 1990. We held the Phase II Hearing on January 30, 1991, and closed the evidentiary record the same day. *See* FCC 91M-445, released February 5, 1991.

5. Bott and the Mass Media Bureau filed Proposed Findings of Fact and Conclusions of Law on April 8, 1991, while Edwards filed a document entitled "Comments, Facts, Pertinent Law, and Conclusions Regarding the Shawnee, Oklahoma FM Broadcast Station Case." On April 11, 1991, Bott moved to have Edwards; "Comments . . . " stricken. That motion was grantd. *See* FCC 91M-1515 released May 2, 1991. Edwards filed what purports to be a "Reply to Bott Communications Proposed Finding and Conclusions of Law" on April 17, 1991.[5]

Findings of Fact
Basic Qualifying Issues
Edwards-1 and Edwards-2

6. Edwards filed his Shawnee application on October 24, 1985. There he certified that he had sufficient net liquid assets on hand or available from committed sources to construct and operate the requested facility for three months without revenue. (Tr. 105, 112).

7. At the Phase I Hearing on September 24, 1990, Edwards represented that he had based his certification on a telephone conversation he had had with a Robert Enoch. Enoch, a former employer of Edwards some 40 years ago, purportedly told Edwards that funds would be available for the construction of his (Edwards') station. (Tr. 113-115).[6]

8. However, it developed that Enoch never intended to provide the financing himself; rather he (Enoch) intended to be the "money broker" and secure the financing for Edwards. (Tr. 115, 126). Edwards never knew, and never tried to find out whether Enoch had arranged the financing or with whom he had made such arrangements. (Tr. 119).

9. In fact, as of June 20, 1990,[7] Edwards still had not taken any steps to identify the source of financing that Enoch had allegedly firmed up (Tr. 131). Stated another way, Edwards simply relied on Enoch's oral assurance that financing would be available. That to him was his reasonable assurance of financing.[8] (Tr. 120).

10. During their conversation Edwards and Enoch purportedly agreed that the money that would be made available to Edwards would take the form of a loan. But Edwards didn't know whether collateral would be required for the loan, or what the repayment terms would be; he didn't know the terms of the loan, the amount of the payments or the interest rate. (Tr. 175).

11. Edwards said that during his telephone conversation with Enoch, he told Enoch that he would need $2.5 million and Enoch said that he would make $3.5 million available. (Tr. 118-119). But there is no record support for Enoch's $2.5 million estimate. Edwards has never drawn up any written cost estimates for constructing and operating his proposed station for three months. Consequently, he can't break his estimated 2.5 million down into its various components. (Tr. 143-144, 172-174).

12. Moreover, there is a question about what the $2.5 million is designed to cover, and when (as vague as it is) the figure was arrived at; i.e., was the estimate arrived at before Edwards filed his application or after he amended his application to specify a new tower site? Edwards says that the $2.5 million estimate included plans for a 2000-foot tower. (Tr. 150). But in his original application he specified only a 1,000 foot tower. A 1,000 foot tower would cost about $100,000. (Tr. 189), while a 2,000 foot tower would cost $1.8 million. (Tr. 145). Edwards admits that he didn't seek quotes on a 2,000 foot tower until after he filed his application. (Tr. 182-183).

Edwards-3

13. As previously noted this case was designated for hearing on May 10, 1990 (*See* Footnote 6 *supra*.). Shortly thereafter and in preparing for the then upcoming hearing, Edwards counsel, Russell Powell (*See* Footnote 1 *supra*.) learned that there were no written documents to support Edwards' 1985 financial certification. He (Powell) instructed Edwards to call Enoch and get the name of the supposed source of financing. Edwards did so, and Enoch gave him the name of Howard Peterson's attorney. Edwards passed this information to his counsel. (Tr. 124-127).

14. Powell then contacted Peterson's attorney who told him that Peterson was *not* willing to provide the financing for Edwards' station. (Tr. 128-129). Consequently, Powell advised Edwards to change his financial certification from "yes" to "no." On July 19, 1990, Edwards did just that. He attempted to amend his application and admit that he was not financially qualified. But, said Edwards, he " . . . will seek leave to amend his application to report new financing as soon as possible." That amendment was denied. FCC 90M-2744 released August 30, 1990.

15. Between July 19, 1990, and November 21, 1990, Edwards claims that Enoch made "a whole lot of efforts" to get financing. (Tr. 464). On November 21, 1990, the D.B. Mann Development Company gave Edwards a loan letter. (Tr. 464, Edwards Ex. 5, p. 4). In the letter, David Mann states that D. B. Mann is willing to lend Edwards $3.5 million for construction and operation of his proposed station subject to certain conditions. (Tr. 352, 365).

16. The D. B. Mann Company specializes in real estate development. It's not a financial institution. (Tr. 357, 369). Before Edwards received the November 21, 1991 Mann letter, he had had no contact or relationship with D. B. Mann. In fact, the first time David Mann ever met Colonel Edwards was on January 29, 1991, the day before the Phase II hearing. He has never talked with Edwards over the telephone, and he has had no correspondence with Edwards other than the November 21st letter.

17. Rather Mann's only contacts with Edwards have been through Enoch. Enoch and Mann are personal friends. Enoch has never provided Mann with any information about Edwards' financial wherewithal. (Tr. 359). Mann has never independently investigated Edwards' financially; i.e., he has never had a credit report done on Edwards, and he has never seen Edwards' personal financial statement. He has relied solely on Enoch's oral representations about Edwards.

18. In his so-called loan letter, David Mann reserves the right not to provide any funding if he (Mann) feels a substantial adverse change has taken place in either the radio industry or the financial market. (Tr. 364-365). He states that the interest will be "our bank's prime rate plus 3%." But he does not state and Edwards does not know what bank Mann was referring to in his letter. At the hearing Mann defined "our bank" as the one he happens to be doing business with when the loan is made.

19. D. B. Mann does not make $3.5 million loans in the regular course of business. (Tr. 374-375). They have never made a loan of even $1 million to a company that was not related to them. The largest loan they have ever made to a non-related company was for $150,000. D. B. Mann has not made any non-related loans; i.e., to outside companies or individuals in the last five years.

20. *Intermediate Findings Edwards 1-2* Under *Aspen FM, Inc.*, FCC 90R-37 released May 23, 1990, paras. 15-17, and *Shawn Phalen*, FCC 90R-64 released July 24, 1990, Edwards must make two showings.[9] First he must show that he was financially qualified on September 10, 1990, when the financial issue was added against him. (FCC 90M-2844). Then he must demonstrate that he was financially qualified at the time he certified that he was; i.e., on October 24, 1985.

21. The record shows that he did neither. When he filed his Shawnee application on October 24, 1985, Edwards certified that he had sufficient net liquid assets on hand or available from committed sources to construct and operate the proposed station for three months without revenue.

22. That certification was abjectly false. Edwards did not have sufficient net liquid assets on hand. Nor were their any such resources available from committed sources. The only thing he had done to arrange for financing was to make a long distance phone call to a former employer of his, Robert Enoch. Enoch, a self-described money broker, orally told Edwards that when the time came he would get the money for Edwards.

23. Between October 24, 1985, and June 20, 1990 (subsequent to designation for hearing), Edwards never knew or even tried to find out whether Enoch had arranged for such financing or with whom he had made such arrangements.

24. Subsequent to designation Edwards retained counsel to handle the upcoming hearing. When counsel learned that Edwards had no reasonable assurance of financing, he advised Edwards to change his financial certification from "yes" to "no."

25. It wasn't until November 21, 1990, that Edwards was able to obtain anything even resembling a loan letter. Enoch purportedly obtained that letter from a real estate

development company, the D. B. Mann Development Company. However, even that letter proved to be little more than an accommodation letter.

26. Based on the record an intermediate finding is warranted that on October 24, 1985, Lt/Colonel Cyrus V. Edwards falsely certified that he had sufficient net liquid assets on hand or available from committed sources to construct and operate the requested facility for three months without revenue.

27. An intermediate finding is also warranted under Issue Edwards-1, that Lt/Colonel Edwards has failed to demonstrate that he is now financially qualified. So Edwards is not qualified to be a Commission licensee under either Edwards-1 or Edwards-2.

Edwards-3: The 47 CFR 1.65 Reporting Issue

28. As previously noted (Finding 14 *supra*.) it wasn't until July 19, 1990 (over two months after designation for hearing) that Edwards tried to change his financial certification from "yes" to "no." However, at that time Edwards did not say *when* he had lost his financing, or even *who* had withdrawn their financial commitment from him.

29. At the hearing (Findings 6-27 *supra*.), it developed that he never had financing in the first place. So he should have answered "no" originally.

30. Edwards claims that the person who withdrew his financial commitment was a Howard Peterson (*See* Findings 13-14 *supra*.; Tr. 128). But the record shows that Peterson had never committed any funding for Edwards' proposal; rather he (Peterson) had only expressed an interest in investing if he could get a controlling interest. (Tr. 433, 442-443). Moreover, Edwards didn't even know of Peterson's existence until his attorney, Russell Powell, advised him that they needed to identify Enoch's source of financing. (Tr. 127-129).

31. But there were other events which could and should have caused Edwards to question his original "yes" certification. He knew when he filed his 1000-foot tower application that he was going to have to amend to an 1800-2000 foot tower. (*See* Finding 12 *supra*.). And he was well aware that such a taller tower was beyond his financial means.

32. Edwards claims that he was looking to Enoch and a Steve Blake of Capital Federal Savings and Loan (Tr. 121). Blake ostensibly told Edwards that Capital Federal had the funding. But Edwards never secured anything in writing from Blake and Blake never appeared at the hearing. (Tr. 121-122, 290, 304). Moreover, Blake left Capital Federal in 1988. (Tr. 140). So any reliance Edwards may have been putting on Blake's oral assurances dissipated at least two years before this case was designated for hearing.

33. *IntermediateEdwards - 3 Findings*. Based on Findings 28-32 *supra*. certain 47 CFR 1.65 findings are warranted. It is found that between October 24, 1985 (when he filed his application) and July 19, 1990, Edwards was in a constant and continual state of 47 CFR 1.65 violation. From the outset he has known that his "yes" answer to financial certification was a charade. Yet he let his application be processed knowing full well that his "yes" answer was false.

34. Moreover during the intervening period; i.e., between October 24, 1985 and July 19, 1990, several incidents occurred that alerted or should have alerted Edwards to the fact that his "yes" certification was false. In fact, Robert Enoch testified that on one occasion he had been unsuccessful in obtaining financing for Edwards. (Tr. 407-409). And that he (Enoch) told Edwards that " . . . I can see hard roads ahead because if the rest of them I talk to act that way, we're going to be a long time." (Tr. 408-409).

35. Because Edwards' 47 CFR 1.65 violation has been constant and continual, and because he has numerous opportunities to level with both the Commission and his competing applicants and refused to do, it is found that Issue 3 must also be decided adversely against him, and Lt/Colonel Edwards is not fit to be a Commission licensee.

Edwards-4: Structural Misrepresentations

36. On March 17, 1986, during the customary predesignation maneuvering, Edwards filed a pleading in which he claimed "minority rights." He represented that if he were granted the construction permit "there will be minority people as part owners of the station." (BCI Ex. 3, p. 4; Tr. 89). But at the hearing when he was asked about his intentions about minority ownership, he equivocated. Eventually he said that if he ever formed a corporation, he would probably have minorities in it. (Tr. 90-95).

37. Again during the pre-designation phase, on November 23, 1987, Edwards filed another petition. There he announced that he was going to change his business format from a sole proprietorship to a corporation. Consequently in the Hearing Designation Order (55 F.R. 20525 *supra*. at paras. 7 and 18) the Chief, Audio Services Division directed Edwards to file the alluded to corporate information " . . . so that the Commission and other applicants can fully and fairly evaluate the ownership of the applicant . . . "

38. Edwards refused to comply with the direction. Instead, on June 11, 1990, Edwards withdrew his pre-designation November 23, 1987 petition (BCI Ex. 15; Tr. 85). There he said "while the possibility remains that I would form a corporation in the event a construction permit is awarded me, I have not reached any final conclusions on this matter." (BCI Ex. 15, p. 3); and he averred "Edwards has not formed a corporation to date and has no specific future plan to do so."

39. A little later (on July 20, 1990), BCI's counsel, Harry Martin, deposed Edwards:

> Martin: "Has there ever been anybody that you have actively considered to be a part owner with you?"
>
> Edwards: "No, sir."
>
> Martin: "Never?"
>
> Edwards: "No, sir."
>
> Martin: "Have you ever approached anybody about the possibility of their joining your company or joining your radio station?"
>
> Edwards: "No, sir."

40. At the September 24, 1990 hearing session, both BCI's counsel and the Trial Judge questioned Edwards about forming a corporation and bringing in additional investors. The Trial Judge asked him who he was going to bring aboard. Edwards said he didn't have anyone in mind and that he would be controlling 100% of the stock. (Tr. 81, 83). He further swore that no one had approached him about investing in his Shawnee project and that he had not approached anyone. (Tr. 84).

41. Later, on November 27, 1990, Edwards' financial guru, Robert Enoch was deposed (*See* Findings 7-17 *supra.*). Enoch says he is in the business of getting people involved in big projects by selling them an ownership interest in such projects. (BCI Ex. 5, p. 11)

42. Enoch says that after he agreed to help Edwards obtain financing, he arranged a meeting between Edwards, and Gary Todd and a Lewis Robard. That meeting took place in January 1987. The prospect of Robard and Todd *lending* Edwards money was never discussed. (BCI Ex. 5, pp. 29-30, Tr. 414, 436). Rather the discussion involved their investing in return for an ownership interest in the station. Indeed it was at that meeting Edwards came to realize that to get financing he would need to form a corporation and bring in investors. (Tr. 414, 418-419).

43. Edwards says Enoch told him (Edwards) that the required money for his Shawnee project would be available. (Findings 10-11 *supra.*). Enoch says that prior to his presentation to D. B. Mann in November, 1990 (Findings 15-91 *supra.*), he had never told Edwards that anyone had given him a commitment to fund the station. Both at his deposition, and again at the hearing Enoch swore that he never told Edwards there was money committed to his project.

44. Edwards admits that Enoch never told him from *where* he (Enoch) would obtain money. But, says Edwards, since Enoch was a "money broker," he knew Enoch wouldn't reveal the source of his funding anyway. So he never even asked.

45. Enoch says that after the Todd-Robard meeting (Finding 42) he and Edwards agreed that it was not going to be possible to get the financing unless (a) they had a corporate entity; and (b) the transaction could be completed quickly. Enoch say Edwards thought it would be a good idea to form a corporation and bring in people as stockholders since Edwards could not fund the station himself.

46. Enoch said that in the spring of 1990, well before the July 19, 1990 Edwards' amendment attempt (*See* Findings 28-30 *supra.*), he tried to bring Howard C. Peterson in as an investor/owner. The deal involved Peterson receiving 51% of the stock in a corporation to be formed after the license was granted. Enoch says that Edwards was aware of the requirement and accepted it. Edwards was to serve as the station's chief engineer, and Enoch was to be there for two years and put the station on the air. (BCI Ex. 5, pp. 47-49).

47. However, Edwards says the idea of bringing in investors was more of a concept than a plan and that it was not an "adopted" plan, only something they tried. (Tr. 422).

48. Enoch says that he has also talked with Edwards about his own participation as a station owner. He says:

> "We have not done anything because we can't. We can't do anything until we get a license in his hand and then we can put the corporate entity in there and we can do whatever we damn please with it.

49. Regarding the so-called Mann loan letter, Enoch says that David Mann will get a 51% voting interest in the corporation, and Edwards understands that. He says that from the beginning Edwards has known that to negotiate a $3.5 million loan, he (Edwards) was going to have to give up 51% of the license.

50. Edwards denies it. He says that the plan to bring in stockholders was not true; that it was a plan only in Enoch's mind; and that he doesn't remember Enoch sharing it with him. He says that Enoch has made a lot of statements he doesn't agree with.[10] Edwards denies having any knowledge of Robard and Todd coming in as investors; he denies knowing that Enouch had offered an equity interest to Peterson: and he denies offering David Mann any ownership interest. But he does admit that as his money-broker he gave Enoch discretion to do what ever was necessary to get the the funding . (Tr. 498). He says, "I never put any restrictions on him whatsoever."

51. *Intermediate Edwards-4 Findings*. Based on Findings 36-50 *supra.* some intermediate findings on Issue Edwards-4 are warranted. It is found that Edwards misrepresented facts to and lacked candor with the Commission when he said that he he will construct and operate his Shawnee proposal as a sole proprietorship: i.e., that he didn't intend to form a corporation and bring in additional investors.

52. He knew when he filed his application on October 24, 1985, that he was going to have to amend that application and specify a far more expensive 1800/2000 foot tower than the 1000 footer he originally proposed. He was also fully aware that such a taller tower was beyond his financial means. (Findings 12 and 31 *supra.*).

53. Any illusions he may have had about being a sole proprietor were completely dispelled in January, 1987, if not before.[11] In January 1987 Edwards and his financial guru, Robert Enoch, met with a couple of prospective financial backers, Gary Todd and Lewis Robard. *See* Finding 42 *supra.* Todd and Robard were not interested in lending Edwards any money; they were interested in investing in his project and taking an ownership interest. As a result of that meeting Edwards realized he would need to form a corporation and bring in investors.

54. Indeed, several months later, on November 23, 1987, Edwards filed a petition with the Commission that indicated that he was going to change his business format from a sole proprietorship to a corporation. *See* Finding 37 *supra.*

55. That representation remained undisturbed throughout the pre-designation phase of this proceeding. It was only after the Chief, Audio Services directed Edwards to fully disclose and describe his corporation that Edwards switched back to his sole proprietorship concept.

56. But to compound his problem when Edwards was asked to explain his shifting, moving-target tactics, he lied. *See* Findings 39-40 *supra.* He asserted that he had never actively considered anybody to be a part owner in his venture, that no one had approached him about investing in the Shawnee project, and that he had not approached

anyone in that regard. However, when his money-broker, Robert Enoch testified directly to the contrary. (Findings 41-49 *supra*.), the most Edwards could offer was: (Tr. 497)

> "There's a lot of statements . . . that he made that I won't say is not true but I certainly wouldn't agree with them."

57. Edwards misrepresentations, his lack of candor, his evasiveness, and his moving-target tactics under Issue Edwards-4 brand him unfit to be a Commission licensee.

Edwards-5: Abuse of Process

58. Colonel Edwards began aggressively abusing the Commission's processes at the pre-designation stage of this proceeding. In the Hearing Designation Order (55 F.R. 20525 *supra*.) the Chief, Audio Services Division pointed out that Edwards has " . . . demonstrated a complete disregard for the Commission's established pleading cycle . . . this has resulted in the filing of numerous unauthorized filings have caused considerable delay and resulted in needless additional time spent by the staff in producing this Hearing Designation Order."

59. Edwards refused to heed the clear and unmistakable admonishment the Chief gave him. He has not obtained or even tried to obtain a copy of the Commission's rules in spite of the Chief Judge's instruction that he do so. *See* FCC 90M-120 released May 22, 1990 and Tr. 315-316. There was a period of time (June 1, 1990 through November 19, 1990) when Edwards had legal counsel, and he says that he relied on counsel to proceed correctly during that period. But the record reflects that neither before June 1, 1990 or after November 19, 1990 did he try to obtain and familiarize himself with a copy of the Commission's rules.

60. As a result: (1) On November 28, 1990, Edwards filed a "Motion For Leave to Supplement . . . " an opposition that was due back on November 13, 1990; fifteen days later, and *without authorization*, he tried to add additional material; after BCI opposed Edwards' Motion For Leave To Supplement, Edwards filed another *unauthorized* pleading entitled "Reply To Opposition To Motion For Leave to Supplement." That pleading was dismissed as unauthorized. *See* FCC 90M-3992 released December 18, 1990;

(2) On December 11, 1990, Edwards filed an unauthorized "Reply To Botts Opposition To Motion For Extension Of Time." That reply was dismissed (FCC 90M-3967, released December 14, 1990); Edwards filed this unauthorized pleading even though the Trial Judge had notified him by telephone on December 7, 1990 that his original extension request had been denied;

(3) On December 10, 1990, Edwards filed an unauthorized "Motion To Dismiss Bott Communication Application File No. BPH-851028MG." This motion was denied not only because it was unauthorized but also because it was untimely, unsupported and was premised on false and inaccurate accusations (FCC 91M-115 released January 11, 1991);[12]

(4) On January 15, 1991, Edwards filed an unauthorized "Answer to Bott's Reply to Opposition To Petition To Enlarge Issues." That pleading was dismissed. (*See* FCC 91M-223 released January 18, 1991).

(5) On April 1, 1991, Edwards submitted unauthorized and improper "Comments, Facts, Pertinent Law, and Conclusions Regarding the Shawnee, Oklahoma FM Broadcast Station Case." At BCI's request that pleading WAS STRICKEN from the record. (*See* FCC 91M-1515).[13]

61. In addition to filing unauthorized, untimely, and *ex parte* pleadings, Edwards had attempted to disrupt the proceeding by using moving target tactics. Take the case of station financing. On July 20, 1990, when he was deposed he said that Robert Enoch was the source of his reasonable assurance certification. When asked if he had reviewed his own personal financial statement before he filed his application Edwards said he hadn't. *See* BCI Ex. 10, pp. 3-4, and 20-21.

62. Less than a month later, on August 15, 1990, but before the first hearing, he said that his original financial certification was based on a "local firm" and Robert Enoch. (BCI Ex. 16, p. 7).

63. At the Steptember 24, 1990, hearing session, when the Trial Judge asked Edwards about his financial certification, he said (Tr. 113):

> "[A]s far as the 90 days was concerned of operation of the station, I had it myself. And the construction costs, and so forth, I had contacted another person that used to manage KTOK in Oklahoma City [Robert Enoch], and he assured me that the funding would be available to build the station."

When he was asked whether he had conversed with Enoch before filing his initial application, and whether those conversations were the basis of his financial certification, Edwards said, "Absolutely, sir." (Tr. 119-120).

64. The following day, September 25, 1990, Edwards partially opposed a Bott "Motion For Production of Documents." There he represented in part " . . . that he was not relying upon his personal funds for the construction and initial operation of his station and consulted no personal financial statement . . . "[14] Consequently, the Trial Judge ruled that Edwards didn't need to make any personal net worth documents available for inspection and copying, as long as it was understood "that he [Edwards] has not ever, does not now, and will not rely on all or any part of his personal net worth in meeting the financial evidentiary burdens assigned to him in this proceeding." *See* FCC 90M-3077, released September 28, 1990.

65. Then, on November 13, 1990, Edwards filed an opposition to a Summary Decision motion BCI had filed. There he stated, for the first time, that when he had made his initial financial certification, he had been relying on his personal financial resources. Tr. 484-485.[15] Moreover, at the second hearing session Lt/Colonel Edwards tried to introduce documents relating to his personal financial wherewithal (*e.g.*, see Tr. 300 (Edwards Ex. 2A), and Tr. 307 (Edwards Ex. 2F)).

66. *Intermediate Findings: Edwards-5* Occasionally, we get a *pro se* applicant who believes he can force his way through a hearing to a grant. This type of *pro se* isn't interested in abiding by the Commission's rules of practice and procedure, or even learning what they are. He believes and acts like rules are made for the other person. As a result he squanders judicial system resources, creates obscurities, and presents ineffective and inefficient evidence and arguments.

67. Lt/Colonel Cyrus Edwards is such a *pro se* applicant. Even at the pre-designation stage of the case he demonstrated a complete disregard of the Commission's procedures by filing numerous untimely and unauthorized pleadings. *See* Finding 58 *supra* He has never obtained or even tried to obtain a copy of the Commission's rules despite the Chief Judge's instruction that he do so.

68. He continued filing unauthorized and untimely pleadings during the hearing phase of proceeding, and deliberately ignored the Trial Judge's directions on how to file an acceptable set of Proposed Findings of Fact and Conclusion of Law; he has raised a series of arguments that bear absolutely no relationship whatsoever to the evidence of record; and he constantly shifted his factual and legal position whenever it suited him, the old moving-target ploy. Moreover, Edwards has deliberately tried to overburden this record by persistently lodging materials with the Trial Judge that he didn't make available to his opponent.

69. In brief by deliberately ignoring the Commission's rules from the outset, Edwards has inserted confusing and extraneous matters into this controversy; he has created obscurities; and he has even denounced his own witness (Robert Enoch) in an effort to conceal the truth. His abuse of the Commission's processes has been both manifest and flagrant.

The Standard Comparative Issue

Description of the Applicants

70. *Lt/Col. Cyrus V. Edwards* is a sole proprietor. Edwards Ex. 1, p. 1. *Bott Communications, Inc. (BCI)*, a Delaware Corporation, has the following officers, directors, and stockholders. (Bott Ex. 1, p. 1):

CHART

Name	Position	No. of Shares	% Ownership
Richard P. Bott, Sr.	Pres/Dir.	0	0
Richard P. Bott, II	Vice Pres/Dir.	20	20
Sherley E. Bott	Sec/Treas/Dir.	0	0
Bott Broadcasting Company	NA	80	80

71. The Bott Broadcasting Company (para. 70 *supra.*), a Delaware Corporation (BBC) has Richard P. Bott, Sr. and his wife, Sherely E. Bott, as joint owners of 100% of its shares (10.000 shares). Richard P. Bott, Sr. is President and Director, and Sherely E. Bott is Secretary, Treasurer, and Director of Bott Broadcasting Company. Richard P. Bott, II is Vice President and Director of Bott Broadcasting Company, but has no ownership interest.

Diversification of Mass Media

72. *Lt/Col. Cyrus V. Edwards* has no ownership interest in or connection with any media of mass communications.

73. *BCI.* Richard P. Bott, Sr., BCI's President and Director, is also the President, Director, and Joint Owner of BBC. He also is President of Bott Broadcasting/Tennessee, Inc. (BBT). BBC owns 80% of BCI's stock and 100% of BBT's.

74. *BBC* is: the permittee of AM broadcast Station KCCV, Overland Park, Kansas; licensee of KQCV(AM), Oklahoma City, Oklahoma; and licensee of WFCV(AM), Fort Wayne, Indiana.

75. *BCI* is: the licensee of KSIV(AM), Clayton, Missouri, the licensee of KCIV(FM), Mt. Bullion, California; and the permittee of a new FM broadcast station in Hastings, Nebraska. BBT is licensee of WCRV(AM), Collierville, Tennessee.

76. *Sherely Bott* is Secretary/Treasurer/and Director of BBC, BCI, and BBT.

77. *Richard P. Bott, II* is the Vice President/Director of BBC, BCI, and BBT. He is also permittee of a new FM station at Blackfoot, Idaho.

78. Neither BCI nor its principals will terminate any of these media interests before the new Shawnee facility begins program tests.

Best Practicable Service

79. *Comparative Coverage*. Edwards would serve 383,318 people within 25,830 Km^2 area. BCI would serve 286,824 people within 21,154 Km^2. During all daytime all of the areas each proposes to serve receive at least five aural services. At night Edwards would provide a 4th service to 315 people over 123 Km^2 and a 5th service to 2,184 people over 421 Km^2.

80. Edwards' superiority in coverage (96,504 people over 4,676 Km^2) warrants a very slight preference. A very slight preference also attaches to Edwards' provision of a 4th and 5th nighttime service. The overall coverage preferences that Edwards has garnered warrant a slight preference in his favor.

81. *Integration of Ownership With Management. Lt/Col. Edwards* was born on June 20, 1918 and is presently over 73 years old. He lives and has lived in Oklahoma City since 1964. Oklahoma City is about 30 to 34 miles from Shawnee. Edwards' proposed 1 mv/m contour doesn't reach Oklahoma City, and his residence is located outside the contour. He says he will commute to Shawnee daily.

82. Edwards claims 100% quantitative integration. He proposes to work full-time (a minimum of 40 hours a week) as the general manager of the proposed station. In that capacity he will have primary and ultimate responsibility for all decisions affecting the station's day-to-day and long range operations. He will hire and fire all station personnel and oversee all engineering, sales, and programming.

83. Edwards has some *vintage* broadcast experience. For about 14 years, from 1945-1959, he was the assistant chief engineer for KTOK(AM), Oklahoma City. In 1955 while he was still with KTOK he started a radio call paging company, Radiocall Paging Service. From 1955-1959 he operated the radio paging business on a part-time basis. After he left KTOK in 1959 he operated the paging busi-

ness full-time until 1980. In 1980 he sold Radio Paging Service. Edwards makes no claim for participation in the civic activities in the Shawnee area.

84. *Bott (BCI)* doesn't plan to integrate any of its principals into the management of its proposed Shawnee FM operation.

85. *Auxiliary Power* There is no record evidence that Edwards will install an auxiliary power generation system. BCI proposes to install and operate auxiliary power generators at the Shawnee station. (BCI Ex. 1, p. 5).

Ultimate Findings of Fact and Preliminary Conclusions of Law

1. Two applicants remain in the running for FM channel 236C on 95.1 MHz in Shawnee, Oklahoma: Lt/Colonel Cyrus V. Edwards (Edwards) and Bott Communications, Inc. (Bott).

2. The two parties adduced evidence on six factual issues. Five of those issues (Edwards 1-5) are basic qualifying issues that have been added against Edwards. The sixth is the standard comparative issue.

Edwards' Basic Qualifying Issues

3. Before we consider the standard comparative issue, we must first consider the basic qualifying issues against Cyrus Edwards. For it is axiomatic that only basic qualified applicants are entitled to a comparative analysis. *See e.g. Louis Adelman*, 29 FCC 1223, 18 RR 1062 (1962) *affirmed sub. nom. Guinan* v. *Federal Communications Commission*, 297 F.2d 782, 22 RR 2026 (1961).

4. Cyrus Edwards has failed to meet any of the five issues that have been added against him. First, on October 24, 1985, Edwards certified that he had sufficient net liquid assets on hand or available from committed sources to construct and operate his proposal for three months without revenue. That 1985 representation was not only abjectly false, Edwards knew it was false. The *only* action he had taken to arrange for financing was to place a long distance telephone call to a former employee of his, Robert Enoch. Enoch, a self described money broker, told Edwards that when the time came he (Enoch) would get the money for Edwards. Edwards did nothing else.

5. Between October 24, 1985 and June 20, 1990 (subsequent to designation for hearing), Edwards never knew or tried to find out whether Enoch had even arranged for such financing or with whom he made such arrangements.

6. A single phone call to an ex-employee hardly constitutes a reasonable basis for the financial certification the Commission requires. In fact, when Edwards (after the case was designated for hearing) hired communications counsel, and counsel found out that Edwards had no reasonable assurance of financing, counsel advised Edwards to quit dissembling and to change his financial certification from "yes" to "no."

7. It wasn't until November 21, 1990 that Edwards was able to obtain anything even resembling a loan letter. That letter, not from a banking institution, but from a real estate company (the D.B. Mann Company), proved to be nothing more than an accommodation letter, and a defective one at that. So the conclusion is warranted that Edwards, in BPH-851024MB, falsely certified that he was financially qualified, and that this false certification renders him unqualified to be a Commission licensee.

8. The further conclusion is warranted under Edwards-1 that Cyrus Edwards is still not financially qualified to be a Commission licensee. He still cannot show that he has net liquid assets on hand or from committed sources to construct his proposal and operate it for three months without revenue. Since he's not financially qualified Edwards isn't entitled to be a Commission licensee.

9. Under Edwards-3 the conclusion is inevitable that Edwards violated 47 CFR 1.65 by waiting until July 19, 1990 to correct his financial certification from "yes" to "no." Edwards claims that he wasn't aware that he needed to report the financial change until a Howard Peterson withdrew his financial commitment to Edwards. That claim is absurd. Peterson had never committed any funding in the first place. So there was nothing to withdraw. Moreover, Edwards didn't even know that Peterson existed until his own attorney, Russell Powell, advised him that they needed to identify Enoch's (the alleged money broker's) source of financing. The nature and scope of Edward's 47 CFR 1.65 violation is such that it too renders him unqualified to be a licensee.

10. Even *assuming* that Edwards could show that he was qualified under Edwards-1, Edward-2, and Edwards-3, he would still be found basically unqualified under Edwards-4. The record evidence conclusively demonstrates that he has made misrepresentations regarding his ownership structure. In fact, his own witness, Robert Enoch says that as early a January 1987 (if not earlier) Edwards knew that he would have to abandon his sole proprietorship ownership structure and form a corporation so as to bring in investors.

11. Enoch says that after the Todd-Robard meeting in January 1987, he and Edwards had a talk. They agreed that it wasn't going to be possible to get financing unless (a) they had a corporate entity to bring in stockholder; and (b) the transaction could be completed quickly. Enoch says they both knew that Edwards couldn't fund the station himself. So the conclusion is warranted that Edwards either misrepresented to or lacked candor with the Commission when he represented to the Commission that he didn't intend to form a corporation and bring in additional investors. So under Edwards-4 the conclusion is unmistakable that Edwards is not of fit character to be a Commission licensee.

12. Turning to the last of the basic qualifying issues; i.e., Edward-5, the conclusion is warranted that Cyrus V. Edwards has deliberately and continuously abused the Commission's processes in prosecuting BPH-851024MB. Such abuses started at the *pre-designation phase* of the proceeding when Edwards demonstrated a complete disregard for the Commission's established pleading cycle. He filed numerous unauthorized pleadings that caused considerable delay.

13. *After designation* Edwards continued his abusive ways. He continued filing unauthorized pleadings when he knew they were unauthorized; he continued filing untimely pleadings when he knew they were untimely; and he ignored the Trial Judges' directions on how to prepare and file an acceptable set of Proposed Findings of Fact and Conclusions of Law. The result: a whole series of arguments that bear absolutely no relationship whatsoever to the evidence of record. *See e.g.* FCC 91M-1515, released May 2, 1991.

14. Through the device of unauthorized pleadings Edwards has tried to shift his legal and factual positions whenever he felt like it. Stated another way, Edwards would take a position on an issue or sub-issue. Then when he sensed that there was another position he might take, without regard to the facts, he would switch positions. Having done that he would sometimes retreat to his original position. Then he'd couple his moving target tactics with the device of sending written materials to the Trial Judge that he never served on his opponent.

15. In brief, by deliberately and continuously abusing the Commission's processes, Cyrus Edwards has inserted confusing and extraneous matters into this proceeding; he has created obscurities; and he has even denounced his own witness, Robert Enoch, in an effort to hide the truth. Consequently, the conclusion is more than warranted that Edwards' abuse of the Commission's processes renders him unfit to be Commission licensee.

The Ultimate Conclusion

16. Under the ultimate issue (see Finding 2 *supra.*) we must decide which of these two applicants should be granted. Here the result is clear. Bott Communications, Inc. is basically qualified to be a Commission licensee. Cyrus V. Edwards isn't.

17. Edwards is not financially qualified; he wasn't financially qualified on October 24, 1985 when he certified that he was; he deliberately withheld decisionally significant information from the Commission thus violating 47 CFR 1.65; he has misrepresented facts to and lacked candor with the Commission in connection with his prosecution of BPH-851024MB; and he has tried to thwart the search for the truth by abusing the Commission's processes. In brief, Edwards has proven himself unfit to be a Commission licensee on each of the five issues that has been added aganist him.

18. So Cyrus Edwards is eliminated from comparative consideration, and no comparative conclusions are needed.[16] Bott Communications Inc. is declared the winner.

SO, unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion,[17] Lt/Colonel Cyrus V. Edwards' application (BPH-851024MB) IS DENIED; and Bott Communications, Inc.'s application (BPH-851028ME) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

FOOTNOTES

[1] Early on, Edwards was represented by Attorney Russell C. Powell. However, on November 19, 1990, Powell moved to withdraw as Edwards' counsel. That motion was granted. *See* FCC 90M-3732 released November 28, 1990. From that time on Edwards has attempted with little or no success, to represent himself.

[2] Edwards-1 through Edwards-3 were added by FCC 90M-2844 released September 10, 1990.

[3] Edwards-4 and 5 were added by FCC 91M-116 released January 11, 1991.

[4] The comparative and ultimate issues were the originally designated issues. *See* 55 F.R. 20525 *supra*.

[5] Edwards' Reply has been disregarded for the same reason his "Comments . . . " were stricken. That document too is fraught with nonrecord material, and factual inaccurancies.

[6] Up through the first hearing (the September 24, 1990 session) Edwards stoutly maintained that he was relying on his conversation with Robert Enoch. But, in November 1990, and for the first time, Edwards attempted to change his story, and asserted that had been relying on his personal finances for financing when he filed his application. That belated switch was rejected. (BCI Ex. 10, p. 20; Tr. 113-114, 273, 275, and 485).

[7] This proceeding was designated for hearing on May 10, 1990. *See* 55 F.R. 20525 *supra*.

[8] At another point Edwards testified that for back-up financial assurance he was relying on a conversation he had with a Capital Federal Savings and Loan Company executive, Steve Blake. This oral exchange purportedly took place in 1981 or 1982, at least three years before Edwards filed his application. Blake purportedly told him that Capital Federal had the funding. But Edwards never followed up on his conversation with Blake; there is not now and never was anything reduced to writing; and Steven Blake failed to appear at the hearing. (Tr. 121-122, 290, 304).

[9] Edwards was appraised of his forward-backward burden early on. *See* FCC 90M-2744 released August 30, 1990.

[10] Robert Enoch was Lt/Colonel Edwards' witness.

[11] As early as March 17, 1986, Edwards represented to the Commission that he was going to abandon his sole proprietorship structure when he said "there will be minority people as part owners of the station." *See* Finding 36 *supra*.

[12] Also see Footnote 4 of FCC 91M-116 released January 11, 1991 where reference is made to Edwards forwarding documents to the Trial Judge without serving them on opposing counsel.

[13] This is not all of the unauthorized and untimely motions that Lt/Colonel Edwards filed in this proceeding. But it is a good representative sample of how he has behaved, or misbehaved as the case may be.

[14] Edwards' counsel argued facts about Edwards presonal finances were "patently irrelevant" (BCI Ex. 17, p.1).

[15] By this time, and with Edwards' moving target presentations, BCI was becoming visibly concerned. *See* FCC 91M-99 released January 10, 1991 at Footnote 1 where the Trial Judge pointed out that an inconsistent evidentiary record *per se* is no ground for granting a Summary Decision.

[16] Note that comparative fndings of fact have been made. *See* Findings 70-85 *supra*. It's only comparative conclusions that aren't needed. This means that if an appellate body disagrees with the conclusions under Edwards-1 through Edwards-5 no remand will be required. Stated another way, findings of fact have been made on *all* issues, and conclusions of law have been made on *all material* issues. *See WFPG, Inc.*, 33 FCC 673 (1962) at para. 13; *Alkima Broadcasting, Inc.*, 30 FCC 932 (1961) at Footnote 2; and *Sayger Broadcasting Co.*, 32 FCC 496 (1962) at Footnote 7; 47 CFR 1.267(b); and 5 USC 557(c)(A).

[17] If exceptions aren't filed within 30 days or the Commission doesn't review the case on its own motion, this Initial Decision will become effective 50 days after its public release. *See* 47 CFR 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Tariff F.C.C. No. 12 — Transmittal No. 3649

ORDER

Adopted: December 6, 1991; Released: December 6, 1991

By the Chief, Common Carrier Bureau:

1. On November 25, 1991 AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective December 9, 1991 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Option 109 of Virtual Telecommunications Network Service (VTNS).

2. On December 2, 1991, the Competitive Telecommunications Association (CompTel) filed a petition to reject or suspend and investigate Transmittal No. 3649.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 3649 and CompTel's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Tariff F.C.C. No. 12, Transmittal No. 3649, filed by the Competitive Telecommunications Association IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

---

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, *Report and Order*, FCC 91-251, released Sep. 16, 1991 (*IXC Order*).

Before the
Federal Coommunications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 10, 1991

Advisory Committee on Advanced Television Service Implementation Subcommittee Meeting

January 28, 1992
10:30 A.M.
Commission Meeting Room (Room 856)
1919 M Street, N.W.
Washington, D.C.

The agenda for the meeting will consist of:

1. Introduction
2. Minutes of Last Meeting
3. Report of Working Party 1
   Policy and Regulation
4. Report of Working Party 2
   Transition Scenarios
5. General Discussion
6. Other Business
7. Date and Location of Next Meeting
8. Adjournment

All interested persons are invited to attend. Those interested also may submit written statements at the meeting. Oral statements and discussion will be permitted under the direction of the Implementation Subcommittee Chairman.

Any questions regarding this meeting should be directed to George Vradenburg III at (213) 203-1334. Dr. James J. Tietjen at (609) 734-2237, or Gina Harrison at (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 10, 1991

COMMON CARRIER BUREAU SOLICITS COMMENTS REGARDING MODIFICATIONS AND IMPROVEMENTS TO THE TARIFF REVIEW PLAN

Comment Date: December 30, 1991

To aid our review of the required annual revisions of the local exchange carriers' (LECs) interstate access tariffs, the Common Carrier Bureau has developed Tariff Review Plans (TRPs). TRPs specify certain information that LECs must file in a uniform format. In each of the last six years, the Bureau has prepared TRPs, after consultation with the LECs and their customers, reflecting both the specific information needed in light of changes in relevant Commission rules and policies and the most effective and least burdensome methods of supplying this information. The TRPs developed through this process are subject to approval by the Office of Management and Budget in accordance with the provisions of the Paperwork Reduction Act, 44 U.S.C. §§ 3506 et seq.[1]

In preparation for the 1992 annual access tariff filings, currently scheduled to be filed on April 2, 1992, the Bureau is examining changes in the TRP necessary to reflect recent rule changes and other events, and our experience in using TRPs. The most significant changes for the 1992 annual access tariff filings will be the incorporation of Open Network Architecture (ONA) rates into the price cap indexes, assuming Ameritech's ONA tariffs take effect before the end of 1991, and the initial implementation of sharing and low end adjustment amounts under price cap regulation. These changes will alter the data required for the TRP.

As we have in the past, the Bureau wishes to obtain the views and advice of customers and other interested persons in order to develop any needed modifications and improvements in the TRP. In order to adopt a final TRP as far in advance of the annual access tariffs filing date as possible, and to enable the TRP to provide the information needed by the Commission to conduct its review of the tariffs in accordance with the Communications Act, the Bureau has determined that an expedited and informal procedure would be most useful.

Interested persons wishing to express their views regarding modifications and improvements to the TRP may do so by letter addressed to the Chief, Tariff Division, Common Carrier Bureau, Federal Communications Commission, 1919 M Street, N.W., Room 518, Washington, D.C. 20554. We invite comment on the form the TRP should take both for carriers subject to price cap regulation and for carriers subject to the rate of return rules. We especially solicit comment on needed changes to the TRP to reflect the new ONA rates and to document carriers' sharing obligations or low end adjustment amounts (*e.g.*, how excluded services should be removed from the computation of sharing obligations or low end adjustment amounts). We also solicit comment from the carriers on any exogenous changes they plan to request, beyond those included in the 1991 annual access tariff filing. These comments should be received no later than December 30, 1991, to allow the Bureau an opportunity to consider them. No reply comments will be considered.

For further information, contact Chris Frentrup (202) 632-6312 of the Common Carrier Bureau, Tariff Division.

FEDERAL COMMUNICATIONS COMMISSION

---

[1] The 1991 TRP, adopted in Commission Requirements for Cost Support Material To Be Filed with 1991 Annual Access Tariffs, DA 91-147, Order, released Feb. 6, 1991, bore OMB Approval Number 3060-0400.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-380

In re Applications of

RIO GRANDE BROADCASTING CO. File No. BPH-880815MV

ROBERTO PASSALACQUA File No. BPH-880816NN

IRENE RODRIGUEZ DIAZ DE McCOMAS File No. BPH-880816OR

UNITED BROADCASTERS COMPANY File No. BPH-880816OW

For Construction Permit for
New FM Station, Channel 247A,
Rio Grande, Puerto Rico

MEMORANDUM OPINION AND ORDER

Adopted: November 26, 1991; Released: December 20, 1991

By the Review Board: MARINO (Chairman), ESBENSEN, and GREENE.

1. Before the Review Board are an Emergency Appeal, filed October 30, 1991, by Irene Rodriguez Diaz De McComas (appellant); and a Motion to Dismiss the Emergency Appeal, filed November 5, 1991, by the Mass Media Bureau. McComas appeals from two orders issued by Administrative Law Judge Joseph P. Gonzalez (ALJ). The first *Order*, FCC 91M-3145, released October 24, 1991, denied a motion filed by Roberto Passalacqua (Passalacqua), which sought, in the alternative, a continuance of the proceeding or certification to the Commission whether the proceeding should be continued, based on a contention that the instant channel may never be permanently assigned at Rio Grande, Puerto Rico. The second *Order*, FCC 91M-3169, released October 29, 1991, denied McComas' request for a hearing conference. Comments in support of the appeal were filed November 1, 1991 by Passalacqua. An Opposition to the appeal was filed on November 12, 1991 by Rio Grande Broadcasting Co.

2. Appellant contends with respect to the first *Order* that the ALJ flagrantly abused his discretion in denying the continuance, primarily in basing his ruling on the ground that Passalacqua was, in effect, seeking reconsideration of the *Hearing Designation Order*, 5 FCC Rcd 5442 (1990) (*HDO),* which set the applications for hearing. Appellant argues that the movant simply challenged the timing of the hearing, not the validity of the *HDO*, and that a continuance is necessary to prevent the parties from expending hearing costs without assurances that an ultimate grant of an application can be made. As for the second *Order*, appellant contends that, because its application was reinstated in this proceeding [1] subsequent to the ALJ's scheduling of procedural dates (FCC 91M-2527, released August 15, 1991), the ALJ abused his discretion in denying its unopposed request for a hearing conference, where its counsel could participate in discussions concerning permission to appeal and other stipulations and scheduling that occurred prior to its reinstatement. The Bureau, in turn, urges the Board to dismiss the appeal as unauthorized under Section 1.301 of the Commission's Rules, 47 CFR § 1.301.

3. We will grant the Bureau's motion and dismiss the appeal. Except for the type of rulings enumerated in Subsection (a) of 47 CFR § 1.301, which rulings are appealable as of right and not present here, all other appeals from interlocutory rulings of presiding officers are permitted only if permission is first secured from the ALJ making the ruling. *See* 47 CFR § 1.301(b). Where leave to appeal has not been sought or secured, the

> ruling is final unless there has been egregious error or flagrant abuse of discretion and the appealing party has met the burden of establishing that such has occurred. *See Communications Satellite Corp.*, 32 FCC 2d 533 (1971). The burden on the would-be appellant is heavy to ensure orderly procedure and prevent the continued delays that could occur if proceedings were halted every time a party was disatisfied with the ALJ's interlocutory ruling and sought Commission or Board intervention.

Jan - Di Broadcasting, Inc., 93 FCC 2d 890, 891 (Rev. Bd., 1983); *see also Charisma Broadcasting Corp.*, 2 FCC Rcd 2979 (Rev. Bd. 1987). Section 1.243(f) and (h) of the Commission's Rules, 47 CFR § 1.243(f) and (h), confers authority on ALJs to "regulate the course of the hearing" and to "hold conferences for . . . simplification of the issues." The ALJ "has great latitude in regulating the course of an evidentiary hearing and . . . in the absence of a clear abuse of discretion by arbitrary or capricious action, his determination in such matters, including the scheduling of hearing sessions, will not be overturned." *Gilbert Broadcasting Corp.*, 54 FCC 2d 69, 70 (Rev. Bd. 1975): *see also Arcatel, Inc.*, 92 FCC 2d 893, 895 (Rev. Bd. 1982) (Board is "loath to intervene in ongoing adjudicatory proceedings, except in the most extraordinary circumstances"). Moreover, litigation expenses, even substantial irrecoverable costs, do not constitute an irreparable injury that would justify a stay of a proceeding. *See Dorothy J. Owens*, 104 FCC 2d 157, 158 (Rev. Bd. 1986), relying on *Shurberg Broadcasting of Hartford Inc. v. FCC*, No. 84-1600 (D.C. Cir. December 21, 1984).

4. Here, appellant neither sought nor received the ALJ's permission to appeal. Nor has it met its heavy burden under the *Communications Satellite Corp.* test[2] or demonstrated other extraordinary circumstances that would warrant immediate Board intervention. Thus, nothing before us suggests that ALJ's actions were arbitrary or capricious or an abuse of his discretion. In denying Passalacqua's motion to grant a continuance or certify the question of a continuance to the Commission, the ALJ reasonably concluded that a continuance was beyond his authority and that a certification of this matter would serve no purpose, since the Commission was fully aware of the potential conflict between the proposed station at Rio Grande and a British Virgin Island station and yet designated the applications for hearing. *See HDO*, 5 FCC

Rcd at 5433 n.1; *see generally Frank H. Yemm*, 39 RR 2d 1657 (1977)(neither an ALJ nor the Review Board has authority to review the propriety of an exercise of delegated authority). With respect to the ALJ's denial of a request for a further prehearing conference, appellant states only that it is concerned that prejudice may occur, not that it has occurred.[3]

5. ACCORDINGLY, IT IS ORDERED, That the Motion to Dismiss, filed November 5, 1991, by the Mass Media Bureau IS GRANTED; and that the Emergency Appeal, filed October 30, 1991, by Irene Rodriguez Diaz De McComas, IS DISMISSED.[4]

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

FOOTNOTES

[1] *Rio Grande Broadcasting* Co., 6 FCC Rcd 5517 (Rev. Bd. 1991).

[2] 32 FCC Rcd at 534. "[T]here has been such a flagrant abuse of discretion as would inevitably require a reversal of the Initial Decision and a hearing *de novo*; or where the proceeding involves basic and far reaching considerations of public policy and vital concerns relating to the public interest which could not otherwise adequately be protected."

[3] However, as we remarked in *Charisma*, 2 FCC Rcd at 2980, we are confident that our experienced triers-of-fact will carefully conduct hearings in a manner that assures every applicant a fair hearing. In any event, appellant is not foreclosed from renewing any claim of prejudice caused by the governing procedural schedule as an exception to a subsequent Initial Decision or other final order in this proceeding. *See* 47 CFR § 1.301(b)(1). *Cf. Harrison County Broadcasting Co.*, 6 FCC Rcd 5819 (Rev. Bd. 1991)(affirming ALJ's authority to hold a *de novo* hearing after an application was reinstated, citing *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945)).

[4] Because of the time element involved, we have provided prepublication copies of this *Order* to the parties and the ALJ.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of the Commission's Rules to Authorize Cellular Carriers to Offer Auxiliary and Non-Common Carrier Services — RM-7823

ORDER

Adopted: December 11, 1991; Released: December 12, 1991

By the Chief, Common Carrier Bureau:

1. On December 3, 1991 Telocator filed a request for extension of time. Telocator requests that the time to file reply comments in response to the above-captioned petition for Rule Making be extended thirteen days, from December 11, 1991 to December 24, 1991.

2. Telocator explains that its investigation of the Commission's public files on December 2, 1991, revealed that the comments of at least six parties had not yet been received by its counsel as of that date. Therefore, in order to ensure that it has received copies of all the pleadings filed and to provide adequate time for its preparation of comprehensive reply comments, Telocator has submitted its request for extension of time.

3. For good cause shown, we find that the public interest will be served by granting the request. Additional time will ensure a full and complete record in this proceeding. Accordingly, Telocator's request for an extension of time is GRANTED. The deadline for filing reply comments is extended to December 24, 1991.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PACIFIC BELL AAD 91-22

Apparent Violations of the
Commission's Rules

CONSENT DECREE ORDER

Adopted: December 9, 1991; Released: December 9, 1991

By the Commission:

I. INTRODUCTION

1. On November 9, 1990, this Commission initiated an enforcement proceeding against Pacific Bell (Pacific) for apparent violations of the Commission's rules in connection with the carrier's transactions with the National Exchange Carrier Association, Inc. (NECA).[1] This Order terminates that proceeding by adopting a consent decree negotiated with Pacific. [2] The decree requires Pacific to make a payment of $250,000 for deposit into the United States Treasury.

II. BACKGROUND

A. The Proceeding's Scope

2. The subject proceeding arose from an adjustment Pacific reported to NECA's common line (CL) pool during December 1988. That adjustment withdrew portions of Pacific's CL costs from that pool and thereby reduced Pacific's share of that pool below the level it had earned. Pacific recorded this reduced share in Account 5082, Switched access revenue, rather than in a nonoperating account. In the *Notice,* we tentatively determined that this adjustment was improper and that the carrier's use of Account 5082 to record the adjustment's effects was inconsistent with our accounting rules. We advised Pacific that it is apparently liable for a forfeiture of $250,000 for this accounting violation. [3]

3. In the *Notice,* we also ordered Pacific to show cause why it should not be required totake certain actions. First, during January, February, and March 1989, Pacific reported adjustments to NECA that collectively reversed its December 1988 adjustment. In the *Notice*, we tentatively concluded that these 1989 adjustments were neither equitable nor consistent with Commission rules, and we ordered Pacific to show cause why it should not be required to withdraw these 1989 adjustments. We indicated that such a withdrawal would be necessary to keep Pacific from profiting from manipulation of the NECA process. [4]

4. Second, in the *Notice,* we tentatively concluded that Pacific should have recorded the effects of its December 1988 adjustment in Account 7360, Other nonoperating income, rather than in Account 5082. Based on this tentative conclusion, we ordered Pacific to show cause why such accounting should not be required. [5]

B. The Parties' Positions

5. In its response to the *Notice,* Pacific stated that its December 1988 adjustment was inconsistent with the Commission's rules and that it should not have recorded the effects of that adjustment in Account 5082. Pacific contended, however, that it had acted in good faith and that this Commission should not impose the proposed forfeiture or implement the other actions proposed in the *Notice.* Pacific argued, in particular, that it should not be required to withdraw its 1989 adjustments because those adjustments were necessary and appropriate to bring it into compliance with Commission rules. The only other party, Allnet Communication Services, Inc. (Allnet), indicated that the 1989 adjustments corrected Pacific's December 1988 adjustment in a reasonably timely manner and that Pacific should not be required to "forfeit the monies associated with" that December 1988 adjustment. [6]

III. DISCUSSION

6. The proposed consent decree would require Pacific to make a tax non-deductible payment of $250,000 for deposit into the United States Treasury. This payment would be excluded from net income calculations for ratemaking purposes and would be recorded in Account 7370, Special charges. The decree would also terminate the subject proceeding, without impeding our ability to pursue other matters and without prejudging any complaints we might receive pursuant to Section 208 of the Communications Act. [7]

7. We have reviewed the terms of the proposed decree, which we hereby incorporate into this Order, and evaluated the circumstances of this case, including those Allnet discusses. We believe that the decree's adoption would resolve the issues in these proceedings in an appropriate manner, while avoiding the delay, expense, and uncertainty of protracted litigation. Accordingly, we find in the exercise of our discretion to conduct our proceedings in the manner that "will best conduce to the proper dispatch of business and to the ends of justice, " [8] that adoption of the consent decree will serve the public interest.

8. In adopting the consent decree, we recognize that it does not implement certain measures proposed in the *Notice*. We believe, based on the record before us, that these measures would be contrary to the public interest and are therefore appropriately excluded from the consent decree. As an initial matter, although we proposed to

---

[1] Pacific Bell, Notice of Apparent Liability for Forfeiture and Order to Show Cause, 5 FCC Rcd 7176 (*Pacific Notice).*

[2] A Copy of the decree is attached to this Order.

[3] *Pacific Notice*, 5 FCC Rcd at 7177, para. 11, 15.

[4] *Id.* at 7177, para. 13.

[5] *Id.* at 7177, para. 12, 16.

[6] *See* Allnet Comments at 9, 12, 14.

[7] 47 U.S.C. §208.

[8] 47 U.S.C. §154(j).

require Pacific to withdraw the adjustments it reported to NECA during January, February, and April 1989 to reverse its December 1988 adjustment, we are now convinced that those 1989 adjustments were necessary and appropriate to bring Pacific into compliance with Commission rules. We are also convinced that the withdrawal of those adjustments is not necessary to keep Pacific from profiting from manipulation of the NECA process. In these circumstances, we believe that we should not require Pacific to withdraw those adjustments.

9. Second, while we believe that Pacific should have recorded the effects of its December 1988 adjustment in Account 7360, rather than in Account 5082, we believe that implementing our proposal to require such accounting would serve no useful purpose at this time, given that we are not requiring Pacific to withdraw its 1989 adjustments. As a matter of equity, if we were to order such accounting, we would also allow Pacific to make offsetting entries to record the effects of its 1989 adjustments in Account 7360. [9] We see no reason to elevate form over substance by requiring such accounting at this stage of the proceeding.

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), (j) that the subject Consent Decree, incorporated by reference herein, IS HEREBY ADOPTED and that the Secretary shall sign such Consent Decree on behalf of this Commission.

11. IT IS FURTHER ORDERED that the enforcement proceeding this Commission initiated on November 9, 1990, against Pacific Bell IS HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

ATTACHMENT

In the Matter of

PACIFIC BELL AAD 91-22

Apparent Violations of the
Commission's Rules

CONSENT DECREE

1. This is a Consent Decree between the Federal Communications Commission (the Commission) and Pacific Bell (Pacific) terminating enforcement proceedings against Pacific. The Commission initiated those proceedings on November 9, 1990, through the release of a *Notice of Apparent Liability for Forfeiture and Order to Show Cause* against Pacific.[10] That *Notice* addressed four adjustments Pacific reported to the National Exchange Carrier Association, Inc. (NECA) during December 1988 and 1989. The first of these adjustments, in December 1988, withdrew $16 million in information origination/termination (IOT) expenses from NECA's common line (CL) pool for 1988. The other three adjustments, in January, February, and April 1989, collectively increased the IOT expenses Pacific reported to that pool by $16 million.

2. In the *Notice*, the Commission tentatively concluded that Pacific had failed to account for the effects of its December 1988 adjustment in the manner prescribed in the Commission's rules. The Commission stated that in December 1988, Pacific apparently reported erroneous data to NECA as part of a concerted effort by Pacific and other carriers to increase the CL pool's rate of return for 1988. The Commission also stated that the reported data were inconsistent with the Commission's rule for allocating IOT costs among access elements. [11] The Commission stated further that Pacific had previously implemented that rule and reported data to NECA in accordance with that rule.

3. The Commission stated, in addition, that Pacific's December 1988 adjustment shifted a portion of Pacific's IOT costs for 1988 from the CL element to the special access element and decreased Pacific's share of the revenue from the CL pool for 1988. The Commission stated that Pacific apparently accounted for this decreased share by reducing its revenues in Account 5082, Switched access revenue, in apparent violation of Sections 32.4999 and 32.5082 of the Commission's Rules. [12] The Commission tentatively concluded that Pacific should have recorded the effects of its December 1988 adjustment in Account 7360, Other nonoperating income, rather than in a telecommunications revenue account.

4. In the *Notice*, the Commission also stated that Pacific's conduct appeared to reflect a serious disregard for the integrity of the NECA reporting process and the Commission's accounting rules. The Commission stated, in addition, that Pacific was voluntarily foregoing revenues that it had a right to retain when it reported its December 1988 adjustment to NECA. The Commission stated further that Pacific apparently concluded by early January 1989 that the December 1988 adjustment should be reversed, and that Pacific reversed a portion of that adjustment in January 1989, and the remainder in February and April 1989. The Commission stated that these reversals appeared neither equitable nor consistent with Commission rules.

---

[9] There would be an offset because the entries Pacific would make to account properly for its December 1988 adjustment would be mirrored by entries in the opposite direction to account for the 1989 adjustments. These entries would all be made on current books of account rather than on books of account for 1988 and 1989. Those prior books have been closed.

[10] Pacific Bell, Notice of Apparent Liability for Forfeiture and Order to Show Cause, 5 FCC Rcd 7176 (1990) (*Notice*).

[11] 47 C.F.R. §69.303 (1988).

[12] 47 C.F.R. §§32.4999, 32.5082.

5. The *Notice* accordingly ordered Pacific to show cause why it should not be required to do the following:

> a. Pay a forfeiture in the amount of $250,000 for failure to account for its December 1988 adjustment in the manner prescribed in Sections 32.4999 and 32.5082 of the Commission's Rules;
>
> b. Record the effects of its erroneous reporting in Account 7360; and
>
> c. Withdraw its January, February, and April 1989 adjustments to the CL pool regarding IOT expenses.

6. Pacific filed its response to the *Notice* on December 10, 1990. In that response, Pacific contended that the Commission's criticism of Pacific, the proposed forfeiture, and the proposed reversal of Pacific's 1989 adjustments were inappropriate. Pacific stated that there was considerable confusion in the Fall of 1988 about the proper reporting of IOT costs. Pacific also stated that it made its December 1988 adjustment to avoid double recovery of IOT costs and to prevent inconsistent reporting of IOT costs among LECs. Pacific stated further that its motives were not to manipulate NECA processes to benefit NECA members, and that it had not acted in concert with other LECs to affect the CL rate of return.

7. In its response, Pacific conceded that its December 1988 adjustment was an accounting misclassification, and that it was further error to make correcting entries over several months, rather than through a single, January 1989 entry. Pacific asserted, however, that it was not voluntarily foregoing revenues when it reported its December 1988 adjustment to NECA. Instead, Pacific stated that when it made that adjustment, it reduced its accrual for special access overearnings by an approximately equal amount. Pacific also stated that when it reversed its December 1988 adjustment during 1989, it increased its accrual for special access overearnings by the amount of the reversal.

8. Pacific attached a report of its independent auditor to its response. That report concluded, among other matters, that by April 1989, Pacific had voluntarily assigned IOT costs in compliance with Commission rules and that the reversal adjustments Pacific made in January, February, and April 1989 corrected Pacific's December 1988 adjustment. The independent auditor stated that Pacific's rate of return report for 1988 reflected both Pacific's December 1988 adjustment and Pacific's 1989 adjustments.

9. The Commission and Pacific agree that the expeditious resolution of this proceeding in accordance with the terms of this Consent Decree is in the best interests of the public and Pacific's ratepayers.

10. In consideration of the Commission's agreement to terminate this proceeding on the terms set forth in this Consent Decree, Pacific agrees to pay, without recourse to a trial *de novo* or any other further protest, the amount of $250,000, within five days of the date on which the Commission releases an order adopting this Consent Decree.[13] Pacific agrees that no portion of this payment shall be included in net income determinations for ratemaking purposes, and that such payment shall be recorded in Account 7370, Special charges. Pacific also agrees that it and its affiliates will not claim a federal or state income tax deduction for this payment.

11. In view of the above and in express reliance thereon, the Commission agrees (a) not to require Pacific to withdraw its January, February, and April 1989 adjustments as proposed in the *Notice*, and (b) to issue an order formally adopting this Consent Decree (the Consent Decree Order) and terminating all Commission proceedings against Pacific arising from the November 9, 1990 *Notice* regarding Pacific, the audit report underlying that *Notice*, and Pacific's December 1988, January 1989, February 1989, and April 1989 adjustments regarding IOT costs. The Commission further agrees that this Consent Decree serves to resolve all issues now pending or which may be brought against Pacific before the Commission arising from matters that are the subject of the *Notice* and the underlying audit, other than issues raised in a complaint, if any, filed pursuant to Section 208 of the Communications Act of 1934, as amended. The Commission further agrees that it will not on its own motion institute against Pacific new proceedings of any kind arising from matters that are the subject of the *Notice* and the underlying audit.

12. Agreement by the Commission to this Consent Decree shall constitute a decision to terminate this proceeding without any finding of wrongdoing or liability on the part of Pacific, or of necessity for sanctions against Pacific. The Commission agrees that the tentative conclusions contained in its *Notice* and the underlying audit report shall not be used against Pacific in any other current or future proceeding before the Commission. Nothing in this Consent Decree shall preclude the Commission from proceeding pursuant to its November 9, 1990 letter to NECA[14] or addressing matters arising in regard to the requirements of that letter,[15] except that the Commission shall not in that proceeding make any finding of wrongdoing or liability against Pacific based on the matters that are the subject of the *Notice* and the underlying audit. It is intended and understood by the Commission and Pacific that this Consent Decree does not constitute an adjudication of any factual or legal issue raised in this proceeding or in the *Notice* and the underlying audit. By virtue of this Consent Decree, neither Pacific nor its affiliates shall be precluded or estopped from subsequently litigating any issues, *de novo*, in any other forum, except as expressly provided herein.

13. Pacific admits the jurisdiction of the Commission over it and over the subject matter of this proceeding for the purposes of this Consent Decree and a Consent Decree Order.

14. Pacific waives any rights it may have to appeal a Consent Decree Order having the provisions described herein and will not engage in conduct inconsistent with the terms of this Consent Decree.

---

[13] Payment shall be made by check or money order drawn to the order of the Federal Communications Commission and shall be for deposit into the General Fund of the United States Treasury. The check or money order shall be mailed or delivered to: Federal Communications Commission, P.O. 73482, Chicago, Illinois 60673-7482.

[14] Letter from Donna R. Searcy, Secretary, FCC, to Lawrence C. Ware, Chairman of the Board of Directors, NECA, 5 FCC Rcd 7183 (1990).

[15] *See* Public Notice, Pleading Cycle Established for Comments on Request for Waiver or Modification of NECA Audit Letter, DA 91-642 (May 24, 1991).

15. Pacific agrees that any violation of a Consent Decree Order or of this Consent Decree shall constitute a separate violation of a Commission order, entitling the Commission to exercise any rights and remedies attendant to the enforcement of a Commission order.

16. The Commission and Pacific agree that the effectiveness of this Consent Decree is expressly contingent upon termination of this proceeding, issuance of a Consent Decree Order as described herein, and compliance by Pacific with the terms of this Consent Decree. If the Consent Decree is not signed by the Commission or its authorized agent and by Pacific, or is otherwise rendered invalid, it shall become null and void and shall not become part of the record in this proceeding.

17. If the Commission or the United States of America on the Commission's behalf brings an action in United States District Court to enforce the terms of a Consent Decree Order or of this Consent Decree, Pacific agrees that it will not contest the validity of either the order or the decree, and will consent to a judgment incorporating the terms of this Consent Decree.

FEDERAL COMMUNICATIONS COMMISSION

For Pacific Bell
Gary W. McBee
Executive Vice President External Affairs

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 90-314

In the Matter of

Amendment of Commission's Rules to Establish New Personal Communications Services

RM-7140, RM-7175 and RM-7618

ORDER EXTENDING TIME FOR COMMENTS

Adopted: December 10, 1991; Released: December 12, 1991

By the Office of Engineering and Technology:

1. Technologies, Strategies and Solutions Associates (TSS) has filed a *Motion for Extension of Time* in the above-captioned proceeding requesting an extension of time for filing comments related to issues discussed at the *en banc* hearing held on December 5, 1991 on personal communications services.

2. TSS requests that the deadline for filing comments be extended from December 19, 1991, to January 9, 1992, to permit small companies located outside of the Washington, D.C. area to obtain the written and video record of the *en banc* hearing, read and view the record, determine if comments should be prepared, and prepare and submit such comments.

3. Requests for extensions of time are not routinely granted. However, in order to develop as complete a record as possible, an extension of time is appropriate in this particular instance. This additional time will permit all interested parties sufficient time to obtain and review the complete *en banc* record and prepare comments on the complex issues presented in this proceeding. Accordingly, IT IS ORDERED, that the deadline for filing comments IS EXTENDED to January 9, 1992.

4. This action is taken pursuant to authority found in Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 USC Sections 154(i) and 303, and pursuant to Sections 0.31, 0.241, and 1.46 of the Commission's Rules, 47 C.F.R. Sections 0.31, 0.241, and 1.46.

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies Transmittal No. 562

Revisions to Tariff F.C.C. No. 2

ORDER

Adopted: December 11, 1991; Released: December 11, 1991

By the Chief, Common Carrier Bureau:

1. On August 9, 1991, the Ameritech Operating Companies (Ameritech) filed Transmittal No. 562 to add "Ameritech OPTINET Reconfiguration Service" (AORS). AORS permits certain network management and reconfiguration functions to be performed either directly by the customer, or by Ameritech at the customer's request. Description and Justification at 1-3. It reconfigures customers' networks from remote locations using digital cross-connection systems and leased lines at the central office, where customers share use of a host computer. Customers performing their own reconfigurations use their own terminals to access the host computer, which validates the reconfiguration commands before conveying them to the digital cross-connect system associated with the customer's service. *Id.*

2. MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate Transmittal 562. Ameritech, MCI argues, does not demonstrate that each of AORS' unbundled rate elements pass the net revenue test. MCI Petition at 4-6. It asserts that Ameritech provides cost support only for the "average AORS service configuration." *Id.* at 5. MCI further contends that Ameritech incorrectly includes sales promotion costs, certain advertising costs, and projected sales compensation costs as one-time expenses, although those costs will continue throughout the life of the service. *Id.* MCI also argues that AORS creates information which will then be transmitted across LATA boundaries, thus violating the Modified Final Judgment(MFJ). *Id.* at 2-4.[1]

3. In its reply, Ameritech contends that a separate net revenue test is not required for each rate element. Ameritech Reply at 3. It adds that it did not use an "average AORS service configuration" in its net revenue test, but rather in its demonstration of annual incremental costs and annual revenues. *Id.*, n. 10. Ameritech also asserts that the costs related to advertising, direct mail, and promotional materials are incremental costs which are directly attributable to AORS. It argues that future expenses in those areas would not be attributed to AORS, but to the OPTINET Service "Family." Ameritech contends that the sales compensation cost is the present value of projected compensation costs for AORS contracts for the life of the service, and is incurred once for each contract. *Id.* at 4. Finally, Ameritech contends that AORS does not violate the MFJ, and that MCI's argument to the contrary is irrelevant since the Commission neither interprets nor enforces the MFJ. *Id.* at 1-2.

4. The Common Carrier Bureau has reviewed Ameritech Transmittal 562 and related pleadings. We conclude that Ameritech's tariff revision presents no question that warrants suspension or investigation at this time.

Accordingly, IT IS ORDERED that the petition to suspend and investigate Ameritech Tariff F.C.C. No. 2, Transmittal No. 562, filed by MCI Telecommunications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

---

[1] *Citing* United States v. AT&T, 552 F.Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983); United States v. AT&T, 569 F.Supp. 1057 (D.D.C.), *aff'd sub nom.* California v. United States, 464 U.S. 1013 (1983).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 3364

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: December 11, 1991; Released: December 11, 1991

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 3364 to modify Virtual Telecommunications Network Service (VTNS) Option 90 under which AT&T provides voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. Transmittal 3364 adds the outage credit units for 45 Mbps data transmission capabilities, which were omitted from the original transmittal. *See* AT&T Transmittal No. 3364 at 1, 7. The transmittal is scheduled to take effect December 12, 1991.

2. MCI Telecommunications Corporation filed a petition to reject these modifications to Option 90, Transmittal 3364, on August 29, 1991. AT&T filed a reply on September 3, 1991.

3. MCI claims that the Commission, at its meeting on August 1, 1991, found that because the lack of 800 number portability remains a barrier to full competition in 800 services, AT&T should be precluded from bundling 800 services with other services in these Tariff 12 contracts. MCI Petition at 2. MCI asserts that the proposed modifications in Transmittal 3364 were not pending as of August 1, 1991. *Id.* Accordingly, says MCI, Transmittal 3364, which modifies a Tariff 12 option that contains bundled inbound calling, should be rejected. *Id.* at 2-6.

4. AT&T replies that the modifications in Transmittal 3364 correct an inadvertent omission in the original filing for Option 90. AT&T Reply at 2. Moreover, says AT&T, these changes are merely ministerial corrections that do not affect inbound transmission capabilities and, therefore, should be permitted to take effect. *Id.* at 4. Consequently, says AT&T, these revisions should be permitted to take effect. *Id.* at 4-5.

5. The Common Carrier Bureau has reviewed AT&T Transmittal No. 3364, the petition filed by MCI and AT&T's reply. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to warrant rejection.

6. Accordingly, IT IS ORDERED that the petition to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3364 filed by MCI Telecommunications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 20, 1991

FAXCHEK SYSTEMS REQUESTS WAIVER OF PREAMBLE REQUIREMENT FOR 900 SERVICES NON-VERBAL CALL

FaxChek Systems (FaxChek), a California sole proprietorship, has requested, under Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, a waiver of the preamble requirement contained in Section 64.711 of the Commission's rules, 47 C.F.R. § 64.711. *See* Policies and Rules Concerning Interstate 900 Telecommunications Services, CC Docket 91-65, Report and Order, 56 F.R. 56160 (November 1, 1991). That rule requires, among other things, that most pay-per-call programs have a preamble which discloses the price, gives the name of the information provider, provides a brief description of the service and affords the caller an opportunity to hang up before charges are imposed. FaxChek alleges that it offers an automated testing service for facsimile machines and that all of the communications are machine to machine and non-verbal. FaxChek argues that it takes steps to assure that all customers are informed of its rates in writing before they use the service and that it is not technically possible to put a preamble on its service. FaxChek alleges that, if the preamble requirement is not waived, it will be unable to comply with the our rules and will have to cease operations.

Parties wishing to comment on this matter may do so no later than **January 10, 1992.** Replies may be filed no later than **January 27, 1992.** All filings concerning this matter should refer to CC Docket 91-65.

Copies of the petition for waiver and any subsequently filed documents in this matter may be obtained from Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036, (202) 452-1422. The petition and documents are also available for inspection and copying in Room 6206, 2025 M Street, N.W., Washington, D.C. 20554.

For further information, contact Thomas David at (202) 632-4887.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-300

In the Matter of

Virginia Public Safety Plan

ORDER

Adopted: December 11, 1991; Released: December 20, 1991

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On March 11, 1991, Region 42 (Virginia) submitted its public safety plan to the Commission for review. The plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in Virginia. On September 20, 1991, Virginia filed revisions to the plan, based on conversations with the Commission's staff.

2. The Virginia plan was placed on Public Notice for comments on October 9, 1991, 56 FR 52549 (October 21, 1991). The Commission received no comments in this proceeding.

3. We have reviewed the plan submitted for Virginia and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in Virginia.

4. Therefore, we accept the Virginia Public Safety Radio Plan. Furthermore, licensing of the 821-824/866-869 MHz band in Virginia may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Arizona Western College File No. 91166
Yuma, Arizona

Request for Waiver

ORDER

Adopted: December 12, 1991; Released: December 20, 1991

By the Chief, Land Mobile and Microwave Division:

1. Arizona Western College seeks waiver of Section 94.93 of the Commission's Rules, 47 C.F.R. § 94.93, to allow a new station authorization on frequencies in the 12,700-13,250 MHz band in the Private Operational Fixed Microwave Service. Arizona Western wishes to establish a long haul video microwave system using these frequencies to connect its main campus to its satellite campuses for two-way video instruction. It does not, however, meet the requirements of Section 94.93 for use of the frequencies. Under this Section, the frequencies were available only to Operational Fixed licensees that held authorizations in the 12,200-12,700 MHz band prior to September 9, 1983, and requested a change to the 12,700-13,250 MHz band prior to September 9, 1988. Arizona Western is not such a licensee.

2. Arizona Western maintains in support of its request that no other potential assignments will meet its particular needs. [1] Thus it asserts that the 1,850-1,990 MHz band and the 6,525-6,875 band, the two otherwise appropriate Operational Fixed Service frequencies, are congested at one of its proposed sites. Further, it argues that use of these frequencies would require costly digital radios and video compression equipment that are beyond its financial resources.

3. We will deny the waiver request. The frequencies that Arizona Western seeks are assigned to the Cable Television Relay Service for relay of television and related audio signals to cable television systems. As noted above, the frequencies were opened for a period of five years only to Operational Fixed licensees displaced when their existing frequencies were allocated for Direct Broadcast Satellite service. As Arizona Western proposes a use inconsistent with the existing licensing scheme, the standard for waiver is a high one.

4. Arizona Western does not meet this standard. While it states as an initial matter that other frequencies are congested, Arizona Western offers no specific support for this claim. Even if it had provided an interference analysis, further, Arizona Western would still have to establish that interference problems could not be solved by using high grade antennas. For the two Operational Fixed Service bands that Arizona Western has rejected, antennas are available with diameters up to 15 feet. These antennas have significantly lower beamwidth that would reduce the possibility of interference. As for Arizona Western's claim of undue expense, finally, we simply do not accept equipment cost as an independent basis for waiver. Section 94.15(c) of the Commissions's Rules, 47 C.F.R. § 94.15(c).

5. We conclude in light of the above that Arizona Western College has established no unique circumstances justifying waiver. Accordingly, pursuant to Sections 0.331 and 1.3 of the Commission's Rules, 47 C.F.R. §§ 0.331 and 1.3, the waiver request filed by Arizona Western College **IS DENIED.**

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile and Microwave Division
Private Radio Bureau

---

[1] The length between tower sites and the fact that video is being transmitted eliminate certain potential assignments as either too limited in range or too narrow in bandwidth.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 12, 1991

Released: December 20, 1991

Carl E. Person, Esq. 8330-R
250 West 57th Street - Suite 529
New York, NY 10107-0529

Dear Mr. Person:

This is in response to your recent complaint filed on behalf of Mr. Curly Thornton, whom you state is "a legally qualified Democratic candidate for President in several states," against ABC, CBS, Fox Broadcasting, NBC, PBS, CNN, C-Span. You assert that Mr. Thornton has been excluded from an agreement made by a consultant for the National Democratic Party "with the respondent media . . . to televise debates among the so-called `major candidates.'" You maintain that broadcasting of the proposed debates would be in violation of Section 315 (the "equal opportunities" law), 312(a)(7) (the "reasonable access" provision), and the Fairness Doctrine. You also argue that many of your client's U.S. and state constitutional rights will be denied. Finally, you request access to the political files of those media entities involved.

Generally, the Commission has no authority to intrude upon broadcasters' programming decisions. The no-censorship provision of the Communications Act, as amended, (47 U.S.C. Section 326), which embodies First Amendment principles, prohibits the Commission from directing broadcasters in the selection or presentation of broadcast material.

Section 315 of the Communications Act (47 U.S.C. Section 315) states in pertinent part:

> (a) If any licensee shall permit any person who is a legally qualified candidate for public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any --
>
> (1) bona fide newscast
>
> (2) bona fide news interview
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection.

The Commission has held that debates are exempt from the equal opportunities provision of Section 315 as on-the-spot coverage of bona fide news events. *Chisholm v. FCC*, 538 F.2d at 358 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976). Moreover, exempt debates may be sponsored or initiated by broadcasters, candidates, third parties, and others. *Henry Geller*, 95 FCC 2d 1236 (1983), *aff'd subnom. League of Women Voters v. FCC*, 731 F.2d 955 (D.C. Cir. 1983). *WCVB-TV*, 2 FCC Rcd 4778 (MMB, 1987). When a broadcaster initiates a debate, it has the discretion to select as participants, based on objective criteria such as polling results, those candidates who are most significant. *See King Broadcasting Co*., 6 FCC Rcd 4998 (1991). In *King*, the Commission said:

> The proposal before us contemplates appearances by the two major party presidential nominees only. However, we believe that exclusion of a major third-party presidential candidate who, based on objective criteria such as polling results showed the significance of his or her campaign, would call into question the bona fides of the broadcaster's selection of candidates. (Footnote omitted).

You have presented no information in this connection that would bring into question the *bona fide* nature of the proposed debate. Moreover, even if a debate were held not to be exempt, the "[e]qual time right under Section 315 of the Communications Act does not include [the] right to appear on [the] same program with other candidates since station licensees cannot compel political candidates to appear on the same program with [other candidates]." (*Conservative Party*, 40 F.C.C. 1086 (1962)).

You also refer to the Fairness Doctrine, which obligated broadcasters to allow reasonable opportunity for the broadcast of contrasting views on controversial issues of public importance in its overall programming. In August 1987, the Commission ceased enforcement of the Fairness Doctrine after concluding that it no longer served the public interest. *Syracuse Peace Council v. FCC*, 2 FCC Rcd 5043 (1987) (*Syracuse*), *aff'd*, 867 F.2d 654 (1989), *cert. denied*, 110 U.S. 717 (1990). Copies of news releases referring to *Syracuse* are enclosed. *Syracuse* ruled upon the Fairness Doctrine generally. In the area of political programming, the Commission held in *Lenora Fulani*, 3 FCC Rcd 6245 (1988), that the *Syracuse* decision applies to news coverage of candidates.

Concerning a licensee's obligation to maintain a political file, Section 73.1940(d) of the rules requires broadcasting stations to:

> . . . Keep and permit public inspection of a complete record (political file) of all requests for broadcast time made by or on behalf of candidates for public office, together with an appropriate notation showing the disposition made by the licensee of such requests, and the charges made, if any, if the request is granted. When free time is provided for use by or on behalf of such candidates, a record of the free time provided shall be placed in the politi-

cal file. All records required by this paragraph shall be placed in the political file as soon as possible and shall be retained for a period of two years.

You do not indicate that you, your client, or any other person have requested and been refused the opportunity to examine any broadcaster's political file.

In view of the foregoing, your complaint IS DENIED.

Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within thirty days of the date of public notice of this letter (see Commission Rule 1.4(b) [47 C.F.R. Section 1.4b)]) by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. *See* Commission Rule 1.115 (47 C.F.R. Section 1.115).

Sincerely,

Milton O. Gross, Chief
Fairness/Political Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 6, 1991

Released: December 20, 1991

Act III Broadcasting
of Rochester, Inc.
c/o Henry Goldberg
Goldberg and Spector
1229 Nineteenth St., NW
Washington, D.C. 20036

8940-PRG

In re: WUHF(TV),
Rochester, New York

Gentlemen:

This letter refers to your request for a 12-month extension of the deadline for divesting your interest in and connection with WUHF(TV), Rochester, New York. No objections have been filed.

Act III Broadcasting of Rochester, Inc. (Act III-Rochester) is the licensee of Station WUHF(TV), Rochester, New York. On June 19, 1990, the Commission authorized the assignment of the license of Station WUTV(TV), Buffalo, New York, from Citadel Communications Company, Ltd. to Act III Broadcasting of Buffalo, Inc. (Act III-Buffalo). *Citadel Communications Company, Ltd.*, 5 FCC Rcd 3842 (1990). Act III-Buffalo and Act III-Rochester are commonly controlled by Act III Broadcasting, Inc. Because the predicted Grade B contours of WUTV(TV) and WUHF(TV) overlap, the application was subject to Section 73.3555(a)(3) of the Commission's Rules, which generally proscribes the common ownership of television stations with overlapping Grade B contours. However, the Commission granted Act III-Buffalo's request for a 12-month temporary waiver of Section 73.3555(a)(3) to divest WUHF(TV).

In granting the temporary waiver the Commission found that the immediate sale of WUHF(TV) "could unnecessarily restrict the value of the station and could artificially limit the range of potential buyers to those with immediate access to the necessary capital, which may preclude the purchase of the station by local groups or minority-controlled entities." *Id.* The Commission therefore determined that a forced sale would work a hardship both on the public and on the licensee, presenting no offsetting public benefit. The Commission noted that steps to find a minority buyer had already been taken. *Id.*

We were also persuaded by the fact that Act III-Buffalo represented that the two stations would operate independently. *Id.* Specifically, the applicant asserted that: (1) WUTV(TV) and WUHF(TV) would operate independently of one another, with separate and autonomous programming, sales, and traffic departments; (2) WUTV(TV) and WUHF(TV) would employ separate national sales representatives firms in both the United States and Canada; and (3) WUTV(TV) and WUHF(TV) would not engage in joint acquisition of syndicated, sports, or other forms of entertainment programming for broadcast on the two stations. *Id.*, at 3842, 3844. We found that such arrangements, for the temporary period of 12 months, minimized any loss of diversity caused by common ownership. We also noted that the effect on diversity was decreased by the small size of the overlap area, the large number of broadcast signals received in that area, and the fact that the two stations served two different markets. We consequently granted the waiver and authorized the assignment of WUTV(TV) from Citadel to Act III-Buffalo.

Not yet having divested WUHF(TV), you now request a 12-month extension of the temporary waiver. You state that you have sent sales information packages to 33 interested parties and have engaged the services of six brokers. Citing the economic downturn of the past year and tightened credit markets, you assert that several interested buyers (including two minority purchasers) have been unable to obtain the necessary financing to allow them to acquire the station. Consequently, you maintain, you cannot sell the station at a reasonable price without an extension of the deadline.

Renewing the pledge to comply with the conditions originally imposed by the Commission, you claim that the factors compelling the previous temporary waiver remain the same. You assert that joint ownership of the two stations will again be for a temporary period, with guarantees of independent operation to minimize the impact on diversity. In addition, you also state that forcing an immediate sale will still discourage purchase by local groups or minority-controlled entities. Finally, you contend that the overlap area is relatively small, that the stations serve different markets, and that the area still receives a wide array of broadcast signals from a variety of other sources.

Based upon your representations, we continue to believe that a forced sale under the circumstances would serve only to harm the public and the licensee, with no offsetting benefits to the public. It appears that good faith attempts to find a purchaser, including minority buyers, have been made. Accordingly, we extend the deadline for the sale of WUHF(TV) until 12 months from the adoption date of this Order. During this time, Act III- Rochester and Act III-Buffalo shall continue to comply with the representations made to the Commission regarding the independent operations of the two stations. Further, we do not expect to grant another waiver beyond this time, absent a showing of compelling circumstances.

Accordingly, IT IS ORDERED, that the request for extension of the waiver filed by Act III Broadcasting of Rochester, Inc., IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

SEPARATE STATEMENT
OF
COMMISSIONER ERVIN S. DUGGAN

In Re: WUHF(TV), Rochester, New York.

Recognizing the difficulty of selling a television station in the current economic climate and recognizing other important circumstances, I vote to support granting the 12-month extension of the temporary waiver requested by Act III Broadcasting to divest Station WUHF(TV). Rochester, New York. Nevertheless, I wish to stress that this narrow and limited action does not suggest a general willingness on my part to waive or relax the television duopoly rule. I will be extremely reluctant to grant a further extension of this waiver.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

THE OFFSHORE TELEPHONE COMPANY,
Complainant,

v. File No. E-91-64

SOUTH CENTRAL BELL
TELEPHONE COMPANY,
Defendant.

ORDER

Adopted: December 16, 1991; Released: December 20, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. Complainant in the above-captioned proceeding, The Offshore Telephone Company (Offshore), by Motion, has petitioned the Commission to dismiss the formal complaint it filed in this matter. Complainant indicates that a mutually agreeable settlement of the matter has been reached.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that The Offshore Telephone Company's Motion to Withdraw Formal Complaint, filed on December 12, 1991, IS GRANTED and that the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-313

In the Matter of

Policy and Rules Concerning
Rates for Dominant Carriers

MEMORANDUM OPINION AND ORDER

Adopted: October 29, 1991; Released: December 20, 1991

By the Commission:

1. On April 17, 1991, this Commission released an Order on Reconsideration in the above docket, generally affirming and clarifying our previous Order, and adopting modifications to the final rules implementing price cap regulation for local exchange carriers (LECs).[1] Three parties petitioned for further reconsideration of that order on the single issue of the Commission's establishment of an interim approach for the evaluation of new services rates.[2]

2. In view of the subsequent adoption by the Commission of an Order resolving this issue,[3] and because no pending proceedings were affected by the interim approach established in the *LEC Price Cap Reconsideration Order*, these petitions for further reconsideration are moot.

3. Accordingly, IT IS ORDERED that the petitions for further reconsideration submitted by BellSouth, Southwestern Bell, and the United States Telephone Association ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

---

[1] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Order on Reconsideration, 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order)*; Second Report and Order, 5 FCC Rcd 6786 (1990) (*LEC Price Cap Order)*.

[2] Petitions for Further Reconsideration filed by BellSouth Telephone, Southwestern Bell Corporation (SWB), and the United States Telephone Association (USTA).

[3] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 88-89, and Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Report and Order & Order on Further Reconsideration & Supplemental Notice of Proposed Rulemaking, FCC 91-186, released July 11, 1991 (*ONA Order)*. The *ONA Order* establishes a flexible cost-based approach to setting rates for new services. *ONA Order*, paras. 38-44.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Cellular Electronics, Inc. File No. 163500-92-3-JSG

Notice of Apparent Liability for
Forfeiture Penalty for Station
KNKK335 in the Public Land Mobile
Service at Ft. Lauderdale and Port
Saint Lucie, FL.

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: December 13, 1991; Released: December 20, 1991

By the Chief, Mobile Services Division:

1. On September 10, 1990, the Commission granted an authorization to Cellular Electronics, Inc. (Cellular) to operate on frequency 931.5375 MHz at Ft. Lauderdale and Port Saint Lucie, Florida. The expiration date of the authorization was September 10, 1991. Prior to September 10, 1991, Cellular constructed the facilities and commenced operations. On October 3, 1991, Cellular filed FCC Form 489, Notification of Status of Facilities, to request reinstatement.

2. Section 22.9(b)(1) of the Commission's rules states:

> *Notification of status of facilities.* (FCC Form 489). When construction has been completed in accordance with the radio station authorization, the licensee shall so notify the Commission using Form 489. Licensees can commence service the day Form 489 is placed in the mail to the FCC.

Therefore, because Cellular commenced operation without timely filing FCC Form 489 with the Commission, it is in apparent violation of Section 22.9(b)(1).

3. Section 503(b) of the Communications Act states, in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
>
> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter . . . shall be liable to the United States for a forfeiture penalty.

We find that Cellular's failure to file the required Form 489 until October 3, 1991, constitutes willful and repeated conduct within the term of the statute.

4. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), 56 Fed. Reg. 37665 (1991), *recon. pending*, the base forfeiture amount for failing to file required forms is $30,000.00. Consistent with this *Policy Statement*, we are adjusting downward the forfeiture by $15,000.00 because failing to file an FCC Form 489 is a relatively minor violation and by an additional $9,000.00 because Cellular voluntarily disclosed its failure to file the FCC Form 489.

5. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Sec 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Sec. 1.80, IT IS ORDERED that Cellular Electronics, Inc. IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of Six Thousand Dollars ($6,000.00) for willful and repeated violations of the aforementioned rule. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

6. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within thirty (30) days of the release date of this order, payable to the order of the Federal Communications Commission, to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
Goodrich Broadcasting, Inc.,

Licensee of Radio Station
WVIC-FM, East Lansing, MI

for a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: December 16, 1991; Released: December 20, 1991

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration (1) a $2,000 Notice of Apparent Liability (NAL) issued April 23, 1991, to Goodrich Broadcasting, Inc. (Goodrich), licensee of Station WVIC-FM, East Lansing, Michigan; and (2) Goodrich's response to the NAL dated June 17, 1991.

2. The NAL was issued for apparent violation of 18 U.S.C. § 1464, prohibiting the broadcast of indecent material.[1] Pursuant to Sections 312(a)(6) and 503(b)(1)(D) of the Communications Act of 1934, as amended, the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. § 1464. The Commission has defined indecency as language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) ("*Pacifica*"), the Supreme Court upheld the Commission's authority to regulate indecent broadcasts under this definition, and the United States Court of Appeals for the District of Columbia Circuit has upheld the Commission's authority to restrict the broadcast of indecent material when there is a reasonable risk that children may be in the audience. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) ("*ACT I*").

3. The complaint underlying the NAL alleged that on September 27, 1989, beginning at 6:00 a.m., WVIC-FM aired indecent material on the "Michaels in the Morning Show." On June 14, 1990, the Complaints and Investigations Branch, Enforcement Division, Mass Media Bureau, requested the licensee's comments regarding these allegations, and Goodrich responded by letter dated July 20, 1990. After reviewing all the information before it, the Mass Media Bureau determined that the broadcast in question apparently violated 18 U.S.C. § 1464. *See Goodrich Broadcasting, Inc.*, 6 FCC Rcd 2178 (MMB Apr. 23, 1991).

4. In its June 17, 1991, response to the NAL, Goodrich argues that the broadcast was not indecent because the references to a sexual organ, in the context of discussing a news story, were not patently offensive, nor were they pandering or titillating. Goodrich also argues that the Commission has no authority to enforce laws against the broadcast of indecent material until a new "safe harbor" is established, pursuant to the decision in *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991) ("*ACT II*").

5. We are unpersuaded by Goodrich's contention that the Commission lacks any enforcement authority with respect to indecent programming because the court in *ACT II* found a 24-hour ban on such material to be unenforceable. In *ACT I*, the court found that the Commission had failed to establish a basis for restricting the broadcast of indecent material aired in the late evening, specifically programming broadcast after 10:00 p.m. Accordingly, the court vacated two Commission orders and remanded the proceedings to the Commission for consideration of "the times at which programs containing indecent material may be broadcast." 852 F.2d at 1335. The court's decision, however, also expressly recognized the Commission's authority, pursuant to *Pacifica, supra*, to enforce 18 U.S.C. Section 1464 against broadcasts during daytime hours, when there was a reasonable risk that children would be in the audience. Consistent with this "time of day" analysis, *ACT I* affirmed the Commission's indecency finding in *Infinity Broadcasting Corp. of Pennsylvania*, 2 FCC Rcd 2705 (1987), which involved material aired between 6:00 and 10:00 a.m. The *ACT II* court, while rejecting the Commission's rules barring indecent broadcasts on a 24-hour basis, explicitly acknowledged that its decision "effectively returns the Commission to the position it briefly occupied after *ACT I* and prior to congressional adoption of the [24-hour indecency ban]." 932 F.2d at 1510. That position, as the above discussion demonstrates, clearly includes Commission authority to act against indecent material aired during the hours at issue in this case, 6:00 to 10:00 a.m.

6. As to the licensee's contention that the September 27, 1989, "Michaels in the Morning Show" was not indecent, we cannot agree. The broadcast described a sexual organ and sexual activity in patently offensive terms as measured by contemporary community standards for the broadcast medium. On-air personalities used explicit, vulgar language and repeatedly solicited audience contributions in the same vein. Moreover, the excerpted broadcast is inconsistent with any claim that the material constituted news programming or that it was presented in a manner that was neither pandering nor titillating. In summary, we believe that the program contained the kind of material encompassed by our definition of indecency stated above.

7. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED, that Goodrich Broadcasting, Inc., licensee of Radio Station WVIC-FM, East Lansing, MI, FORFEIT to the United States the sum of two thousand dollars ($2,000) for its violation of Section 1464 of Title 18 of the United States Code. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of

the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

ATTACHMENTS

WVIC-FM, East Lansing, MI
Michaels in the Morning Show

RM: Rich Michaels
LF: Lisa Farrell
MC: Male Caller
FC: Female Caller

September 27, 1989, at 6:00 a.m.

RM: Maybe a listener has an idea for a headline because this really didn't have one, it was just, of course you believe it was in the Weekly World News. It was about a man who lost his testicle down the hot tub drain.

LF: Oh my.

RM: Yes, the headlineless story, so maybe we can come up with a headline.

LF: Oh yeah.

RM: Michael Aleman(?) is his name, he was having his honeymoon.

LF: Yeah.

RM: And he was plunged into terror when his left testicle was sucked into a hot tub drain and well, you know.

LF: Oh.

RM: I don't want to get too visual. The excruciating drama unfolded less than eight hours after Aleman and his new bride, Antonia, tied the knot. After arriving at their honeymoon suite the loving couple were taking a little private bath. Well, he turned the wrong way and one of the tubs big drains sucked in the, well you know.

LF: Vital equipment.

RM: Right, and held it fast and now what happened was they called in, this apparently is a true story. They called in, guess the people who made the tubs to see if they could help them out. An ambulance showed up. Also, Mrs. Aleman already passed out.

LF: I can believe it.

RM: Paramedics tried but failed to retrieve Aleman's testicle from the drain but weren't able to retrieve it.

LF: Oh my.

RM: This kind of a story needs a headline, it needs something to stand, I mean something like that sucks or something (gunshot sound effect).

LF: Oh, that poor man.

RM: This is a good place to stop.

* * * *

RM: You had a comment on that story about the man in the hot tub with the, well, how do you say this delicately, the incident.

MC: Yeah.

RM: OK, what kind of a headline would you give it?

MC: Man's honeymoon goes down the tubes.

RM: Future children along with it.

MC: That's a rough way to start a life with a new mate, I'm telling you.

RM: Isn't it really, gosh, she has like a war vet there on her hands.

MC: He's got a fifty percent chance of having kids. Now, I don't know whether that's a blessing or a threat (unintelligible).

RM: Sorry, can't hear you. What's that?

MC: More tasteless crap.

RM: I can't hear a thing you're saying. That's the man that calls up every week and doesn't like, doesn't like anything that he ever hears on the morning program here.

MC: He's a substitute teacher.

RM: Hey, how you doing today.

FC: Pretty good.

RM: Go ahead.

FC: Headline for that story you just called.

RM: Yeah, the man who lost his gonad.

FC: Another jewel down the drain. Sounds good to me.

RM: Gonad, done gone.

* * * *

RM: You wanted to call about that story I had on the air a few minutes ago.

MC: Ouch.

RM: Yeah, really.

MC: Oh (unintelligible) makes me hurt.

RM: I know that's why I didn't want to get into too many details. If you're just tuning in, there was a story about a guy who lost a vital part, shall we say, in a hot tub incident, yeah.

MC: Ohhh.

MC: For a headline, honeymoon couple has a ball in a hot tub.

RM: OK.

MC: OK. Here's one for your story this morning.

RM: Yes.

MC: Man ties knot, loses nut. (Unintelligible)

RM: You guys are nuts.

* * * *

MC: That poor gentleman in the hot tub.

RM: Yeah, the poor guy who lost his certain body part in the hot tub.

MC: Yeah, there are a couple of things that come to mind on this. Rich, like I was wondering if the paramedics actually tried to use Drano.

RM: Oh.

MC: Or maybe he should have screamed the ever so popular commercial, let go my egg-oh.

RM: Oh, that's terrible sir, terrible.

September 27, 1989, at 9:00 a.m.

RM: Yeah, about that news story that just on, there was no headline on it. Honest to God. It was in the tabloid and it looks like a legitimate story about the guy who had an incident with the hot tub and do you have a suggestion for or an idea for the headline?

FC: Drain sucks off man.

RM: (Laughs)

FC: A good headline, honeymoon drains testicle.

RM: (Laughs)

FC: Man falls victim to ball sucker.

RM: (Laughs)

MC: OK, how about drain waters fall, so does ball.

RM: Well, drain waters fall, so does ball. It's got potential. (Unintelligible) Work on that one. OK, 363-2295, 12 minutes before 10 o'clock, 95 FM, good morning.

* * * *

RM: If you just tuned in, this news story in the papers here, a man in a hot tub lost part of his well, he lost half of his, you know he lost one half of his assets. We're looking for a news headline, go ahead.

MC: Well, how a hot tub goes nuts.

RM: (Laughs)

MC: (Unintelligible) goes nuts over new bride.

MC: That's the way the ball bounces.

MC: Honeymooners happiness hindered as prospects go down the drain.

RM: (Laughs) Or, gonad done gone.

MC: Headline would be, man gets ball sucked on honeymoon.

* * * *

FOOTNOTE

[1] "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both." 18 U.S.C. § 1464. The relevant material is attached.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

GTE MOBILNET OF INDIANA LIMITED PARTNERSHIP, GTE MOBILNET OF FORT WAYNE LIMITED PARTNERSHIP, GTE MOBILNET OF INDIANA RSA #3 LIMITED PARTNERSHIP and GTE MOBILNET OF INDIANA RSA #6 LIMITED PARTNERSHIP

File No. 06048-CL-MP-90

For authority to combine the Cellular Geographic Service Areas of the Fort Wayne, Indiana MSA (096B) (KNKA391), Huntington, Indiana RSA (Indiana 3 - 405B) (KNKN313) and Randolph, Indiana RSA (Indiana 6 - 408B) (KNKN488) with the previously combined[1] Cellular Geographic Service Areas of the Anderson, Indiana MSA (217B) (KNKA629), Bloomington, Indiana MSA (282B) (KNKA642), Indianapolis, Indiana MSA (028B) (KNKA216), Kokomo, Indiana MSA (271B) (KNKA689) and Muncie, Indiana MSA (236B) (KNKA554)

MEMORANDUM OPINION AND ORDER

Adopted: December 12, 1991; Released: December 23, 1991

By the Chief of the Mobile Services Division:

BACKGROUND

1. On July 11, 1990, GTE Mobilnet of Indiana Limited Partnership, GTE Mobilnet of Fort Wayne Limited Partnership, GTE Mobilnet of Indiana RSA #3 Limited Partnership and GTE Mobilnet of Indiana RSA #6 Limited Partnership (collectively GTE) filed a request[2] to combine the CGSAs of the above-captioned MSAs and Rural Service Areas (RSAs). [3] Kokomo CellTelCo (Kokomo)[4] filed a petition to deny. GTE and Kokomo filed responsive pleadings and Michiana Metronet, Inc. (Michiana)[5] filed informal comments in support of Kokomo's petition to deny.[6] For the reasons set forth below, we grant GTE's request to combine CGSAs, as amended, and deny Kokomo's petition to deny and Michiana's informal comments.

CONTENTIONS AND DISCUSSION

2. Kokomo and Michiana contend that GTE failed to (1) depict on the map submitted with GTE's application each base station site and its respective 39 dBu contour within the CGSA of the proposed combined system and (2) state that the combined 39 dBu contours will cover 75% of the total CGSA, in violation of Section 22.903(a) of the rules.[7] GTE argues that Section 22.903(a) is inapplicable to applications to combine CGSAs and that its application comports with Public Notice, Report Number CL-88-102 (released April 29, 1988).[8] GTE also argues that the April 29, 1988 Public Notice does not require a request to combine CGSAs to be filed on an FCC Form 401 and does not require the map submitted with the request to depict each cell site and its respective 39 dBu contour. In addition, GTE claims that Kokomo and Michiana base their interpretation of the Commission's rules for filing applications to combine CGSAs upon Public Notice, Report Number CL-90-314 (released September 25, 1990),[9] which was not in effect when GTE filed its application.

3. The April 29, 1988 Public Notice sets forth the Bureau's requirements for filing requests to combine CGSAs which were in effect when GTE filed its application to combine the above-captioned CGSAs. *See supra* note 8. That Public Notice does not include specific map requirements for combination requests because combining CGSAs does not modify or otherwise change the existing individual cellular systems. Combining CGSAs "allows licensees to make permissive modifications between systems by notification (FCC Form 489) rather than by application (FCC Form 401)." *See* April 29, 1988 Public Notice. Therefore, to properly review and process requests to combine CGSAs, all that is required is a map which clearly depicts the proposed combined CGSA and demonstrates that the applicant's present CGSA borders are coterminous. GTE's map, as amended, fulfills both of these requirements. Accordingly, we find that GTE's map, as amended, is complete and acceptable for filing.

4. Michiana next contends that the Commission must consider the competitive effect that a grant of the proposed combination would have on the "individually licensed and separately operated nonwireline cellular systems in the markets involved because of the already limited competitive environment created by the duopoly structure of each cellular market." Michiana informal comments at 4. Because "the Commission will [not] prevent system operators from taking steps, such as combining CGSAs, that will give them a competitive advantage in the marketplace[,]" we reject Michiana's contention and find that the proposed combination of CGSAs will facilitate the provision of service to the public without harming competition. *See GTE Mobilnet of Oregon Limited Partnership*, 3 FCC Rcd 5933 (Mob. Serv. Div. 1988).[10] We therefore find that it is in the public interest to grant GTE's combination request.

ORDERING PARAGRAPHS

5. Accordingly, IT IS ORDERED that the jointly-filed request, as amended, filed by GTE Mobilnet of Indiana Limited Partnership, GTE Mobilnet of Fort Wayne Limited Partnership, GTE Mobilnet of Indiana RSA #3 Limited Partnership and GTE Mobilnet of Indiana RSA #6 Limited Partnership to combine the Cellular Geographic Service Areas of the Fort Wayne, Indiana MSA (096B), Huntington, Indiana RSA (Indiana 3 - 405B) and Randolph, Indiana RSA (Indiana 6 - 408B) with the previously combined Cellular Geographic Service Areas of Anderson, Indiana MSA (217B), Bloomington, Indiana MSA (282B), Indianapolis, Indiana MSA (028B), Kokomo, Indiana MSA (271B) and Muncie, Indiana MSA (236B) IS GRANTED.

6. IT IS FURTHER ORDERED that the petition to deny filed by Kokomo CellTelCo IS DENIED.

7. IT IS FURTHER ORDERED that the informal comments filed by Michiana Metronet, Inc. ARE DENIED.

8. This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order. *See* 47 C.F.R. §1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief of the Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Public Notice, Report No. CL-89-105 (released March 14, 1989) (the Common Carrier Bureau (Bureau) grants GTE Mobilnet of Indianapolis Limited Partnership and GTE Mobilnet Incorporated's application to combine the Cellular Geographic Service Areas (CGSAs) of the Anderson, Bloomington, Indianapolis, Kokomo and Muncie, Indiana cellular Metropolitan Statistical Areas (MSAs) (market numbers 217B, 282B, 028B, 271B and 236B, respectively).

[2] *See* Public Notice, Report No. CL-90-261 (released July 27, 1990) (the Bureau announces that GTE's combination request is acceptable for filing).

[3] Although GTE's combination request also sought approval to expand the CGSA of the Kokomo, Indiana MSA, GTE subsequently filed an FCC Form 401 application to expand the Kokomo CGSA to the MSA border and add a cellular base station. *See* GTE combination request at 1; *see also* Letter from GTE to the Chief of the Mobile Services Division (MSD) at 1 (dated February 4, 199[1]) (GTE clarifies its expansion request). Because the Bureau granted GTE's Form 401 application, GTE's expansion request is now moot. *See* Public Notice, Report No. CL-91-164 (released June 13, 1991). In addition, GTE's combination request sought approval to expand the CGSA of the Huntington, Indiana RSA. GTE subsequently withdrew this request. *See* GTE amendment to combination request at 1 (GTE files an amended map which reflects its withdrawal of its request to expand the CGSA of the Huntington RSA).

[4] Kokomo is the Block A cellular permittee for the Kokomo, Indiana market (MSA 271) (KNKA798).

[5] Michiana is Block A cellular licensee for the Fort Wayne, Indiana market (MSA 096) (Station KNKA472).

[6] The Bureau announced August 28, 1990 as the deadline for interested persons to file comments to GTE's combination request and September 15, 1990 as the deadline to file replies. *See* Public Notice, Report No. CL-90-261 (released July 27, 1990). Kokomo's responsive pleading and Michiana's informal comments were filed on September 25, 1990. Although Kokomo's responsive pleading and Michiana's informal comments are untimely filed, we will consider them as informal requests for Commission action under Section 1.41 of the Commission's rules.

[7] Section 22.903(a) provides that the CGSA "of the cellular system shall be defined by the applicant as the area intended to be served." Sections 22.903(a) and 22.903(a)(1) provide that the applicant must draw the CGSAs "on one or more U.S. Geological survey map(s) with a scale of 1:250,000[,]" "depict each base station site and its respective 39 dBu contour" within the CGSA and "state that the combined 39 dBu contours of all base stations will cover at least 75% of the total CGSA."

[8] The April 29, 1988 Public Notice provides that

> [i]n order to standardize processing procedures, all future requests to combine a . . . [CGSA] with the CGSA of an adjacent cellular system . . . . should be filed by letter in duplicate including a map of the currently authorized and the proposed combined systems, no filing fee is required. The letter may request to expand the CGSA's while combining them, but should not include any modification, addition or deletion of cell sites or any other changes to the authorized systems. Requests to combine CGSA's will be assigned a File Number and will be put on Public Notice for a 30 day period.

[9] The September 25, 1990 Public Notice provides that

> [r]equests to enlarge a [CGSA] and combine a CGSA with one or more CGSAs of adjacent cellular systems are separate actions, each request requiring a separate filing fee. In situations where the CGSA is not contiguous with the other CGSA(s)[,] a separate FCC Form 401 must be filed for each market in which a CGSA is being enlarged since CGSA extensions are deemed to be a major modification . . . . A letter to combine CGSAs may be included in the expansion application if only one CGSA is to be expanded.

[10] Kokomo also contends that Indiana Bell Telephone Company, Inc. (Indiana Bell) Tariff Indiana Regulatory Utility Commission (I.R.U.C.) Number T-7, Part IV, Section 2.1.3(D), discriminates against nonwireline cellular carriers and provides GTE with a competitive advantage over nonwireline carriers by offering favorable interconnection service to carriers who combine CGSAs. Kokomo requests that the Commission require Indiana Bell to revise its tariff provision and, in the meantime, defer processing GTE's combination request. The tariff provision is ambiguous and, therefore, it is not clear that Indiana would apply the provision as Kokomo alleges. Therefore, Kokomo's contention is premature and is rejected.

> Further, Kokomo requests that the Commission defer processing of GTE's combination request until GTE obtains a waiver of the Modified Final Judgment (MFJ) prohibition. *See* United States v. American Telephone

and Telegraph, Co., 552 F. Supp. 131, 227 (D.C.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983). The determination of whether the operation of a cellular system is in compliance with the MFJ or requires a waiver is a matter for resolution by the U.S. District Court for the District of Columbia. *See* New York SMSA Limited Partnership, 58 Rad. Reg. 2d 525, 530 (1985); *see also* Bell Atlantic Mobile Systems of Philadelphia, Inc., 2 FCC Rcd 7531 (MSD 1987). For this reason, we deny Kokomo's request for deferral.

Finally, Kokomo contends that, if the Commission grants the combination request, GTE must demonstrate through separate filings that each system complies with the construction and coverage provisions contained in Sections 22.43(c)(1), 22.43(c)(2) and 22.31 of the rules. Kokomo's contention is premature and therefore is rejected.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: December 12, 1991

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

KDFW-TV Inc.
Licensee of KDFW-TV
400 N. Griffin Street
Dallas, Texas 75202

Dear Licensee:

This letter constitutes a Notice of Apparent Liability (NAL) for a forfeiture of $25,000 pursuant to Section 503(b) of the Communications Act of 1934, as amended, for your apparent willful and repeated violations of Section 315(b) of the Communications Act, as amended, (47 U.S.C. Section 315(b)), and Section 73.1940(b) of the Commission's Rules (47 C.F.R. Section 73.1940(b)). This letter also cautions you for failing to disclose information regarding lowest unit charge.

BACKGROUND

This action results from the audit of KDFW-TV, which commenced July 16, 1990, to ascertain your compliance with the political programming laws, particularly the "lowest unit charge" (LUC) provision of Section 315(b) of the Act. Based on our review of the materials you provided on July 16, 1990, and your subsequent responses to our further requests for information of August 15, 1990, November 19, 1990, February 26, 1991, and October 21, 1991, it appears that KDFW-TV violated Section 315(b) and Section 73.1940(b).

In your November 19, 1990, response, you acknowledged that review of station records indicated "inadvertent overcharges to political candidates in connection with the March 1990 primary election." You stated:

> Generally, these disparities resulted from time being sold to the political advertiser in advance of the run date, followed by a drop in demand prior to the run date, which resulted in one or more commercial spots being run at a lower rate. KDFW has paid rebates to all political advertisers found to have been overcharged. The total of the rebates was approximately $25,000 or some 4 percent of the total advertising time sold to political advertisers during the 45 days preceding the March 1990 primary election.

Furthermore, examination of KDFW-TV's political rate card and your explanation of the station's sales practices indicate that the station offered candidates two rates: 1) a candidate-only fixed rate, referred to as the "current selling level" (CSL); and 2) the "lowest unit rate" (LUR), a preemptible-with-notice class, which corresponded to the commercial advertiser's "holding rate." According to you, the "holding rate" for commercial advertisers "is intended to assure placement of the spot, absent technical difficulties or conditions of unusually high demand or other unusual circumstances." By your calculation, only about one percent of the "holding rate" spots were preempted during the Texas pre-primary period. Moreover, even during "the relatively high demand month of May, 1990," which was not during a pre-election period, you stated that only two percent of the "holding rate" spots were preempted. Although your station does not generally maintain preemption statistics, "if asked by a political advertiser [you] would describe in general terms the limited preemptibilty of holding rate time."

Additionally, while not specified on the political rate card, you stated that you offered immediately preemptible spots to candidates and commercial advertisers during periods of low advertising demand. You stated that although the political rate card did not specify immediately preemptible rates, "its availability was made known and prices quoted when requested by either political or commercial advertisers." Further, you stated that in your experience, "[i]mmediately preemptible time is purchased on our station only occasionally by commercial advertisers and almost never by political candidates on account of its high degree of preemptibility."

With respect to make-goods, you explained that when a commercial advertiser's "holding rate" spot was to be preempted, the advertiser was notified and an alternative time slot was negotiated. You state that "[t]his practice in effect results in the advertiser being provided a 'make-good' on a time-sensitive basis." Finally, you state that the station recently revised its guidelines applicable to political advertising to clarify that immediately preemptible rates, as well as other special packages and discount rates will be available. You also indicated that the candidate-only fixed rate has been eliminated and the station now offers candidates and commercial advertisers the same classes of time.

DISCUSSION

Political Programming Law

Section 315(b) directs broadcasters to charge legally qualified candidates for public office the "lowest unit charge" (LUC) of the station for the same class and amount of time for the same period during the 45 days preceding a primary election and the 60 days preceding a general or special election. Section 73.1940(b) of the Commission's rules (47 C.F.R. Section 73.1940(b)), which implements Section 315, states, in part, that "[a]ll discount privileges otherwise offered by a station to commercial advertisers shall be available upon equal terms to all candidates for public office."

Congress intended the lowest unit charge provision to "place the candidate on par with a broadcast station's most favored commercial advertiser." S. Rep. No. 96, 92d Cong., 1st Sess. 27 (1971). The Court of Appeals stated that the 1972 LUC amendment entitles all candidates to buy run-of-schedule (ROS) and preemptible spots when the station offers them to commercial advertisers. *Hernstadt v. FCC*, 677 F.2d 893, 897 (D.C. Cir. 1981). There, the court concluded: "We hold that the lowest unit provision entitles candidates to ROS and preemptible terms when those terms are offered to others making similar use of broadcast facilities." *Supra*, at 907. The court reasoned that these types of spots are not only classes of time, but also discount privileges, which must be offered to all candidates.

The Commission stated in 1988 that licensees must calculate the lowest unit charge for a particular class of time according to the lowest price "any advertiser" has paid for a spot which has cleared a particular time period or daypart. *Public Notice on Lowest Unit Charge*, 4 FCC Rcd 3823, 3824 (1988)("*1988 Public Notice*"). "Any advertiser" includes any commercial advertiser or any other candidate who paid less for the same class of time and whose spots appeared in the same time period. The *Public Notice* explained that preemptible time must be treated as a single class of time. thus entitling candidates to rebates for any lower priced preemptible time which clears a particular daypart during which a candidate's time also clears.

KDFW-TV's Apparent Rate Violations

You acknowledged that in reviewing the materials provided to the Commission, you discovered that the station inadvertently overcharged several candidates during the pre-election period. You explained that the overcharges resulted from the station's failure to adjust its political LUR to reflect the lower "holding rates" offered commercial advertisers. You stated that because some commercial "holding rate" spots actually cleared at lower prices than the candidates' LUR charges. the candidates that purchased LUR spots were entitled to, and ultimately received. approximately $25.000 in rebates. We note that the rebates did not occur until several months after the Bureau initiated its audit and more than six months after the Texas primary.

Based on the foregoing, it appears that KDFW-TV willfully and repeatedly violated Section 315(b) of the Communications Act and Section 73.1940(b) of the Commission's Rules during the 45-day period preceding the March 13. 1990. Texas primary election. by overcharging candidates almost $25,000.[1] With respect to corrective measures taken by the station, restitution for overcharges has not dissuaded the Commission from imposing forfeitures in the past. *KAYS. Inc*., 43 FCC 2d 1183 (1973); *De La Hunt Broadcasting Corp*., 51 RR 2d 1189 (1982). The Commission has stated that corrective action subsequent to a notification of a possible violation does not relieve a licensee of its liability. *See Executive Broadcasting Corporation*, 3 FCC 2d 699 (1966). Here. KDFW-TV's corrective measures with respect to its sale of time to political candidates occurred only after Commission inquiry had begun, and more than 6 months after the Texas primary election.

Failure to Disclose

The following discussion highlights certain additional areas of concern to the Commission regarding KDFW-TV's sales practices when dealing with political candidates.

Political broadcasting obligations are imposed upon broadcasters, not on candidates and their representatives. A broadcaster cannot implement a policy designed to accommodate only the most savvy and well-informed candidate in meeting its lowest unit charge obligations. The representatives' or candidates' knowledge, or lack thereof, does not replace the broadcaster's obligation to disclose to candidates the benefits of discounts, packages, and other option availabilities, as required by Section 73.1940(b).

By publishing a limited rate card that does not reference the existence of all rate options made available to commercial advertisers, particularly immediately preemptible rates, time sensitive make good policy, and other discount privileges such as a less than a 1% chance of preemption at the "holding rates," or otherwise disclosing this information except upon a candidate's request, it does not appear that KDFW-TV met its political broadcasting obligation to make all rates available to candidates.

Although we continue to believe that it is implicit in the obligations placed on broadcasters by the lowest unit charge requirement, we recognize that the Commission had not, prior to the *Mass Media Bureau Report on Political Programming Audit*, 68 RR2d 113 (MMB 1990), specifically articulated broadcasters' affirmative disclosure duties.[2] Accordingly, we believe that the imposition of sanctions against a licensee for its failure to disclose the kind of information described herein would be inappropriate. Therefore, the Commission cautions KDFW-TV to reform its sales practices and that, in the future, failure to disclose pertinent information about its lowest unit charge and associated discount privileges made available to commercial advertisers may result in a forfeiture.

FORFEITURE

Under our new forfeiture standards, the base amount for a violation of the lowest unit charge provision is $12,500. *Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*. Because the violations were repeated, we conclude that doubling the base amount is appropriate. This adjustment is consistent with our new forfeiture standards, and results in a forfeiture of $25,000.

Accordingly, pursuant to Section 503(b) of the Act, you are hereby advised of your apparent liability for a forfeiture of twenty-five thousand dollars ($25,000) for your apparent willful and repeated violations of 47 C.F.R. Section 73.1940(d) during the forty-five days preceding the March 13, 1990, Texas primary election, in the manner described above.

In regard to this forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's rules (47 C.F.R. Section 1.80), as summarized in the attachment to this letter. Any comments relating to your ability to pay should include financial items as set forth in the attachment.

This letter was adopted by the Commission on December 12, 1991.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] KDFW-TV calculated $24,685 in overcharges, involving 7 candidates, and their purchase of 51 spot advertisements. The station contends, however, that it mistakenly rebated monies on 4 of the 51 spots, totaling $1500.

[2] The full scope of the disclosure obligation is detailed in the Commission's *Report and Order* in MM Docket No. 91-168 (adopted December 12, 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: December 12, 1991

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

TVX Broadcast Group, Inc.
Licensee of Station KTXA-TV
1712 East Randol Mill Rd.
Arlington, TX 76011

Dear Licensee:

This letter constitutes a Notice of Apparent Liability (NAL) for a forfeiture of $7,500 pursuant to Section 503(b) of the Communications Act of 1934, as amended, for your apparent willful and repeated violations of Section 73.1940(d) of the Commission's Rules (47 C.F.R. Section 73.1940(d)) during the forty-five days preceding the March 13, 1990, Texas primary election. The letter also cautions you for failing to disclose information regarding discount privileges made available to commercial advertisers.

BACKGROUND

This action results from the political audit of KTXA-TV, which commenced July 16, 1990, in order to ascertain your compliance with the political programming law, particularly the "lowest unit charge" (LUC) obligation set forth in Section 315(b) of the Communications Act of 1934, as amended, (47 U.S.C. Section 315(b)) and Section 73.1940(b) of the Commission's rules (47 C.F.R. Section 73.1940(b)). Based on the material provided by you on July 16, and your response of August 16, 1990, we issued a further inquiry on October 29, 1990, to which you responded on November 19, 1990. It appears from all of the information before us that KTXA-TV violated the "political file" requirements of Section 73.1940(d) of the rules. It also appears that your failure to disclose certain information about discount privileges made available to commercial advertisers is inconsistent with a disclosure obligation implicit in Section 315(b) of the Communications Act and Section 73.1940(b) of the Commission's rules.

In our October 29, 1990, inquiry, we stated that "KTXA-TV political rate cards show only a single, preemptible rate and a higher priced 'fixed' rate for the available programming." We asked you to explain whether the station offered to political candidates information about the various intermediate preemptible rate levels, package plans, and other discount privileges offered commercial advertisers, including whether the station accorded to candidates an opportunity to negotiate for lower rates. We asked how often the station preempted commercial advertisers' preemptible spots. We also asked you to comment upon the fact that Commission analysis of invoices and the political file showed that candidates generally paid more for advertising time than did commercial advertisers within the same dayparts. In addition, because your "make-good" policy (the rescheduling of preempted spots) was unclear, we asked you whether the station *ever* furnished make-goods to favored commercial advertisers on a time-sensitive basis. Finally, we asked you to explain the absence from the station's political file of any specific information about the scheduling of political advertisements or the charges made for such time.

With respect to our inquiry regarding KTXA-TV's political rate card, your November 19 response indicates that despite the appearance of only one preemptible and one fixed rate on the political rate card, the station, through its sales representative, Seltel, and its local station sales staff, made available to candidates all information about various rates made available to commercial advertisers. You contend that candidates were given the opportunity to negotiate for all of the various options, including rotations and package plans, made available to commercial advertisers. You state, however, that all candidates asked only for the non-preemptible fixed rates thus accounting for a significant number of disparities between those rates charged candidates and the preemptible rates purchased by virtually all commercial advertisers. You also explain that disparities may be attributable to the fluid nature of commercial sales at KTXA-TV and that "[o]ften, a lower rate than the variable commercial rate could clear a given daypart or program due to available expiring inventory." You state that KTXA-TV "issued rebates to all candidates who were charged higher rates than those charged to commercial advertisers for comparable advertising placement and treatment."

In describing your station's selling practices, you state that commercial advertisers and political candidates are sold both fixed and preemptible time. You explain that when KTXA-TV receives an advertising order, a station manager assigns it a section level that reflects the type of priority treatment, or preemption level, the ad will receive. Section IV is most likely to be preempted; Sections I and II were assigned to fixed, non-premptible spots. You state that commercial advertisers rarely receive a Section I assignment because it is generally reserved for program length commercial material. Section III (preemptible) and Section IV (highly preemptible) were assigned only to preemptible ads. You state that generally there is no direct correlation between the rates charged and the section assignment, except that a higher rate may include understandings about the degree to which spots may or may not be subject to preemption.

Regarding preemption, you further stated:

> KTXA-TV recognizes its most preferred clients by assigning them a low section number so that they will receive preferential preemption treatment over other commercial advertisers of the same class who do not place advertising in the same frequency and amount. A similar approach is taken with regard to political advertisers. As previously stated, all political agencies requested fixed time for their clients during the LUC period in question. Following its standard policy, KTXA-TV then assigned these ads its most favorable section level for preemption treatment, while giving them the lowest of their fixed rates.

Similarly, you state that it is the station's policy that when a candidate did request preemptible time, "an unusual occurrence," KTXA-TV would determine the LUC "based on Section IV rates", while the candidate would be given Section III preemption treatment.

You also state that you have never informed candidates of the station's policies with respect to "preferential preemption treatment" made available to its "most preferred clients" when they purchased at preemptible rates. In response to our inquiry about the amount of commercial advertising ever actually preempted, you state that it occurs "on occasion," but you do not further indicate whether commercial advertisers actually accorded a priority against preemption were, in fact, ever preempted.

With respect to KTXA's "make-good" policy, you state that "[i]n certain circumstances, KTXA-TV does provide commercial advertisers with make goods on a time sensitive basis." You contend, however, that this policy has no impact on candidates, because candidate advertising is "rarely, if ever, preempted" since the station gives candidates who purchase preemptible time priority against preemption until all commercial advertisers are preempted. Although no candidate purchased preemptible time during the pre-primary period, you contend that make goods would have been provided prior to the election. You state that the station never disclosed to candidates its commitment to make good preempted political spots before election day.

Concerning KTXA-TV's political file, you contend that until the Commission's September 13, 1990, *Public Notice*, which provided guidance on issues generated by the audit, the station had maintained its political file in full accordance with Section 73.1940(d) of the rules. Specifically, you state that the file contained a completed NAB recommended "Request for Political Time" form and a completed NAB "Political Broadcast Agreement" form for every required transaction. You acknowledge, however, that these forms, as utilized by the station, did not include the exact charges made and the schedule of ads run, as specified in the September 13 *Notice*, and you admit that these requirements had not been implemented by the station prior to issuance of the *Notice*.

DISCUSSION

Political Programming Law and Precedents

Section 315(b) directs broadcasters to charge legally qualified candidates for public office the "lowest unit charge" (LUC) of the station for the same class and amount of time for the same period during the 45 days preceding a primary election and the 60 days preceding a general or special election. Section 73.1940(b) of the Commission's rules states, in part, that "[a]ll discount privileges otherwise offered by a station to commercial advertisers shall be available upon equal terms to all candidates for public office." Congress intended the lowest unit charge provision to "place the candidate on par with a broadcast station's most favored commercial advertiser."

Section 73.1940(d) of the Rules requires licensees to maintain a "political file" which forms a complete record of all requests for broadcast time made by or on behalf of candidates for public office, "together with an *appropriate notation showing the disposition made by the licensee of such requests and the charges made, if any, if the request is granted*." (emphasis added). The rule also requires stations to place all required records in the political file as soon as possible and to retain those records for two years.

Apparent Failure to Maintain Accurate Political File

It appears that KTXA-TV did not comply with the requirements for political files. Examination of the materials you furnished, particularly invoices for all political and commercial sales, indicates that nine candidates purchased time during the audited period. However, the station's political file contained sales agreement forms for only four of these candidates. Thus, opponents of the omitted five candidates who reviewed the political file would have no notification that their opposition had even bought time from the station, a clear violation of the rule. In addition, the sales agreement forms included in the file for the remaining four candidates contained no record of the actual schedules of time broadcast or the rates paid for individual spots, as required by the rule. Thus, review of the file by these candidates' opponents would reveal only that time had been purchased, with no indication of what precise equal opportunities had been triggered.

Section 73.1940(d) requires "a complete record" of all requests for time made by candidates and the licensee's disposition of such requests. Information on the disposition of candidate requests requires a full description of the pertinent information sufficient to put competing candidates on notice of exactly what "equal opportunities" might exist. In order for this information to be complete, it must include a full description of the schedule of the candidate's broadcasts and the corresponding charges. You acknowledge that such information was not included on the forms utilized by the station for any of the candidates who purchased time from the station during the audited period. The only remaining documents in the file pertinent to individual candidates, copies of eight checks from candidates, were also unclear. Furthermore, as noted above, it does not appear that any sales forms concerning candidates Jim Mattox, Ann Richards, Mark White, and Clayton Williams were included in the political file, thereby completely thwarting the notification purpose of the rules.

Maintenance of an accurate and complete political file is an essential element of Section 315 of the Communications Act. Except for maintaining a political file, a station generally has no obligation to notify opposing candidates when a candidate appears on its facility, and opposing candidates have only seven days within which to make a request for equal opportunities. Because you failed to include the necessary information in the political file, opposing candidates did not have requisite information available for them to knowingly exercise their rights under Section 315 prior to the March 13, 1990, Texas primary election. Thus, imposition of a $7,500 forfeiture for your willful and repeated violation of Section 73.1940(d) is appropriate.

Failure to Disclose

The following discussion highlights certain additional areas of concern to the Commission regarding KTXA-TV's sales practices when dealing with political candidates.

You acknowledge that KTXA-TV did not disclose to candidates information about the "preferential preemption treatment" made available to commercial advertisers, in relationship to the "frequency and amount" of their preemptible spot purchases. Therefore, candidates chose to buy only the non-preemptible class of time without knowing that they could have purchased spots at lower preemptible rates, and that under the station's preemption policy, they would have received favorable preemption treatment which, in the final analysis, may have resulted in limited instances of actual preemption.

Although you state that KTXA-TV's general policy is to make available to candidates all preemptible rates, package plans, discounts, and rotations upon request, you assert that no candidate or representative actually requested information about preemptible rates or the likelihood of preemption at preemptible rates and thus this information was not disclosed.

We are also concerned with KTXA-TV's failure to disclose its make good policy to candidates, particularly its acknowledged time sensitive treatment of commercial advertiser's preempted spots and its commitment to make good a preempted political spot on a time sensitive basis prior to the election. You note that the station preempted no candidates during the pre-election period making disclosure of the station's make good policy irrelevant for candidates. However, you also acknowledge that every candidate chose to purchase non-preemptible time, apparently to avoid preemption.

Political broadcasting obligations are imposed upon broadcasters, not on candidates and their representatives. A broadcaster cannot implement a policy designed to accommodate only the most savvy and well-informed candidate in meeting its lowest unit charge obligations. The representatives' or candidates' knowledge, or lack thereof, does not replace the broadcaster's obligation to disclose to candidates the benefits of discounts, packages, and other option availabilities, as required by Section 73.1940(b). By publishing a limited rate card that does not reference the existence of the "preferential preemption treatment" made available to commercial advertisers with the purchase of preemptible time, or the station's make good policy, and by otherwise failing to inform candidates of these discount privileges, it does not appear that KTXA-TV met its political broadcasting obligation to disclose pertinent information about discount privileges available to commercial advertisers.

There is no evidence thay any particular candidate actually requested and was refused a particular class of time by KTXA-TV, as occurred in *Hernstadt, supra*. Furthermore, although we continue to believe that it is implicit in the obligations placed on broadcasters by the lowest unit charge requirement, we recognize that the Commission had not, prior to the *Mass Media Bureau Report on Political Programming Audit*, 68 RR2d 113 (MMB 1990), specifically articulated broadcasters' affirmative disclosure duties.[1] Accordingly, we believe that the imposition of sanctions against a licensee for its failure to disclose the kind of information described herein would be inappropriate. Therefore, the Commission cautions KTXA-TV to reform its sales practices and that, in the future, failure to disclose pertinent information about its lowest unit charge and associated discount privileges made available to commercial advertisers may result in a forfeiture.

FORFEITURE

Accordingly, pursuant to Section 503(b) of the Act, you are hereby advised of your apparent liability for a forfeiture of seven thousand five hundred dollars ($7,500) for your apparent willful and repeated violations of 47 C.F.R. Section 73.1940(d) during the forty-five days preceding the March 13, 1990, Texas primary election, in the manner described above.

Under our new forfeiture standards, the base amount for a violation of the political file rule is $7,500. *Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*. While the fact that the violations were repeated with every candidate could justify a higher forfeiture under the *Policy Statement*, under the circumstances of this case, consistent with our discretion under Section 503(b), we conclude that a forfeiture of $7,500 is appropriate here.

In regard to this forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's rules (47 C.F.R. Section 1.80), as summarized in the attachment to this letter. Any comments relating to your ability to pay should include financial items as set forth in the attachment.

This letter was adopted by the Commission on December 12, 1991.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] The full scope of the disclosure obligation is detailed in the Commission's *Report and Order* in MM Docket No. 91-168 (adopted December 12, 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: December 12, 1991

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Chronicle Publishing Company 8330
Licensee of Television Station KRON-TV
1001 Van Ness Avenue
San Francisco, California 94109

Dear Licensee:

This letter constitutes a Notice of Apparent Liability for a Forfeiture of $25.000 pursuant to Section 503(b)(1) of the Communications Act of 1934, as amended, for your apparent willful and repeated violations of Section 315(b) of the Communications Act of 1934, as amended (47 U.S.C. § 315(b)), and Section 73.1940(b) and (c) of the Commission's Rules (47 C.F.R. § 73.1940(b) and (c)).

BACKGROUND

On July 16 and 17, 1990, the Commission initiated an audit and inquiry into KRON-TV's sale of time to political candidates during the 1990 primary election, particularly the "lowest unit charge" obligation set forth in Section 315(b) of the Act. We requested, *inter alia*, the station's program logs, political file, commercial invoices, political and commercial rate cards, if any, and lists of political advertising for the 10-day period immediately preceding the California primary election (Sunday, May 27 through Tuesday, June 5, 1990). We also requested information concerning KRON-TV's "lowest unit charge" calculations, classes and lengths of time offered, levels of preemptibility, "make-good" policies, and rate changes. Based on the materials provided by KRON-TV to an FCC field investigator on July 17, the August 16 and 23, 1990 station responses to an inquiry left by the investigator, and your December 18, 1990, response to a further Commission inquiry, it appears that KRON-TV violated Section 315(b) and Section 73.1940(b) and (c).

Your response to our initial inquiry included several revisions of KRON-TV's political rate cards, and several internal commercial rate guides for distribution to the station's sales force as part of a "Weekly Inventory Kit." Although you claim that KRON-TV has no specifically defined levels of preemptibility that you sell to commercial advertisers, your internal commercial rate guides reflect three "target rates" for preemptible commercial spots from which sales personnel conduct oral negotiations with commercial advertisers, the chosen preemptible rate dependent upon time sensitivity and other "special needs" of the advertiser. Rate One (the highest) is suggested if a certain program's inventory is tight; Rate Three (the lowest) if inventory is weak. For example, you explain that commercial advertisers with deadlines buy at a higher preemptible rate, but that there is no "current selling level" and no commercial advertiser is assured unequivocally against preemption, unless it purchases "fixed" time.[1]

With respect to political advertisers, however, you explain that they are treated differently. For example, you state that you issue a political rate card, revised periodically, reflecting the station's lowest rates for preemptible and nonpreemptible "fixed" time, based on the anticipated time availability and likely advertiser demand or lowest single-advertiser rate of any preemptible advertisement for a time period already sold to run in the pre-election period. As a practical matter, you explain that, with very few exceptions, candidates requested and bought "fixed" time, while commercial advertisers did not.[2]

The Commission's further letter of inquiry concerned, among other things, the presence of only two rates on KRON-TV's political rate card, "preemptible" and "candidate fixed", and whether it disclosed to candidates information about "intermediate rates" offered to commercial advertisers. You responded that while KRON-TV's general station policy was to make available to political candidates the same intermediate preemptible rates and the same package plans, rotations, and other discount privileges that the station offered to commercial advertisers, most candidates were interested in purchasing only "fixed" spots to ensure they were aired before the election.[3] You elaborated further that in light of the "historical and clear preference of candidates for fixed spots," your sales personnel generally were not asked for, and did not, as a matter of general station practice, specifically disclose or offer candidates or their representatives, an opportunity to negotiate for lower rates. You pointed out that you willingly provided such opportunities to candidates (or their representatives) upon request.[4] You also acknowledged, in response to our inquiry, that station sales personnel did not specifically inform candidates purchasing "fixed" spots about the chances of preemption at preemptible rates. You pointed out that the information was also available upon request, but that no candidates inquired about this information during the 1990 pre-primary election period.

DISCUSSION

Political Programming Law

Section 315(b)(1) of the Act provides:

> (b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed --
>
> > (1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period. 47 U.S.C. § 315(b)(1).

> "Lowest unit charge" means the lowest advertising rate offered or sold by the station for a particular class, amount of time, and period or program. It also means that licensees must offer candidates all discount privileges offered to commercial advertisers. Section 73.1940(b) of the Commission's Rules, which implements Section 315, also provides that "[a]ll discount privileges otherwise offered by a station to commercial advertisers shall be available upon equal terms to all candidates for public office." 47 C.F.R. § 73.1940(b).

KRON-TV's Apparent Rate Violations

In your response, you acknowledge that in reviewing the materials you provided to the Commission, you discovered that the station inadvertently overcharged several candidates during the pre-election period. On August 23, 1990, you provided further information explaining that the overcharges resulted from the application of a seasonal rate increase to late-buying candidates whose ads appeared in the same time period or program with those of political advertisers who bought time before the rate increase went into effect. Specifically, candidates who purchased fixed spots in late March to be aired in May and June were charged from Revisions #5, #6, and #7 of the station's political rate card, while candidates who purchased fixed spots after April 17 to be aired in May and June were charged from Revision #8 of the political rate card, which reflected a rate increase enacted on April 17. You explain that the station "simply failed to apply new rates to already-accepted orders for [fixed] spots scheduled to run during the statutory pre-election period." You acknowledge that this "single continuing misunderstanding" also resulted in the application of discriminatory rates between candidates for the same office. (The 95 political announcements for which you made overcharges during the audited period and for which you stated that you would make refunds are shown in Appendix A.)

With respect to a station's rate increases after the pre-election period due to normal business practices, the Commission has stated that candidates who contract to purchase time after a rate increase becomes effective are entitled to the lower rates that were charged to other advertisers who contracted for time before the rate increase, as long as the spots are of the same class and amount of time for the same period. *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC 2d 510, 529 (1972)("1972 Public Notice"). The Commission reiterated in 1988 that licensees must calculate the lowest unit charge for a particular class of time according to the lowest price any advertiser has paid for a spot which has cleared a particular time period or daypart. *Public Notice on Lowest Unit Charge*, 4 FCC Rcd 3823, 3824 (1988)("*1988 Public Notice*"). "Any advertiser" includes any commercial advertiser or any other candidate who paid less for the same class of time and whose spots appeared in the same time period.

You assert that, in any event, these overcharges to candidates purchasing from political rate card 8 were actually *undercharges* to candidates purchasing from political rate cards #5, 6, and 7, because the station would have been entitled to apply the new rate to the spots already sold because the political rate card reserves the station's right to increase the rates quoted on that sheet without notice. This does not excuse such discriminatory rates for two reasons. First, you did not charge the same rate to each candidate regardless of the appropriate amount. Second, as indicated by the invoices and program logs you provided, it appears that the candidates who purchased time pursuant to political rate cards #5, 6, and 7 entered into contracts with KRON-TV wherein the specific prices were quoted. The Commission has stated explicitly that where a candidate purchases time to air during the pre-election period, the price for which is stated in the contract, and the station enacts a subsequent rate increase which results in a charge that is greater than that provided in the contract, the candidate is entitled to the charge specified in the contract. *1972 Public Notice*, 34 FCC 2d at 529 (Question 12). Thus, because these pre-rate-increase candidates had contracts with the station with specific prices quoted, the station could not have applied subsequent rate increases to these particular candidates' purchases. By specifying a price in the contracts with the pre-rate-increase candidates, you effectively locked your station into a lowest unit charge established by those contracts for time to air during the pre-election period, regardless of the political rate card disclaimer that "rates . . . are subject to change without notice." You accordingly were obligated to sell time to each candidate at that lowest unit charge rate.

Apparent Discrimination Between Candidates

The "rate increase" overcharges discussed above also apparently resulted in discrimination between candidates for the same office. In at least two instances, candidates' "fixed" spots aired in the same time period at different rates because one candidate bought time before the rate increase while the other purchased time after the rate increase.[5] These discrimination overcharges are as follows:

Candidates	Party	Office	Date of Advertisement	Time of Broadcast	Length: Seconds	Rate Charged
1) Feinstein	Dem.	Gov.	5/28/90	7:34 p.m.	:30	4500
Van de Camp	Dem.	Gov.	5/29/90	7:28 p.m.	:30	4000
2) Feinstein	Dem.	Gov.	6/2/90	7:51 p.m.	:30	4500
Van de Camp	Dem.	Gov.	6/2/90	7:41 p.m.	:30	4000

In addition to the apparent lowest unit charge violations described above, these overcharges also apparently violated the no-discrimination rule in Section 73.1940(c).[6] That rule provides:

> In making time available to candidates for public office, no licensee shall make any discrimination between candidates in practices, regulations, facilities, or services for or in connection with the service rendered pursuant to this part, or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage; nor shall any licensee make any contract or other agreement which shall have the effect of permitting any legally qualified candidate for any

> public office to broadcast to the exclusion of other legally qualified candidates for the same public office. 47 C.F.R. § 73.1940(c).

The purpose of this rule against discrimination is to afford competing candidates equal treatment in the use of broadcast facilities including practices related to the availability and purchase of advertisements. By affording Mr. Van de Camp a lower advertising rate than Ms. Feinstein for the same 30-second nonpreemptible "fixed" announcements during the same time period, it appears that KRON-TV discriminated against Ms. Feinstein in a manner that clearly could cause "prejudice or disadvantage." *See WPRY Radio Broadcasters, Inc.*, 40 FCC 2d 1183, 1193 (1973); *Midnight Sun Broadcasters, Inc.*, 40 RR 2d 660 (B/c Bur. 1977).

Apparent Make-Good Violations

You acknowledge that some candidates' fixed spots that were ordered shortly before the contracted-for air date did not "clear" because the inventory for the programs ordered was already sold out. You explain that the station's political sales manager would provide "make goods," attempting to find fixed spots in other programs to match the value of the spot that did not clear. In some instances, you state that the candidates were accommodated in more expensive prime time adjacencies at a lesser rate than the full "fixed" price of that adjacency. You explain that you regarded these spots as preemptible because the candidates paid less than full "fixed" prices for those programs, even though they paid more than the lowest preemptible rate for those programs. According to your response, you have now determined that you should treat these spots as preemptible for purposes of determining lowest unit charges, and will refund to candidates any charges in excess of the lowest preemptible spot clearing in that time period during the same week.

We agree that there were overcharges to those three candidates whose "make-good" spots were more expensive than the preemptible spots of commercial advertisers in the same program, in apparent violation of Section 315(b)(1) and Section 73.1940(b).[7] We also agree that the candidates were entitled to the same rate as the lowest preemptible spot clearing in that same time period. *See 1988 Public Notice*, 4 FCC Rcd at 3824.

With respect to the 98 overcharges outlined in Appendices A and B, you state that you will be making appropriate refunds. We request that you advise the Commission within thirty (30) days of the date of this letter of the actions you have taken. Because the only overcharges you listed occurred during the 10-day audited period, we have no information as to other overcharges, if any, during the rest of the pre-election period that resulted from either the erroneous application of rate increases to certain candidates, or the provision of "make-goods" to certain candidates. Therefore, you should submit a report within thirty (30) days from the date of this letter, indicating any KRON-TV overcharges, as described above, that occurred from April 22, 1990, to May 26, 1990, and what actions you have taken with respect thereto.

Failure to Disclose

The following discussion highlights certain additional areas of concern to the Commission regarding KRON-TV's current sales practices when dealing with political candidates. As explained below, although these practices do not warrant a forfeiture, we believe they are inconsistent with the purposes of Section 315(b) and, accordingly, should be modified.

We have reviewed your published political rate card, the internal commercial rate guides for the pre-election period, and your program logs, commercial invoices and contracts. It is apparent that you offered commercial advertisers a number of different classes of time and preemptible rates, as well as a non-preemptible rate, depending upon their needs, whereas you offered candidates only two classes of time, an immediately preemptible rate and a non-preemptible "candidate fixed" rate. Our review of a number of time periods reveals that very few advertisers (commercial or political) purchased time at the lowest preemptible rates shown on your political rate cards. This strongly suggests that commercial advertisers were aware that, in order to "clear," they had to pay more for preemptible time than that which you considered the station's "lowest unit charge."

In contrast, by virtue of your limited political rate card, candidates were not on notice, and may well have been unaware, of their option to buy more expensive preemptible time that had a greater chance of "clearing;" rather, they apparently relied on premium-priced "fixed" time to gain that assurance. Although you state that price is one of several factors you consider when deciding the preemptibility of an advertisement, it is obviously a major consideration, as evidenced by the high percentage of commercial advertisers who paid more than the lowest preemptible rate and whose ads "cleared" during the audited period.

Candidates are entitled to all discount privileges, including the right to buy all classes or categories of preemptible spots that the broadcaster offers to commercial advertisers. *Hernstadt v. FCC*, 677 F.2d 893 (D.C. Cir. 1981); *1988 Public Notice*, *supra*; *WHDH, Inc.*, 23 FCC 2d 763 (1967). In *Hernstadt*, the Court concluded, "[W]e hold that the lowest unit charge provision entitles candidates to ROS and preemptible terms when those terms are offered to others making similar use of broadcast facilities." Although you state that KRON-TV's general policy is to make available to candidates all preemptible rates, package plans, discounts, and rotations upon request, you assert that no candidate or representative actually requested information about "intermediate rates."

Political broadcasting obligations are imposed upon station licensees, not on candidates and their representatives. A station cannot implement a policy designed to accommodate only the most savvy and well-informed candidate. The representatives' or candidates' knowledge, or lack thereof, does not replace the broadcaster's obligation to offer candidates the benefits of discounts, packages, and option availabilities. By publishing a limited rate card that does not reference the existence of other negotiated rate options and by otherwise failing to inform candidates of such options, however, it does not appear that KRON-TV met its political broadcasting obligation to make all rates available to candidates.

Although we continue to believe that it is implicit in the obligations placed on broadcasters by the lowest unit charge requirement, we recognize that the Commission had not, prior to the *Mass Media Report on Political Programming Audit*, 68 RR 2d 113 (MMB 1990), articulated stations' affirmative disclosure duties.[8] Further, there is no evidence that any candidate actually requested and was refused a particular class of time by KRON-TV, as occurred in *Hernstadt*. Therefore, the Commission cautions KRON-TV to reform its sales practices and that, in the future, failure to disclose pertinent information about its lowest unit charge and associated discount privileges made available to commercial advertisers may result in a forfeiture.

CONCLUSION

Based on the foregoing, it appears that KRON-TV willfully and repeatedly violated Section 315(b) of the Communications Act and Section 73.1940(b) and (c) of the Commission's Rules from May 27, 1990, to June 4, 1990, by overcharging candidates on the 98 occasions cited. These overcharges resulted from the erroneous application of rate increases to certain candidates, as well as the provision of "make-goods" to certain candidates. With respect to corrective measures taken by the station to prevent a recurrence, a licensee's intent to make restitution for lowest unit charge violations has not dissuaded the Commission from imposing forfeitures in the past. *KAYS, Inc.*, 43 FCC 2d 1183 (1973); *De La Hunt Broadcasting Corp.*, 51 RR 2d 1189 (1982). The Commission has stated that corrective action subsequent to a notification of a possible violation does not relieve a licensee of its liability. *See Executive Broadcasting Corporation*, 3 FCC 2d 699 (1966). Here, KRON-TV's corrective measures in selling time to political candidates (as well as issuing refunds, if so issued) have occurred only after Commission inquiry had begun.

FORFEITURE

Under our new forfeiture standards, the base amount for a violation of the political broadcasting rules is $12,500. *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*. Because the violations here were repeated, we conclude that doubling the base amount is appropriate. This adjustment is consistent with our new forfeiture standards, and results in a forfeiture of $25,000.

Accordingly, pursuant to Section 503(b) of the Communications Act, you are hereby advised of your apparent liability for a forfeiture of twenty-five thousand dollars ($25,000) for your apparent willful and repeated violations of 47 U.S.C. Section 315(b) and 47 C.F.R. Section 73.1940 in the manner and on the dates described above and in the Appendices attached hereto. You are also directed to submit to the Commission within thirty (30) days of the date of this letter, the procedures implemented by KRON-TV to ensure that this type of conduct does not recur, a list of the rebates you conclude you should make as a result of your review of apparent overcharges, and the steps you have taken to refund the overcharges in connection with the lowest unit charge violations. The response must be signed by an officer or director of the licensee corporation.

In regard to this forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's Rules (47 C.F.R. Section 1.80), as summarized in the attachment to this letter. Any comments relating to your ability to pay should include financial items as set forth in the attachment.

This letter was adopted by the Commission on December 12, 1991.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

OVERCHARGES BASED ON RATE INCREASES

Candidate & Office	Date of Advertisement	Time of Broadcast	Length: Seconds	Rate Charged	Lowest Unit Charge	Difference
Dianne Feinstein	5/28/90	10:28 a.m.	:30	450	400	50
	5/29/90	12:58 p.m.	:30	450	400	50
(Gov.-Dem.)	6/1/90	3:43 p.m.	:30	450	400	50
	6/4/90	11:34 a.m.	:30	450	400	50
	5/28/90	7:34 p.m.	:30	4500	3800	700
	5/29/90	7:41 p.m.	:30	4500	3800	700
	6/2/90	7:51 p.m.	:30	4500	3800	700
	5/27/90	11:30 p.m.	:30	3800	3400	400
	5/28/90	11:29 p.m.	:30	3800	3400	400
	6/2/90	11:28 p.m.	:30	3800	3400	400
	6/3/90	11:36 p.m.	:30	3800	3400	400
	5/31/90	6:58 p.m.	:30	4000	3500	500
	6/1/90	6:58 p.m.	:30	4000	3500	500
	5/27/90	7:43 a.m.	:30	500	300	200
	6/3/90	6:06 a.m.	:30	500	300	200
	5/28/90	7:14 a.m.	:30	1200	1000	200
	5/30/90	8:18 a.m.	:30	1200	1000	200
	5/31/90	7:48 a.m.	:30	1200	1000	200
	6/4/90	7:15 a.m.	:30	1200	1000	200
	5/28/90	4:59 p.m.	:30	2000	1800	200
	5/30/90	4:59 p.m.	:30	2000	1800	200
	6/4/90	4:59 p.m.	:30	2000	1800	200
	6/2/90	6:20 p.m.	:30	1200	900	300

John Van de Camp	5/29/90	10:51 p.m.	:30	450	400	50
	6/1/90	1:58 p.m.	:30	450	400	50
(Gov.-Dem.)	5/28/90	4:40 p.m.	:30	900	850	50
	5/29/90	4:54 p.m.	:30	900	850	50
	5/29/90	7:28 p.m.	:30	4000	3800	200
	6/2/90	7:41 p.m.	:30	4000	3800	200
	5/30/90	11:28 p.m.	:30	3800	3400	400
	5/31/90	11:28 p.m.	:30	3800	3400	400
	6/1/90	11:28 p.m.	:30	3800	3400	400
	6/3/90	6:34 a.m.	:30	500	300	200
	5/29/90	8:10 a.m.	:30	1200	1000	200
	6/4/90	8:59 a.m.	:30	1200	1000	200
	6/4/90	8:28 a.m.	:30	1200	1000	200
	5/31/90	4:59 p.m.	:30	2000	1800	200
Ira Reiner	5/29/90	11:58 p.m.	:30	450	450	50
	5/29/90	4:33 p.m.	:30	900	850	50
(Atty-Gen. Dem.)	5/30/90	7:34 p.m.	:30	4500	3800	700
	5/28/90	11:28 p.m.	:30	3800	3400	400
	5/28/90	6:58 p.m.	:30	4000	3500	500
	5/27/90	8:25 a.m.	:30	500	300	200
	6/4/90	12:29 a.m.	:30	1800	1600	200
	5/28/90	4:59 p.m.	:30	2000	1800	200
Arlo Smith	6/3/90	6:25 a.m.	:30	2800	2600	200
	6/1/90	4:53 p.m.	:30	900	850	50
(Atty-Gen. Dem.)	6/2/90	7:51 p.m.	:30	4500	3800	700
	6/4/90	7:19 p.m.	:30	4000	3500	500
	6/4/90	7:22 a.m.	:30	1200	1000	200
	6/1/90	4:59 p.m.	:30	2000	1800	200

Bill Press (Ins. Comm. Dem.)	5/29/90	1:59 p.m.	:30	450	400	50
	5/31/90	12:24 p.m.	:30	450	400	50
	6/1/90	10:58 p.m.	:30	450	400	50
	5/29/90	11:28 p.m.	:30	3800	3400	400
	6/2/90	11:28 p.m.	:30	3800	3400	400
	6/4/90	11:28 p.m.	:30	3800	3400	400
	5/29/90	6:58 p.m.	:30	4000	3500	500
	6/1/90	6:58 p.m.	:30	4000	3500	500
	5/29/90	12:29 a.m.	:30	1800	1600	200
	6/4/90	12:01 a.m.	:30	1800	1600	200
	5/31/90	8:18 a.m.	:30	1200	1000	200
	6/1/90	8:09 a.m.	:30	1200	1000	200
	6/4/90	7:14 a.m.	:30	1200	1000	200
	6/1/90	4:58 p.m.	:30	2000	1800	200
	6/4/90	4:58 p.m.	:30	2000	1800	200
John Garamendi (Ins. Comm. Dem.)	5/29/90	4:48 p.m.	:30	900	850	50
	5/30/90	4:55 p.m.	:30	900	850	50
	5/31/90	4:29 p.m.	:30	900	850	50
	5/29/90	11:29 p.m.	:30	3800	3400	400
	6/1/90	11:28 p.m.	:30	3800	3400	400
	6/3/90	6:25 a.m.	:30	500	300	200
	5/29/90	12:25 a.m.	:30	1800	1600	200
	6/4/90	12:10 a.m.	:30	1800	1600	200
	5/29/90	8:28 a.m.	:30	1200	1000	200
	6/4/90	7:59 a.m.	:30	1200	1000	200
	6/4/90	4:59 p.m.	:30	2000	1800	200

Conway Collis (Ins. Comm. Dem.)	6/3/90	6:14 p.m.	:30	2800	2600	200
	5/28/90	7:28 p.m.	:30	4500	3800	700
	5/29/90	7:53 p.m.	:30	4500	3800	700
	6/2/90	7:42 p.m.	:30	4500	3800	700
	6/3/90	11:36 p.m.	:30	3800	3400	400
	5/30/90	6:58 p.m.	:30	4000	3500	500
	6/4/90	7:19 p.m.	:30	4000	3500	500
	5/28/90	12:07 a.m.	:30	1800	1600	200
	5/30/90	12:06 a.m.	:30	1800	1600	200
	6/1/90	12:21 a.m.	:30	1800	1600	200
	6/4/90	12:25 a.m.	:30	1800	1600	200
	5/28/90	7:15 a.m.	:30	1200	1000	200
	5/29/90	6:59 a.m.	:30	1200	1000	200
	6/1/90	8:19 a.m.	:30	1200	1000	200
	6/4/90	7:28 a.m.	:30	1200	1000	200
	5/28/90	4:58 p.m.	:30	2000	1800	200
	5/29/90	4:59 p.m.	:30	2000	1800	200
	5/31/90	4:58 p.m.	:30	2000	1800	200

APPENDIX B

OVERCHARGES BASED ON MAKE-GOOD ACCOMMODATIONS

Candidate & Office	Date of Advertisement	Time of Broadcast	Length: Seconds	Rate Charged	Lowest Unit Charge	Difference
John Garamendi (Ins. Comm. Dem.)	5/31/90	8:29 p.m.	:30	15,200	10,000	5,200
Bill Press (Ins. Comm. Dem.)	5/31/90	11:29 p.m.	:30	3,000	2,000	1,000
John Van de Camp (Gov.-Dem)	5/31/90	9:29 p.m.	:30	11,000	10,000	1,000

FOOTNOTES

[1] According to KRON-TV, preemption decisions are based on such factors as rate, flight length, and prior preemptions in the same flight.

[2] As elaborated in n.3, *infra*, very few candidates bought immediately preemptible spots during the audited period.

[3] To illustrate this point, KRON-TV listed a total of only eight preemptible advertisements purchased by four different candidates (five by one candidate) during the 10-day audited period.

[4] We note that you did not disclose whether the media buyers for candidates were the same as those for commercial advertisers.

[5] Although KRON-TV's broadcast week is Tuesday-Monday, and some of these spots aired in separate weeks, *i.e.*, on Monday, May 28 and Tuesday, May 29, 1990, the rate for fixed spots did not change during the entire ten-day audited period, from Sunday, May 27, 1990, to the primary, June 5, 1990, and therefore may be considered identical for purposes of lowest unit charge calculations.

[6] Contrary to your assertion, failure to adjust rates to reflect lowest unit charge may be the basis for a number of statutory or rule violations (47 U.S.C. § 315(b) and 47 C.F.R. § 73.1940(c)), for which separate forfeitures may be assessed under Section 503(b)(2) of the Act. *Cf. Universal Broadcasting Co. of Minneapolis-St. Paul, Inc.*, 58 FCC 2d 1367 (1976)(forfeitures for Sections 317(c) and [then] Section 73.119(b)). Further, as a general matter, separate violations occurred as to each candidate involved, in every instance in which an overcharge occurred. The fact that any separate violations were similar in nature does not make them a "single continuing violation" as you suggest. Rather, these were merely repeated violations of the same requirements.

[7] This apparent "preemption" also raises the question as to why the station did not clear nonpreemptible "fixed" spots ordered by candidates in favor of commercial advertisers' preemptible spots for those programs.

[8] The precise scope of this disclosure duty is discussed in detail in the Commission's *Report and Order* in MM Docket No. 91-168 (adopted Dec. 12, 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: December 12, 1991

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

KGO Television, Inc.
Television Station KGO-TV
900 Front Street
San Francisco, California 94111

Dear Licensee:

This letter cautions you to revise your conduct with respect to the negotiation of "reasonable access" for federal candidates to ensure compliance with the requirements of Section 312(a)(7) of the Communications Act of 1934, as amended, (47 U.S.C. §§ 312(a)(7)), and Commission policy associated therewith. We also caution you to revise your political sales practices to conform with the lowest unit charge provision of Section 315(b) of the Communications Act.

BACKGROUND

On July 16 and 17, 1990, the Commission initiated an audit and inquiry into KGO-TV's sale of time to political candidates during the 1990 primary election, particularly the "lowest unit charge" obligation set forth in Section 315(b). We requested, *inter alia*, the station's program logs, political file, commercial and political invoices, political and commercial rate cards, if any, and lists of political advertising for the 10-day period immediately preceding the California primary election (Sunday, May 27 through Tuesday, June 5, 1990). We also requested information concerning KGO-TV's "lowest unit charge" calculations, classes and lengths of time offered, levels of preemptibility, "make-good" policies, and rate changes. Based on the materials provided by KGO-TV to an FCC field investigator on July 17, the August 16, 1990, station responses to an inquiry left by the investigator, and the licensee's November 20, 1990, response to a further Commission inquiry, it appears that KGO-TV violated Sections 312(a)(7) and 315(b)(1) of the Act, and Section 73.1940(b) of the Commission's Rules.

Your response to our initial inquiry included several revisions of KGO-TV's political rate cards, and several internal commercial rate cards for distribution only to the station's sales personnel. Our further letter of inquiry concerned, among other things, the apparent limitations on the amount of time federal candidates may purchase, as reflected on the station's political rate cards. You respond that since no federal candidates purchased time on KGO-TV during the 1990 pre-primary period, the weekly unit maximums on the rate cards were irrelevant for purposes of our inquiry. You state that, in any event, the maximums were not restrictive numbers, as they allowed candidates to purchase spots in every daypart in every week of the statutory period. You also point out that, since any candidate who wished to purchase more than the maximum could do so, the "maximums" were guidelines rather than hard-and-fast limitations. You state that the station removed the maximums from the political rate cards after the Commission's September 7, 1990, public notice, which reminded broadcasters of their reasonable access obligations.

In response to our lowest unit charge inquiry, you state that the rate on the commercial rate card reflects the rate for nonpreemptible "fixed" spots for those commercial advertisers who request guaranteed clearance. You state that while the majority of KGO-TV commercial advertisers purchase preemptible spots, some advertisers, who seek to highlight a campaign, set sales dates, or announce a store opening, buy nonpreemptible "fixed" spots. You state that your practices with commercial advertisers consist of separate negotiations with each order. You declare that you determine the price per daypart by such factors as the rate card price, projected ratings delivery, available inventory in each particular daypart being sold, availability by product category, and the inherent flexibility of the order. You describe the process as an "auction grid card without the grids." With respect to the station's practices with political advertisers, the only rates charged candidates in 1990 were those reflected on the political rate cards, with one exception -- overnight spots sold to one candidate. All of your political rate cards show two rates for 30-second spots, preemptible and nonpreemptible "fixed," and "maximum units per week" for both federal and nonfederal candidates.

We inquired further as to the presence of only those two rates on KGO-TV's political rate cards, and whether you disclosed to candidates information about "intermediate" preemptible rates available to commercial advertisers. You responded that you did not have a policy requiring sales personnel to discuss "intermediate rates" with candidate representatives, because you had no doubt that all candidate representatives knew that the two rates on the political rate cards were not the only two available to candidates. You point out that the station issued a new sales policy after the Commission's September 7, 1990, public notice which you characterize as a "new requirement that stations inform political candidates of various sales practices including the existence of so-called 'intermediate' rates."

DISCUSSION

Political Programming Law

Section 312(a)(7) of the Act requires "reasonable access" for federal candidates. That section states:

> (a) The Commission may revoke any station license or construction permit -
>
> (7) for willful or repeated failure to allow reasonable access to or permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy. 47 U.S.C. § 312(a)(7).

Thus, consistent with the statute, the Commission requires stations to afford federal candidates a right of access to all dayparts, including prime time, and to conduct individual negotiations without establishing any bans or limitations on the number or placement of spots or program time. *See CBS, Inc. v. FCC* (*Carter/Mondale*), 453 U.S. 367 (1981).

Section 315(b)(1) provides:

> (b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed --
>
> (1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period. 47 U.S.C. § 315(b)(1).

"Lowest unit charge" means the lowest advertising rate offered or sold by the station for a particular class, amount of time, and period or program. It also means that a candidate is entitled to all discount privileges which the broadcaster offers to commercial advertisers. Section 73.1940(b), which implements Section 315, also provides that "[a]ll discount privileges otherwise offered by a station to commercial advertisers shall be available upon equal terms to all candidates for public office." 47 C.F.R. § 73.1940(b).

Reasonable Access to Federal Candidates

Our review of KGO-TV's published political rate card indicates that KGO-TV had a policy that appeared to impose a limitation on the amount of time a federal candidate could purchase during a daypart, time period, or program per week. Although you claim that this was not an actual limitation, and that federal candidates could purchase more than the "weekly maximums," this published policy gives the appearance of an absolute limitation because the political rate card does not refer to the "maximums" as "suggested" or otherwise qualify it by informing federal candidates that they may purchase more than the maximums. It further appears that KGO-TV's policy does not contemplate individual negotiations with federal candidates, in apparent contravention of the Commission's requirements implementing Section 312(a)(7) as affirmed in the *Carter/Mondale* case. Rather, the policy appears to encourage federal candidates to limit their purchases unless they knew specifically, without so being informed, that they were entitled to purchase more. The fact that the "maximums" may have allowed for what you consider reasonable amounts of time is irrelevant because of the lack of individual negotiations inherent in the publication of *any* maximum amount. Contrary to KGO-TV's assertion, the prohibition of *any* limitations on federal candidate purchases was not a new requirement announced by the Commission in its September 7, 1990, public notice; rather, it has been the Commission's requirement since 1978[1], and the Supreme Court specifically affirmed it in the 1981 *Carter/Mondale* case. By publishing a "maximum" on your rate card, which appeared to limit the amount of time a federal candidate could purchase on your station, you have apparently circumvented the intent of Section 312(a)(7) and Commission policy associated therewith. The fact that you removed the "maximums" from your political rate cards after we issued our September 7, 1990, public notice, does not diminish our concern. Because no federal candidates requested time on KGO-TV during the pre-primary period, however, we cannot conclude that any federal candidate has been denied "reasonable access" rights during the period in question. You are cautioned, however, to conform your conduct in this regard to established Commission policy.[2]

Failure to Disclose

The following discussion highlights certain areas of concern to the Commission regarding KGO-TV's current sales practices when dealing with political candidates. Although these practices do not warrant a forfeiture, we believe they are inconsistent with the purposes of Section 315(b) and should be modified as elaborated below.

We have reviewed your published political rate card, the internal commercial rate guides for the pre-election period, and your program logs, commercial invoices and contracts. It is apparent that you offered commercial advertisers a number of different preemptible rates, as well as other nonpreemptible "fixed" rates, depending upon their needs, whereas your political rate card offered candidates only two rates, an immediately preemptible rate and a nonpreemptible "fixed" rate.[3] By virtue of your limited political rate card, candidates were not expressly made aware of their option to buy more expensive preemptible time that had a greater chance of "clearing;" rather, they may have relied on premium-priced "fixed" time to gain that assurance. Although you state that price is one of several factors in the preemptibility of an advertisement, it is obviously a major consideration, as evidenced by the high percentage of commercial advertisers who paid more than the lowest preemptible rate and whose ads "cleared" during the audited period. Indeed, our review of a number of time periods reveals that very few advertisers (commercial or political) purchased time at the lowest preemptible rates shown on your political rate cards.[4]

Candidates are entitled to all discount privileges, including the right to buy all classes or categories of preemptible spots that the broadcaster offers to commercial advertisers. *Hernstadt v. FCC*, 677 F.2d 893 (D.C. Cir. 1981); *1988 Public Notice*, *supra*; *WHDH, Inc.*, 23 FCC 2d 763 (1967). In *Hernstadt*, the Court concluded, "[W]e hold that the lowest unit charge provision entitles candidates to ROS and preemptible terms when those terms are offered to others making similar use of broadcast facilities."

Political broadcasting obligations are imposed upon station licensees, not on candidates and their representatives. A station, therefore, cannot implement a policy designed to accommodate only the most savvy and well-informed candidate. The representatives' or candidates' knowledge, or lack thereof, does not replace the broadcaster's obligation to offer candidates the benefits of discounts, packages, and option availabilities. To the extent KGO-TV's published rate schedule implicitly represents that access by candidates to certain discount privileges is limited, it may have resulted in significant practical barriers to candidates' acquisition of preemptible time at intermediate rate levels, thereby causing them to pay unnecessarily high advertising rates and frustrating the intended purposes of the lowest unit charge provision of Section 315. By publishing a limited rate card that does not reference the existence of other negotiated rate options, and by otherwise failing to inform candidates of such options, it does not appear that KGO-TV met its political broadcasting obligation to make all rates available to candidates.

Although we continue to believe that it is implicit in the obligations placed on broadcasters by the lowest unit charge requirement, we recognize that the Commission had not, prior to the *Mass Media Bureau Report on Political Programming Audit*, 68 RR 2d 113 (MMB 1990), specifically articulated stations' affirmative disclosure duties.[5] Further, there is no evidence that any candidate actually requested and was refused a particular class of time by KGO-TV, as occurred in *Hernstadt*. Therefore, the Commission cautions KGO-TV to reform its sales practices and that, in the future, failure to disclose pertinent information about its lowest unit charge and associated discount privileges made available to commercial advertisers may result in a forfeiture.

This letter was adopted by the Commission on December 12, 1991.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *Report and Order (Commission's Policies in Enforcing Section 312(a)(7)*, 68 FCC 2d 1079 (1978).

[2] We note that had KGO-TV applied this policy to any federal candidate, or actually informed any federal candidate that such "maximums" existed, we would view this as a violation of Section 312(a)(7) that may well have warranted an appropriate sanction.

[3] When asked about intermediate rates, you state in your November 20 response at footnote 3: "We presume . . . the Political Branch intends to refer to rates between the lowest unit rate in the preemptible class and the lowest unit rate in the fixed class." We note that what you refer to as the lowest unit rate in the preemptible class is apparently the rate for the lowest level of preemptibility and is not necessarily the station's statutory "lowest unit charge." As explained in our *1988 Public Notice, supra*, depending upon how a station sells time to commercial advertisers, any of the preemptible level rates could be the "lowest unit charge" in a particular time period.

[4] *See* Appendix.

[5] The precise scope of this disclosure duty is discussed in detail in the Commission's *Report and Order* in MM Docket No. 91-168 (adopted Dec. 12, 1991).

APPENDIX

ANALYSIS OF EIGHT KGO-TV TIME PERIODS AND PROGRAMS

Time	Program	Candidate Rates Paid (All Fixed)	Commercial Rates Paid (All Preemptible)	
			High	Low
7-9 a.m.	Good Morning America	$900	$ 900	$ 350
5-6 p.m.	Local News	2000	2000	950
7-7:30 p.m.	ABC News	3500	3000	
7:30-8 p.m.	Entertainment Tonight	3500	3500	1960
10-11 p.m. (Thurs.)	Primetime Live	5500	3000	3000
10-11 p.m. (Fri.)	20/20	8500	7500	7000
11-11:30 p.m.	Late News	3500	3000	1200
11:30-Midnight	Nightline	1600	1400	800

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re:

Exclusive Jurisdiction
With Respect to Potential
Violations of the Lowest Unit
Charge Requirements of Section
315(b) of the Communications
Act of 1934, as amended

DECLARATORY RULING

Adopted: December 12, 1991; Released: December 13, 1991

By the Commission: Commissioner Quello dissenting in part and issuing a statement; Commissioner Marshall issuing a statement.

1. By this ruling the Federal Communications Commission declares that any state cause of action dependent on any determination of the lowest unit charge under Section 315(b) of the Communications Act, or of some other duty arising under that subsection, is preempted by federal law. The sole forum for adjudicating such matters shall be this Commission.

BACKGROUND

2. Under Section 315(b) of the Communications Act, a broadcast station's charges for advertising time purchased for candidate uses while campaigning for political office during the last 45 days of a primary campaign or the last 60 days of a general election campaign may not exceed "the lowest unit charge of the station for the same class and amount of time for the same period." Outside those immediate pre-election periods, the charges to such candidates may not exceed "the charges made for comparable use of such station by other users." Subsection (d) of Section 315 directs the Commission to prescribe rules to implement the statute. The Commission over the years has adopted rules, provided general guidance and issued rulings both orally and in writing in response to complaints and requests for declaratory relief in particular cases arising under Section 315(b) (as well as Sections 315(a) and 312(a)(7)). In its continuing attention to political broadcasting issues, the Commission is in the process of updating its guidelines and regulatory policies regarding current and possible future advertising practices with respect to political programming.[1]

3. In a *Public Notice* released on October 10, 1991,[2] the Commission stated that it was considering issuing, on its own motion, a declaratory ruling confirming its earlier conclusion[3] that it has exclusive jurisdiction to determine questions of liability for violations of Section 315(b). Citing litigation in several states where candidates for elective office have sued broadcast stations for charging rates allegedly in excess of those permitted under Section 315(b), and the inconsistent rulings with regard to jurisdiction that have been issued to date in such litigation, the Commission specifically sought public comment upon the following issues: (1) whether its jurisdiction to determine the lawfulness of political advertising charges is exclusive; (2) whether federal and state courts must refer the liability question to the FCC in any case alleging that charges for political advertising are excessive; and (3) whether its exclusive jurisdiction should extend beyond the basic liability question and, if so, whether the Commission should preempt any cause of action in any court in which an alleged violation of Section 315(b) is an essential element.

4. Comments were received on October 21, 1991.[4] The 27 sets of comments filed on behalf or by broadcasting interests argued that the Commission has exclusive jurisdiction over all aspects of complaints alleging excessive political advertising charges and urged the Commission to preempt completely any such cause of action in any court.[5] The joint candidate commenters stated that the FCC does not have exclusive jurisdiction over Section 315(b) matters and that it lacks the authority to confer upon itself exclusive jurisdiction over any matter.[6] Finally, one commenter did not address the merits of the legal questions posed in the *Public Notice*, but requested instead that the Commission not issue any declaratory ruling to assert exclusive or primary jurisdiction until it provides "express authority for a candidate and a candidate's representatives to have access to a station's commercial files upon reasonable request."[7]

5. On the basis of our review of the comments and our own independent legal analysis, as set forth below, the Commission has concluded that any state cause of action dependent on any determination of the lowest unit charge under Section 315(b) or of some other duty arising under that subsection should be preempted.[8] Other claims, such as standard breach of contract actions, not dependent upon the determination of the lowest unit charge or some other duty arising under Section 315(b) are not preempted.[9]

DISCUSSION

6. The preemption doctrine has its roots in the Supremacy Clause of the Constitution. U.S. Const., Art. VI, cl. 2. Preemption may be either express or implied, and it is "compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose."[10] In the absence of express preemptive language, an intention by Congress to supersede state law may be inferred because of the pervasiveness of the federal regulatory scheme, because the federal interest is so dominant, or because the purpose of the federal law and the character of its obligations reveal an intent to preempt.[11] Furthermore, a court will find preemption where state law would actually conflict with federal law or would stand as an obstacle to the accomplishment of the full purposes and objectives of Congress.[12]

7. We find that Congress by implication preempted state causes of action of which alleged violations of Section 315(b) are an integral part because: (1) the purpose of the federal law and the character of its obligations reveal an intention to preempt such causes of action; (2) allowing actions to proceed in state courts would result in potentially inconsistent interpretations of federal law; and (3) such actions would stand as an obstacle to the realization of the full objectives of Congress. The express language of Section 1 of the Communications Act provides that, for purposes of "centralizing authority" with respect to inter-

state communications, Congress created the FCC "which shall execute and enforce the provisions of [the] Act." Moreover, the Supreme Court has held that, in adopting the Act, Congress "formulated a unified and comprehensive regulatory system for the [broadcasting] industry" to be administered by the Commission.[13] As to Section 315 in particular, courts have held that the Commission's authority is exclusive with respect to matters addressed specifically by the Act and, thus, that it preempts state and local regulation of those matters.[14]

8. Section 315 itself embodies Congress' mandate that uniform federal policies govern political broadcasting rates. In particular, Section 315(d) specifically directs the FCC to "make rules and regulations to carry this provision [Section 315] into effect." This narrowly focused directive, which exists in addition to the more general grant of Rule Making authority in Sections 4(i) and 303(f) of the Act, 47 U.S.C. §§ 154(i) and 303(r), is "something more" than the usual delegation of Rule Making authority.[15] Rather, it "amounts to a congressional direction to the FCC to recognize the importance of this particular section of the statute and to prescribe separate rules and regulations to deal with the multitudinous situations that arise in applying it *to all federal, state and local candidates for office throughout the nation*."[16] In view of this comprehensive regulatory and enforcement scheme, we find that Congress' purposes and objectives in adopting Section 315(b) reveal an intention to preempt state litigation over the charges for the broadcast of political advertisements.[17]

9. We further find that, regardless of whether *Congress* -- either explicitly or by implication -- has preempted state law claims based upon violations of Section 315(b), the Commission itself has authority to preempt such claims. Substantial judicial precedent makes clear that an agency may preempt state action under the Supremacy Clause whether or not an intention to preempt can be found in the governing statute or its legislative history. The leading case on agency preemption is *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982). The Supreme Court in that case held that "[f]ederal regulations have no less preemptive effect than federal statutes." 458 U.S. at 153. The Court held further that if the agency has not exceeded its statutory authority or acted arbitrarily, its preemption order should be upheld. 458 U.S. at 154.

10. The Supreme Court applied the rule established in *de la Cuesta* to affirm this Commission's preemption of some aspects of state regulation of cable television in *City of New York v. FCC*.[18] In proper circumstances, the Court said, the agency itself may determine "that its authority is exclusive and preempts any state efforts to regulate in the forbidden area."[19] The Court also stated that a federal agency acting within its delegated authority is empowered to preempt state laws "to the extent it is believed that such action is necessary to achieve its purposes."[20] In reviewing agency preemption orders, moreover, the Court said that it would not disturb an agency's decision to preempt if that decision represents "a reasonable accommodation of conflicting policies that were committed to the agency's care," unless it appears "from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."[21]

11. Commission preemption of state claims arising under Section 315(b) meets the standards established in *City of New York*. First, as the Court stated in that case, a federal agency acting within the scope of its delegated authority may preempt state regulation.[22] Here, the Commission clearly has authority to enforce the lowest unit charge requirement as it applies to all broadcasters and all candidates;[23] indeed, it has explicit authority to prescribe appropriate rules and regulations "to carry this provision into effect."[24] The Commission's efforts over the years to provide guidance as well as to take enforcement actions with respect to Section 315(b) are evidence both of its authority under the statute and of its commitment to uniform enforcement of its regulation in this important policy area. Thus, the Commission is acting well within its delegated authority when it enforces Section 315(b).

12. Moreover, preemption is necessary to allow the Commission to "achieve its purposes" by developing uniform standards for interpreting and enforcing Section 315(b). The importance of having uniform standards that are understood throughout the broadcast industry is underscored by the Commission's pending Rule Making into political broadcasting, which seeks, *inter alia*, to provide certainty and consistency in this important area of regulation.[25] Rulings by courts in numerous jurisdictions around the country almost certainly would produce varying and possibly conflicting determinations among state courts and between those courts and the Commission, thereby frustrating the objectives of certainty and uniformity.[26]

13. As various commenters have pointed out, inconsistency in the enforcement of Section 315(b) would leave both candidates and broadcasters unsure of their respective rights and responsibilities under the lowest unit charge requirement.[27] The prospect of lawsuits in various states might make it difficult, if not perilous, for broadcasters who serve more than one jurisdiction to provide various candidates prompt, authoritative quotes for the lowest unit charge available to them. We thus find that state court adjudication of claims of which alleged violations of Section 315(b) are an integral part would "conflict with the basic objectives of federal policy"[28] with respect to political broadcasting. The development and enforcement of consistent guidelines by this agency, in contrast, would provide critical certainty: to candidates, the certainty that they are indeed receiving the lowest unit charge; and to broadcasters, the certainty that they are fully complying with the law.

14. Preemption also is necessary for another important reason. While there is no express statutory right of candidate access to broadcast facilities beyond the "reasonable" access provisions of Section 312(a)(7) of the Act for federal candidates, there is a public good in the dissemination of information regarding political campaigns. Indeed, the legislative history of the political broadcasting laws suggests that one purpose of those laws was "to give candidates for public office greater access to the media" and "to halt the spiraling cost of campaigning for public office."[29] We believe that the comments of some broadcasters are correct in pointing out that inconsistent rulings on Section 315(b) lawsuits might encourage some stations simply to refuse to accept political advertisements, or at least, in the case of federal candidates, to curtail such advertisements to a bare minimum. Such a response to state lawsuits, we believe, would frustrate the Congressional intention to encourage greater (and less costly) access for candidates.[30] We conclude, therefore, that we should preempt state lawsuits of which allegations of violations of Section 315(b) are an integral part to avoid frustration of this federal purpose.[31]

15. As the Court observed in *City of New York*, "it has long been recognized that many of the responsibilities conferred upon federal agencies involve a broad grant of authority to reconcile conflicting policies."[32] In this case, the Commission's determination that preemption is necessary to avoid disruption or frustration of its enforcement of Section 315(b) is a "reasonable accommodation of conflicting policies."[33] The emergence of civil litigation in a number of courts around the country raises a real possibility of conflicting rulings as to what constitutes the "lowest unit charge" and what remedies are appropriate for violations of the statutory requirement. The FCC is the authority specifically designated by Congress to enforce the lowest unit charge requirement,[34] however, precisely because it has the expertise necessary to make such determinations based upon its understanding of the complex and often arcane practices of the broadcast advertising industry. Preempting claims arising under Section 315(b) represents a reasonable approach to avoiding conflicting policies in the interpretation and enforcement of the lowest unit charge requirement.

16. There also is no basis for believing that preemption is "an accommodation of policies that Congress would not have sanctioned."[35] The Supreme Court in other contexts has found that Congress intended in adopting the Communications Act to give the FCC broad authority to provide "a unified and comprehensive regulatory system for the [broadcasting] industry."[36] Although in adopting Section 315(b) Congress did not expressly preempt state regulation, neither did it indicate any intention that the Commission refrain from preempting if the Commission believes such action is necessary or appropriate to its enforcement of that section.[37]

17. We recognize that, in our previous consideration of this matter,[38] we limited our conclusion in favor of preemption to the issue of liability and did not find it necessary to decide whether preemption should also extend to efforts to obtain state law remedies for the violation of federal requirements relating to lowest unit charge. After considering the comments submitted in response to the *Public Notice*, however, we have had an opportunity to thoroughly analyze the reasons that support preemption in this area. It is now clear to us that those considerations support preempting state law remedies for the violations of the lowest unit charge requirement or of some other federal duty arising under Section 315(b).

18. The Commission has been specifically designated by Congress as the authority responsible for enforcing Section 315(b), and a determination of the appropriate remedy for a violation of Section 315(b) is an integral part of that enforcement. State efforts to provide their own remedies for a violation of the lowest unit charge requirement of Section 315(b), or of other duties arising thereunder, would interfere with uniform enforcement of the Act by the Commission just as surely as would state determinations of the initial question of whether Section 315(b) has been violated.

19. The Supreme Court recognized a related policy concern when it upheld the preemption of judicial remedies for defamation arising from political broadcasts in *Farmers Educational & Coop. Union v. WDAY, Inc.*[39] In that case, the Court found that allowing a separate judicial remedy would "hamper the Congressional plan to develop broadcasting as a political outlet."[40] Therefore, the Court affirmed the preemption of local lawsuits that stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[41] We believe that allowing state courts to impose additional remedies for violations of Section 315(b) might encourage stations to refuse to carry political advertising, and thereby would frustrate the Congressional intent to foster dissemination of information regarding political campaigns.[42] Thus, we conclude that our preemption should extend to remedies as well as to the determination of liability.

20. Finally, we note that Section 414 of the Act, which preserves remedies "existing at common law or by statute," does not foreclose our preemptive action here. Such "savings clauses" do not preclude preemption where allowing state remedies would lead to a conflict with or frustration of statutory purposes.[43] In any event, the lawsuits we preempt here have no meaning apart from Section 315(b) and thus derive not from any "existing" state common law or statutory origin, but solely from the federal statute.[44] State actions to enforce the Section 315(b) obligations of broadcasters are far removed from the traditional state remedies that are preserved by the "savings clause." *See, e.g., Arrow Transp. Co. v. Southern R. Co.*, 372 U.S. 658, 671 n.22 (1963). Section 414 cannot have been intended to "create" new state causes of action based on legal obligations established under federal law and enforced by this Commission.[45]

PROCEDURES

21. The Commission finds that it will further our ability to promptly and fairly dispose of Section 315(b) complaints brought to us as a consequence of this ruling (and all other Section 315(b) claims) by setting out the procedural framework for resolution of such complaints.

22. In order to invoke the Commission's enforcement procedures, complainants alleging a violation of Section 315(b) will be required to make a *prima facie* case.[46] This must, at minimum, consist of a short, plain statement of the claim sufficient to show that the complainant is entitled to the relief requested. This requirement could be met by a simple recitation of a sequence of events showing that, if all allegations are accepted as true and all inferences are drawn in the complainant's favor, the complaint would reasonably lie.[47] The complainant will be required to serve the complaint upon the station, and the station will be given ten days to answer the complaint if it so desires. If, after reviewing the complaint and answer (if filed), the Mass Media Bureau ("Bureau") finds that a *prima facie* case has been made, it will issue an Order that will give the parties the opportunity to elect one of two alternative procedures to resolve the complaint: mediation (Alternative Dispute Resolution);[48] or evaluation and disposition by the Bureau subject, of course, to review by the full Commission.

23. Under either process, once a *prima facie* showing has been made, the complainant will be entitled to limited discovery subject to specific conditions. The Bureau's Order will establish the limitations on and timetable for discovery.[49] Documents subject to discovery will consist of the station's records related to rates, terms and conditions for any advertising, commercial or political, broadcast during the 45- or 60-day period pertinent to the complaint. The station will be permitted to redact its records prior to production by deleting the identities of commercial advertisers and other proprietary information not relevant to the resolution of the complaint. Document production will be subject to a protective order limiting

its examination to parties designated in the order (as well as the Commission), and prohibiting further dissemination of the information revealed thereby.[50]

24. Within 30 days after the completion of discovery, the complainant will be required to file an amended complaint alleging specific facts based on the information discovered, stating the nature of the Section 315(b) violation and the amounts said to be owed. The station complained against will be given a 15 day opportunity to respond. If the parties have not elected to pursue mediation,[51] the Bureau will either impose an appropriate sanction where it finds the rules have been violated, or issue an appropriate order dismissing the complaint where it finds no violation.[52] In appropriate circumstances, the dispute may be referred to the Administrative Law Judges (ALJs) for resolution.

25. The sanctions available to the Commission for Section 315(b) violations (in addition to the rebate of any amounts found to have been charged in violation of Section 315(b)) include forfeitures, letters of admonition, short-term renewal, and designation of the station's license for revocation. Any decision rendered by the Bureau or an ALJ may be appealed directly to the full Commission.[53]

26. Accordingly, pursuant to Sections 1, 4(i), 303(r), and 315(b) and (d) of the Communications Act, 47 U.S.C. §§ 151, 154(i), 303(r), and 315(b) and (d); Section 5(e) of the Administrative Procedure Act, 5 U.S.C. § 556(e); and Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, *IT IS DECLARED* that state causes of action involving alleged violations of the lowest unit charge requirement or of some other duty arising under Section 315(b) ARE PREEMPTED to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX I

COMMENTS FILED IN INTENTION TO ISSUE DECLARATORY RULING WITH RESPECT TO EXCLUSIVE AUTHORITY OF FCC TO DETERMINE WHETHER BROADCASTERS HAVE VIOLATED LOWEST UNIT CHARGE REQUIREMENT OF SECTION 315(b)

1. CBS, Inc.
2. Northern Television, Inc.
3. Association of Independent Television Stations
4. Barnes, Browning, Tanksley & Casurella
   Long, Aldridge & Norman
   Savell & Williams
   Venema, Towery, Thompson & Chambliss
5. Gillett Communications of Atlanta, Inc.
   Gillett Communications of Boston, Inc.
   Gillett Communications of San Diego, Inc.
   Gillett Communications of Ohio, Inc.
   Gillett Communications of Detroit, Inc.
   Gillett Communications of Milwaukee, Inc.
   KSBY, Inc
   KSBW, Inc.
   WTVT License, Inc.
6. Busse Broadcasting Corporation
7. Fox Television Stations, Inc.
   Allbritton Communications Company
   Federal Broadcasting Company
8. WMUR-TV, Inc., Manchester, New Hampshire
9. Benedek Broadcasting Group
   Lin Broadcasting Corporation
   Midwest Television, Inc.
   Paducah Newspapers, Inc.
   Post-Newsweek Stations, Inc.
   Providence Journal Company
   The Spartan Radiocasting Company
10. National Broadcasting Company, Inc.
11. American Family Broadcast Group, Inc.
12. Nationwide Communications, Inc.
13. Freedom Newspapers, Inc.
14. Tribune Broadcasting Company
    Gray Communications Systems, Inc.
    Gannett Co., Inc.
    The Spartan Radiocasting Company
    The Providence Journal Company
    Westinghouse Broadcasting Company, Inc.
    Burnham Broadcasting Company, A Limited Partnership
    Post-Newsweek Stations, Inc.
15. Niels C. Holch, McGuiness & Holch
16. Osborn Communications Corporation
17. State Broadcasting Associations
    California Broadcasters Association
    Connecticut Broadcasters Association
    Florida Association of Broadcasters
    Illinois Broadcasters Association
    Iowa Broadcasters Association
    Louisiana Association of Broadcasters
    Maine Association of Broadcasters
    Maryland/District of Columbia Delaware Broadcasters Association
    Michigan Association of Broadcasters
    Minnesota Broadcasters Association
    Missouri Broadcasters Association
    Nebraska Broadcasters Association
    New Hampshire Association of Broadcasters

New Jersey Broadcasters Association
New York State Broadcasters Association
Oklahoma Association of Broadcasters
Pennsylvania Association of Broadcasters
Tennessee Association of Broadcasters
Texas Association of Broadcasters
Utah Broadcasters Association
Washington State Association of Broadcasters
West Virginia Broadcasters Association
Wisconsin Broadcasters Association
18. Minnesota Broadcasters Association
19. Great American Television and Radio Company, Inc.
Kelly Broadcasting Company
McGraw-Hill Broadcasting Company, Inc.
The New York Times Company
20. Capital Cities/ABC, Inc.
Chris-Craft Industries, Inc.
The Times-Mirror Company
21.WCOV-TV, Montgomery, Alabama (Woods Communications Corp.)
22. Mobile Video Tapes, Inc.
Louisiana Television Broadcasting Corporation
Clear Channel Television, Inc.
Rocket City Television, Inc.
23. A. H. Belo Corporation
Booth American Company
Broad Street Television, L.P.
Cosmos Broadcasting Corporation
Cox Enterprises, Inc.
Diversified Communications
Evening Post Publishing Company
First Media Corporation
H & C Communications, Inc.
Multimedia, Inc.
Nebraska Television Corporation
River City Broadcasting, L.P.
24. National Association of Broadcasters
25. WKRG-TV, Inc.
26. Woods Communications Group, Inc.

LATE FILED COMMENTS **

1. Pulitzer Broadcasting Company and WDSU Television, Inc.

2. Westinghouse Broadcasting Company, Inc.

** Late-filed comments were treated as informal comments.

Separate Statement of Commissioner James H. Quello, Dissenting in part.

In re: Exclusive Jurisdiction With Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934, as amended.

By this Declaratory Ruling ("Ruling"), the Commission is taking the important step of reaffirming our exclusive jurisdiction to enforce violations of Section 315 of the Communications Act. To the extent it does so, the Ruling is fully supported by law and represents sound policy. I can support this aspect of the Ruling without reservation.

I think it is important to emphasize that this action does not represent a new assertion of FCC authority. Section 315 never has been considered to have created a private right of action separate from our administrative processes. *See, e.g., Belluso v. Turner Communications Corp.*, 633 F.2d 393, 397 (5th Cir. 1980). Until recently, no one had ever sought a judicial remedy for purported lowest unit charge violations. In the two decades since Section 315(b) was enacted, the Commission has provided the sole remedy.

So in many ways this Ruling merely recognizes the obvious. It certainly is no departure from the Commission's historic view of its jurisdiction and statutory responsibilities. This necessarily means that the Commission is not "taking away" any existing remedy.

Conspicuously absent from the Ruling is any discussion of the Commission's existing complaint procedures or any suggestion that they have been in some way inadequate. Perhaps the reason for this omission is the fact that the Commission did not request comment on the question of procedures, nor did it engage in much internal analysis on this point.[1]

It has been suggested that the FCC is not obligated to provide parties an opportunity to comment on procedural issues. Whether or not this claim is true in this context, the Commission has been rather erratic in this proceeding in deciding when to solicit and when to forego public input. For example, there is no requirement that the Commission receive comments in order to promulgate a declaratory ruling, yet we chose to do so here. Also, in our *Notice of Proposed Rulemaking*, the Commission solicited advice on procedures for implementing sponsorship ID and other requirements. In all of our current proceedings, the question of complaint procedures is the only significant subject on which we did not request comment. If, as some have suggested, our current proceedings "may be the most important determinations made since the enactment of the lowest unit charge standard," this omission is exceedingly strange.

At this point, the new procedural guidelines raise more questions than they answer. For example, the Ruling encourages the use of Alternative Dispute Resolution at a time when the Commission's policy on such procedures is essentially conceptual. There is no discussion of how discovery will be limited to relevant documents or how the Commission will enforce such limits. Moreover, although the Ruling expresses concern with the potential administrative burden created by complaints, it establishes a new multi-stage procedure that includes a complaint, discovery, an amended complaint and several levels of Commission decisions including the possibility of hearings.

I dissent from the hastily made decision to adopt procedures because we do not yet know whether the new guidelines will help or make matters worse. Will the new procedures allow candidates to make a prima facie case and obtain quick relief or will they delay matters? Will they encourage the filing of speculative complaints, thus requiring the extension of our abuse of process rules? Will the number of complaints diminish now that the Commission is clarifying the political rules or will the volume of complaints under the new procedures create an administrative nightmare? We simply do not know. And, unfortunately, there was insufficient interest at the Commission in taking the time to find out.

I would have preferred to adopt the Declaratory Ruling on preemption and at the same time, issue a Further Notice to explore these issues. I believe that candidates, broadcasters and other interested parties would have welcomed the opportunity to comment on the issue of procedures.

Ironically, the internal pressure to adopt procedures intensified at the very time that the Commission is clearing up the confusion that prompted this Declaratory Ruling. Along with this Ruling and the *Report and Order*, the Commission is releasing a number of enforcement actions arising from the 1990 political broadcasting audit. Contrary to the exaggerated claims that 80 percent of television and 50 percent of radio stations overcharged candidates, the Bureau is assessing fines for overcharging in only two cases — about 7 percent of the stations audited. All together, the Bureau is issuing Notices of Apparent Liability to five of the thirty stations we examined, two for lowest unit charge violations and three for political file violations. In short, the level of rule violations by broadcasters is far below what some suggested in the wake of the audit. For this reason I wonder whether the rush to adopt new procedures may be premature.

We are doing the right thing by making clear that the Commission has exclusive jurisdiction to determine both liability and damages in complaints that implicate Section 315(b). Although I would not have taken the additional step of adopting procedures just yet, I am hopeful that they can be administered efficiently, and in a way that is fair to all concerned.

---

[1] To put the issue into some perspective, the Commission adopted the Notice of Proposed Rulemaking on our political broadcasting policies last June. The Commission began examining the issue of jurisdiction in July and released the Notice of Intent to Issue a Declaratory Ruling in October. By sharp contrast, a draft order proposing new procedures was circulated less than a week ago at a time when other pressing matters were under consideration.

SEPARATE STATEMENT OF
COMMISSIONER SHERRIE P. MARSHALL

Re: Declaratory Ruling on FCC Preemption of
Claims Dependent on Section 315(b)

Today's declaratory ruling should not be interpreted as the generous act of a Federal agency intent on providing shelter to broadcasters charged with price gouging. To the contrary, I write separately to emphasize that the Commission is asserting its jurisdiction over all claims sounding in 47 USC §315(b) so as to vigorously prosecute such claims, not bury them.

I joined in calling for this full extension of the Commission's preemptive authority only after I was confident that the Commission possessed the legal authority, the administrative wherewithal, and the institutional resolve to adjudicate Section 315 claims fairly and competently. Our declaratory ruling itself recounts in detail the weighty record compiled in support of Commission preemption of all claims arising from the statutory duty of broadcasters to provide candidates with the lowest unit charge for political advertisements.

That ruling also details the efficient, yet fair administrative processes the Commission has established for prompt resolution of bona fide overcharge grievances. Moreover, the fines and rebates we are separately ordering today for past violations of §315(b) clearly demonstrate this Commission's commitment to enforcing the legal obligations our licensees owe candidates for public office.

While we stand prepared to provide for a timely and thorough resolution of all candidate overcharge claims, I would not deny that the recent surge of such allegations could create a substantial burden on the Commission's ever scarce resources. Thus, I strongly endorse the Commission's offer of an alternative dispute resolution process to both candidates and respondent broadcast stations.

I also wish to underscore the sincerity of the Commission's suggestion that stations and candidates should attempt to reach a mutually satisfactory settlement of their overcharge disputes. As our declaratory ruling explains, the Commission will look favorably upon the private settlement of these disputes in reviewing any overcharge claims brought to its attention. Indeed, in light of the flood of claims that might immediately follow our issuance of this preemption ruling, this Commissioner, for one, will be disinclined to impose any additional sanctions on licensees who act promptly to rebate funds or otherwise redress the bona fide claims of aggrieved candidates pursuant to such a settlement.

Let us move with dispatch to dispose of these past grievances and ensure -- through our newly revised political broadcast rules -- clear regulatory guidance to broadcasters and candidates alike for the upcoming and future political campaign seasons.

# # #

FOOTNOTES

[1] *See Codification of the Commission's Political Programming Policies* (MM Docket No. 91-168), 6 FCC Rcd 5707 (1991). A *Report and Order* revising and codifying these policies is being adopted contemporaneously with this Declaratory Ruling.

[2] *Public Notice*, FCC No. 91-326, 6 FCC Rcd 5954 (1991), 56 Fed. Reg. 51895 (October 16, 1991) (hereinafter "Public Notice").

[3] News Release, Report No. GN-74, June 6, 1991.

[4] A list of the Comments received is attached as Appendix 1.

[5] *See, e.g.*, Comments of National Association of Broadcasters; Association of Independent Television Stations; Busse Broadcasting Corporation; A.H. Belo Corporation, *et.* al.; Capital Cities/ ABC Inc., *et. al.;* Tribune Broadcasting Company, Inc.

[6] *See* Comments jointly filed by the law firms of Barnes, Browning, Tanksley & Casurella; Long, Aldridge & Normal; Savell & Williams; and Venema, Towery, Thompson & Chambliss (hereinafter "Kahn and Jablonski"), on behalf of various candidates seeking refunds for alleged overcharges.

[7] *See* Comments filed by Niels Holch, on behalf of certain candidates.

[8] Similarly, any state cause of action dependent on any determination of the lowest unit charge under Section 315(b) or of some other duty arising under that subsection that is initiated in a federal court pursuant to diversity jurisdiction also is preempted and should be dismissed. Moreover, because Section 315(b) does not give rise to a private federal cause of action, any federal lawsuit based directly upon allegations of violations of Section 315(b) should be dismissed, *See Zell Miller for Governor v. Pacific & So. Co.*, No. 1:91-CV-RLV (N.D. Ga., June 4, 1991), slip opinion at 15 (*citing Belluso v. Turner Communications Corp.*, 633 F.2d 393, 397 (5th Cir. 1980)), *appeal pending*. *See also William L. Dickinson v. Cosmos Broadcasting Co.*, C.A. No. 91-T-072-N (M.D. Ala., April 1, 1991), slip opinion at 18.

[9] As the court made clear in *Zell Miller for Governor*, *supra*, claims that stem from Section 315(b) cannot be converted to state law claims simply because "the plaintiff may have artfully cast his essentially federal law claims as state law claims." Slip Opinion at 11-12.

[10] *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

[11] *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

[12] *See Hines v. Davidowitz*, 312 U.S. 52, 57 (1941).

[13] *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940). *See also Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 6 (1942).

[14] *E.g., Belluso v. Turner Communications Corp.*, 633 F.2d 393, 396 (5th Cir. 1980).

[15] *Kay v. FCC*, 443 F.2d 638, 643-44 (D.C. Cir. 1970).

[16] *Id.* (emphasis supplied).

[17] In adopting the current version of Section 315(b), Congress indicated that the ability of the Commission to enforce that provision was an important consideration. Pointing out the importance of having restrictions that were "workable and enforceable," the Senate committee took comfort in assurances by the Commission's chairman that the broadcast provisions "were enforceable by the Commission." S. Rept. No. 96, 92d Cong., 1st Sess. 20, *reprinted*, 1972 U.S. Code Cong. & Admin. News at 1786 (1971). We note in addition the decision in *Belluso v. Turner Communications Corp.*, 633 F.2d 393, where the court held that Congress did not intend to create a private federal cause of action for damages as a remedy for a violation of Section 315(a) of the Communications Act and opted instead for an exclusive administrative remedy. The court's reasoning is equally applicable to Section 315(b). Thus, because we conclude that Congress did not intend for a private *federal* cause of action for damages to be available as an additional remedy when Section 315(b) is violated, it would seem anomalous if Congress did not also preempt the states from providing an additional remedy in the form of a private *state* cause of action that is predicated on establishing a violation of Section 315(b). *See also* discussion in paragraph 20 *infra*.

[18] 486 U.S. 57 (1988).

[19] *Id.*, 486 U.S. at 64, *citing Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984), and *de la Cuesta*, 458 U.S. at 152-54.

[20] 486 U.S. at 63.

[21] 486 U.S. at 64. *See also, e.g., Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977).

[22] 486 U.S. at 63, citing *Louisiana Public Service Commission v.* FCC, 476 U.S. 355, 368-369 (1986). The decision in *Louisiana* that the FCC had exceeded its authority to preempt relied upon an express reservation in the Communications Act of authority for the states to regulate intrastate common carrier service. 47 U.S.C. §152(b)(1). No such provision applies to the regulation of broadcasters.

[23] *See FCC v. Pottsville Broadcasting Co.*, 309 U.S. at 137.

[24] 47 U.S.C. §315(d). *See also Kay v. FCC*, 443 F.2d at 643-44.

[25] *See Codification of the Commission's Political Programming Policies*, 6 FCC Rcd at 5710 (a purpose of the Rule Making is to develop a "single, up-to-date written source to which the public can turn for guidance" on how to comply with Section 315(b)).

[26] *Cf. Belluso v. Turner Communications Corp.*, 633 F.2d at 396 (administrative remedies before FCC for violations of Section 315(a) are exclusive); KVUE, Inc. v. Austin Broadcasting Corp., 709 F.2d 922, 934-36 (5th Cir. 1983) (state law extending "lowest unit charge" availability beyond statutory period under Section 315(b) preempted as an obstacle to achievement of purpose of federal statute).

[27] A multiplicity of tribunals and a diversity of procedures "are quite as apt to produce incompatible or conflicting adjudication as are different rules of substantive law." *Gardner v. Teamsters Union*, 346 U.S. 485, 490-91 (1953).

[28] *City of New York v. FCC*, *supra*, 486 U.S. at 69.

[29] *See* S. Rept. No. 96, 92d Cong., 1st Sess., at 20, *reprinted*, 1972 U.S. Code Cong. & Admin. News at 1774.

[30] *Cf. Farmers Educational & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 534-35 (1959); *KVUE v. Austin Broadcasting*, 709 F.2d at 936 n.65. We recognize that, apart from the equal opportunities provision of Section 315(a), Congress chose not to require that stations afford access rights to individual state and local candidates. Nevertheless, Congress clearly wanted to foster and encourage candidates' access to the broadcast media, and the state lawsuits conflict with that objective.

[31] *See City of New York v. FCC*, 486 U.S. at 64.

[32] 486 U.S. at 64.

[33] *Id.*

[34] *See* 47 U.S.C. §315(d).

[35] *See City of New York v. FCC*, 486 U.S. at 64.

[36] *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 168 (1968), *quoting FCC v. Pottsville Broadcasting Co.*, 309 U.S. at 137. *See also Farmers Educational & Coop. Union v. WDAY, Inc.*, 360 U.S. at 529 (state libel actions preempted to avoid undermining a "basic purpose" of Section 315, even though an express provision preempting such actions had been deleted from final version of statute).

[37] *City of New York v. FCC,* 486 U.S. at 69.

[38] *See* News Release, Report No. GN-74, June 6, 1991 (cited in n.3, *supra).*

[39] 360 U.S. at 534-35.

[40] 360 U.S. at 535.

[41] *Id.* (citation omitted).

[42] *See KVUE v. Austin Broadcasting,* 709 F.2d at 936 n. 65.

[43] *See, e.g.,* Texas & Pacific Railroad Co. v. Abilene Cotton Oil Co., 204 U.S. 427 (1907); *Pennsylvania Railroad v. Puritan Coal Mining Co.,* 237 U.S. 121, 129 (1915); *In re Long Distance Telecommunications Litigation,* 831 F.2d 627 (6th Cir. 1987); *Comtronics, Inc. v. Puerto Rico Telephone Co.,* 553 F.2d 701, 707-08 n.6 (1st Cir. 1977); *Blackburn v. Doubleday Broadcasting, Inc., 353 N.W.2d 550 (Minn. 1984).*

[44] *Zell Miller for Governor, supra,* slip op. at 11-12.

[45] *See Comtronics, Inc. v. Puerto Rico Tel. Co.,* 553 F.2d at 708 n.6.

We also reject the argument that we should not preempt because only the courts can finally determine the extent of our authority. Our preemption order clearly is subject to judicial review pursuant to Section 402(a) of the Communications Act, 47 U.S.C. §402(a). *See also* 28 U.S.C. §2342 *et. seq.* But that fact neither disables us from making a declaratory ruling as to our view of our authority nor excuses us of our obligation to clarify an issue in dispute.

[46] As a matter of general policy, we also believe that complainants should bring any lowest unit charge complaints in a timely manner. It would not serve the public interest to attempt to resolve such complaints on the basis of a stale record, and by requiring timely action we ensure that the Commission is able "to remedy violations before a pattern of abuse develops." *National Citizens Committee for Broadcasting v. FCC,* 567 F.2d 1095, 1116 (D.C. Cir. 1977); *cert. denied,* 436 U.S. 926 (1978).

[47] We intend to apply a standard similar to that imposed by Section 8(a)(2) of the Federal Rules of Civil Procedure. Thus, a complainant would be required to describe the factual basis for its belief that a specific station has committed a violation, rather than, for example, merely accusing a station of overcharging candidates based upon general information released in the Mass Media Bureau's 1990 Audit Report. Similarly, the fact that a station made efforts to settle overcharge claims would not be considered in deciding whether a complainant has established a *prima facie* case.

In the past, candidates have relied upon invoices or other information demonstrating inconsistencies in lowest unit charges. In addition, a complainant could make a *prima facie* case by using generally-available industry or statistical data on average rates to support its belief that the rate paid by a candidate was higher than the average rate charged by the station for the same class of time. These examples, of course, are not the sole means by which a *prima facie* case could be established; rather, they are merely intended to serve as a useful guide to interested parties.

[48] In this regard, the Commission believes that time-limited mediation may be the most efficient means of resolving complaints, particularly where the circumstances of a given case are fairly straightforward. Therefore, the Commission's proposed Alternative Dispute Resolution process (ADR) may provide a useful vehicle to resolve these complaints in a fair and expeditious manner. *See Initial Policy Statement and Order,* FCC Release No. 91-304, 56 Fed. Reg. 51178 (October 10, 1991).

[49] No more than sixty days will be allowed for discovery.

[50] Failure to abide by the terms of the protective order may result in the imposition of sanctions which could include those set forth in 47 C.F.R. §1.24 (censure, suspension or disbarment of persons practicing before the Commission) or possible dismissal of the complaint.

[51] Even if the parties elect to resolve a dispute through mediation, we of course retain our jurisdiction to enforce the requirements of Section 315(b).

[52] Given the substantial demand on agency resources which Section 315(b) cases might create, the Commission would welcome bona fide, mutually satisfactory settlements of overcharge disputes between complainant candidates and respondent broadcasters. Thus, while retaining our discretion to determine whether additional sanctions are warranted, the Commission would be inclined to look with favor upon such settlements in making that determination.

[53] *See* 47 C.F.R. §1.115.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: December 12, 1991

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Cincinnati TV 64 Ltd. C7-115
Licensee of WSTR-TV, Cincinnati, OH
2 Copley Place
Boston, Mass. 02116

Dear Licensee:

This letter constitutes a Notice of Apparent Liability (NAL) for a forfeiture of $1,500 issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (47 U.S.C. Section 503(b)), for your willful and repeated violations of Section 73.1940(d) of the Commission's rules (47 C.F.R. Section 73.1940(d)). This letter also cautions you to modify your selling practices as they relate to disclosure of larger daypart rotations, and preemption and make-good policies.

BACKGROUND

This action results from the audit of WSTR-TV, commenced July 16, 1990, regarding your compliance with the political programming laws. Based on the materials WSTR-TV provided to an FCC field investigator on July 16; your August 16, 1990, response to a letter of inquiry left by the investigator; and your July 1, 1991, response to a further Commission inquiry of February 11, 1991, we find that WSTR-TV apparently failed to maintain an accurate political file in violation of our rules.

DISCUSSION

Apparent Failure to Maintain Accurate Political File

On July 16, 1990, an FCC field investigator arrived at your station to inspect your political file. The investigator made a copy of the file at that time. In your letter of August 16, 1990, you explain that at the time the FCC field investigator collected the political file, two documents were missing. These were a "Record of Request for Broadcast Time by or on Behalf of a Candidate for Public Office," recording an inquiry from the campaign of James Walsh for county judge, and an "Agreement Form For Political Broadcasts," signed by Mr. Walsh. According to your letter, both of these documents had been misfiled. You included a copy of these documents with your letter. Section 73.1940(d) requires licensees to maintain a political file which forms a complete record of all requests for broadcast time made by or on behalf of candidates for public office, "together with an appropriate notation showing the disposition made by the licensee of such requests and the charges made, if any, if the request is granted." The rule also requires stations to place all required records in the political file as soon as possible and to retain those records for a period of two years.

It appears that neither the notation regarding James Walsh's inquiry for broadcast time nor the contract between James Walsh and the station were placed in the political file on a timely basis, in violation of Section 73.1940(d). Maintenance of an accurate political file is an essential element of Section 315 of the Communications Act. 47 U.S.C. Section 315(a). A station generally has no obligation to notify opposing candidates when a candidate appears on its facility, and opposing candidates have only seven days within which to review the political file and make a request for "equal opportunities." Because you failed to include the necessary information in the file, opposing candidates did not have such information available for them to exercise their rights under Section 315 prior to the May 8, 1990, primary.

Failure to Disclose

The following discussion highlights certain additional areas of concern to the Commission regarding WSTR-TV's current sales practices when dealing with political candidates. As explained below, although these practices do not warrant a forfeiture, we believe they are inconsistent with the purposes of Section 315(b) and, accordingly, should be modified.

Our February 11, 1991, inquiry asked you to explain rate disparities between rates paid by Judge James Walsh and lower rates paid by some commercial advertisers. You explain these disparities by the fact that the commercial advertisers bought larger daypart rotations. You admit that these larger daypart rotations were not disclosed to political candidates on the political rate cards. Nor does it appear that these rotations were disclosed to Judge James Walsh as part of his political "package."

Regarding the station's make-good policy, your responses explain that commercial advertisers are assigned preemptibility ratings ranging from Section 1 (fixed) to Section 5 (most preemptible). You also state that you offer political candidates preemptible rates based on Section 5 preemptibility, but, in fact, treat political spots as the least preemptible, or the highest priority afforded any commercial advertiser. You acknowledge, however, that you did not disclose this favorable policy against preemption to either candidate. You also acknowledge that "candidates' spots purchased at the political (preemptible) rate were never preempted." Your July 1 letter further states that the station uses its best efforts to provide timely make goods to political candidates, but that this information was not revealed to candidates. In this context, the Commission's *1988 Public Notice, supra*, stated:

> Since Congress enacted the lowest unit charge requirement to ensure that candidates are treated as favorable as the most favored commercial advertisers during the pre-election period, the Commission concludes that "make goods" for political spots must air before the election where the licensee would so treat a most favored commercial advertiser when time is of the essence...

As a practical matter, if a candidate is advised that a make-good will be provided prior to the election, the candidate might choose to purchase the less expensive preemptible class of time. We conclude that the station's failure to disclose its make good policy involving sale of time to candidates is inconsistent with a licensee's Section 315(b) obligations.

Section 315 directs broadcasters to charge legally qualified candidates for public office the "lowest unit charge" (LUC) of the station for the same class and amount of time for the same period during the 45 days preceding a primary election and the 60 days preceding a general or special election. Section 73.1940(b) of the Commission's Rules, which implements Section 315, states, in part, that "[a]ll discount privileges otherwise offered by a station to commercial advertisers shall be available upon equal terms to all candidates for public office." Congress intended the lowest unit charge provision to "place the candidate on par with a broadcast station's most-favored commercial advertiser." S. Rep. No. 96, 92d Cong., 1st Sess. 27 (1971).

Political broadcasting obligations are imposed upon broadcasters, not on candidates and their representatives. A broadcaster cannot implement a policy to accommodate only the most savvy and well-informed candidates in meeting its lowest unit charge obligations. The representatives' or candidates' knowledge, or lack thereof, does not replace the broadcaster's obligation to disclose to candidates the benefits of discounts, packages, and other option availabilities, as required by Section 73.1940(b).

By failing to disclose to candidates that larger daypart rotations were available and by failing to disclose the station's favorable preemption and make-good policies, it does not appear that station WSTR-TV met its political broadcasting obligation to make all rates and discount privileges available to candidates.

Although we continue to believe that it is implicit in the obligations placed on broadcasters by the lowest unit charge requirements, we recognize that the Commission had not, prior to the *Mass Media Bureau's Political Programming Audit*, 68 RR2d 113 (MMB 1990) specifically articulated broadcasters' affirmative disclosure duties.[1] Accordingly, we believe that the imposition of sanctions against a licensee for its failure to disclose the kind of information described herein would be inappropriate. The Commission cautions WSTR-TV, however, to reform its sales practices and that, in the future, failure to disclose pertinent information about its lowest unit charge and associated discount privileges made available to commercial advertisers may result in a forfeiture.

FORFEITURE

Accordingly, pursuant to Section 503(b) of the Communications Act, you are hereby advised of your apparent liability for a forfeiture of one thousand five hundred dollars ($1,500) for your apparent willful and repeated violations of 47 C.F.R. Section 73.1940(d), in the manner described above.

Under the Commission's *Policy Statement, Standards for Assessing Forfeitures,* 6 FCC Rcd 4695 (1991), *recon. pending,* $7,500 is the base forfeiture for violation of the public file rules. The violation in this case is relatively minor in nature because only two items were involved. Accordingly, we find that, consistent with the policy statement, a downward adjustment to $1,500 is appropriate.

In regard to this forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commissions rules (47 C.F.R. Section 1.80), as summarized in the attachment to this letter. Any comments relating to your ability to pay should include financial items as set forth in the attachment.

This letter was adopted by the Commission on December 12, 1991.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

---

[1] The full scope of the disclosure obligation is detailed in the *Report and Order* in MM Docket No. 91-168 (adopted December 12, 1991).

**Before the
Federal Communications Commission
Washington, D.C. 20554**

LETTER

Released: December 12, 1991

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Michael R. Ewing C3-1068
Vice President/General Manager
Metropolitan Broadcasting Corporation
Licensee of KRLD
1080 Metromedia Place
Dallas, Texas 75247

Dear Mr. Ewing:

This letter constitutes a Notice of Apparent Liability (NAL) for a forfeiture of $3,750 issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (47 U.S.C. Section 503(b)), for your willful and repeated violations of Section 73.1940(d) of the Commission's rules (47 C.F.R. Section 73.1940(d)).

This action results from the audit of KRLD, commenced July 16, 1990, to ascertain your compliance with the political programming laws. Based on the materials KRLD provided to the Commission: your August 15, 1990, response to a letter of inquiry from the Commission; and your December 17, 1991, response to a further Commission letter of inquiry, we find that KRLD apparently failed to maintain a complete political file in violation of our rules.

BACKGROUND

On July 16, 1990, an FCC field inspector arrived at your station to inspect your political file. The inspector made a copy of the file. In our November 1, 1990, letter of further inquiry we noted, *inter alia,* that your political file, at the time of the inspector's visit, "did not appear to be organized so that the public could readily obtain the requisite information." We asked you to explain the absence of any information regarding the schedule of spots or charges for advertisements purchased by several candidates. Finally, we asked, how, in light of the missing material, opposing candidates were apprised of their equal opportunity rights.

In your reply letter of December 17, 1991, you claimed that it was difficult for you to comment in December about the status of your political file in July. However, you acknowledge that "some of the final contracts representing schedule purchases by some primary election candidates were not in [y]our file following the inspection, and that some of the papers were out of order." You also state that you have modified your political file to include more information and to provide easier access. Finally, you state your belief that all information regarding equal time and political schedules was disseminated by telephone, and that, as of the date of your letter, the FCC had been the only visitor to inspect the political file in that year.

DISCUSSION

Section 73.1940(d) requires licensees to maintain a political file which forms a complete record of all requests for broadcast time made by or on behalf of candidates for public office, "together with an *appropriate notation showing the disposition made by the licensee of such requests and the charges made,* if any, if the request is granted." (emphasis added). The rule also requires stations to place all required records in the political file as soon as possible and to retain those records for a period of two years.

It appears that KRLD did not comply with the requirements of 73.1940(d). Our review of the file indicated the following apparent deficiencies:

A) Jack Reins

Two "Agreement Form[s] For Political Candidates," dated March 7, 1990, and February 2, 1990, did not list information regarding the "disposition made by the licensee," including the schedule of spots purchased, and the charges for each spot. Each form contains the word "varies" under the schedule section of the form.

B)Art Brender

"Agreement Form For Political Candidates" contains no information regarding the "disposition made by the licensee," including the schedule of spots, and the charges for each spot.

C) Dan Krenek

"Agreement Form For Political Candidates" -- The schedule information is crossed out and written over so that contract terms are not discernable.

D) Bill Meier

"Agreement Form For Political Candidates" contains no information regarding the "disposition made by the licensee," including the schedule of spots, and the charges for each spot.

In addition you acknowledge, in your December 17 letter, that you failed to put several final contracts into the political file on a timely basis. Maintenance of an accurate political file is an essential element of Section 315 of the Communications Act. 47 U.S.C. Section 315(a). A station generally has no obligation to notify opposing candidates when a candidate appears on its facility, and opposing candidates have only seven days within which to make a request for "equal opportunities." Because you failed to include the necessary information in the file, opposing candidates did not have such information available for them to exercise their rights under Section 315 prior to the March 13, 1990, primary. The fact that all relevant information may have been disseminated by telephone and that no one other than the FCC has asked to see the political file does not affect the conclusion that you violated the rule requiring that certain information be contained in the political file.

FORFEITURE

Accordingly, pursuant to Section 503(b) of the Communications Act, you are hereby advised of your apparent liability for a forfeiture of three thousand seven hundred fifty dollars ($3,750) for your apparent willful and repeated violations of 47 C.F.R. Section 73.1940(d), in the manner described above.

The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act and the guidelines described in our recently adopted *Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*. Under these standards, $7,500 is the base forfeiture for failure to maintain a public file. The violation in this case is relatively minor in nature because of the few items involved. Accordingly, we find that, consistent with the *Policy Statement*, a downward adjustment, to $3,750 is appropriate.

In regard to this forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commissions rules (47 C.F.R. Section 1.80), as summarized in the attachment to this letter. Any comments relating to your ability to pay should include financial items as set forth in the attachment.

This letter was adopted by the Commission on December 12, 1991.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-325

In the Matter of

Cherokee Communications. Inc.

ORDER
(Proceeding Terminated)

Adopted: December 12, 1991; Released: December 13, 1991

By the Chief, Common Carrier Bureau:

1. On November 8, 1991, we released orders directing certain operator service providers (OSPs) to demonstrate that their rates are just and reasonable and to begin announcing, at the beginning of each call, that their rates are available upon request.[1] The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) authorizes the Commission to impose either or both of these requirements on any OSP whose rates and charges filed pursuant to that Act appear, upon review, to be unjust or unreasonable. *See* 47 U.S.C. § 226(h)(2).

2. On December 10, 1991, Cherokee Communications, Inc. (Cherokee) filed revisions to its informational tariff which reduce its rates substantially. In an accompanying report of sample prices, Cherokee states that its total charge for a sample eight-minute call would be $6.58. In a report filed June 21, 1991, Cherokee stated that its total charge for the same call under the rates then in effect would be $9.12. This represents a reduction of almost 28 percent from the highest total charge Cherokee reported in its June 21 report. It was on the basis of that report and the rates Cherokee then had in effect that we found that Cherokee's rates appeared to be unjust and unreasonable. Cherokee no longer charges the rates that prompted this proceeding. Cherokee therefore need not provide further justification for its rates and charges at this time and is not required to announce, at the beginning of each call that it handles, that its rates are available on request. [2] We hereby terminate the captioned proceeding.

3. Accordingly, IT IS ORDERED that the proceeding initiated in CC Docket No. 91-325 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

---

[1] Advanced Technology Cellular Telecommunications, CC Docket No. 91-324, DA 91-1379, released Nov. 8, 1991 (Com. Car. Bur.); Cherokee Communications, Inc., CC Docket No. 91-325, DA 91-1380, released Nov. 8, 1991 (Com. Car. Bur.); Capital Network Systems, Inc., CC Docket No. 91-326, DA 91-1381, released Nov. 8, 1991 (Com. Car. Bur.); Com Systems, Inc. CC Docket No. 91-329, DA 91-1384, released Nov. 8, 1991 (Com. Car. Bur.); Conquest Telecommunications Services, CC Docket No. 91-327, DA 91-1382, released Nov. 8, 1991 (Com. Car. Bur.); CPS Operator Services, Inc., CC Docket No. 91-328, DA 91-1383, released Nov. 8, 1991 (Com. Car. Bur.); International Pacific, Inc., CC Docket No. 91-330, DA 91-1385, released Nov. 8, 1991 (Com. Car. Bur.); Peoples Telephone Company, Inc., CC Docket No. 91-331, DA 91-1386, released Nov. 8, 1991 (Com. Car. Bur.); South Texas Phone, Inc., CC Docket No. 91-332, DA 91-1387, released Nov. 8, 1991 (Com. Car. Bur.); TelTrust, Inc., CC Docket No. 91-333, DA 91-1388, released Nov. 8, 1991 (Com. Car. Bur.); U.S. Fiberline Communications, CC Docket No. 91-334, DA 91-1389, released Nov. 8, 1991 (Com. Car. Bur.); U.S. Long Distance, Inc., CC Docket No. 91-331, DA 91-1390, released Nov. 8, 1991 (Com. Car. Bur.). (*Rate Review Orders).*

[2] We emphasize that this Order does not represent an affirmative finding that Cherokee's rates are just and reasonable.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Advanced Technology Cellular Telecommunications	**CC Docket No. 91-324**
Capital Network Systems, Inc.	**CC Docket No. 91-326**
Com Systems, Inc.	**CC Docket No. 91-329**
Conquest Telecommunications Services	**CC Docket No. 91-327**
CPS Operator Services, Inc.	**CC Docket No. 91-328**
International Pacific, Inc.	**CC Docket No. 91-330**
Peoples Telephone Company, Inc.	**CC Docket No. 91-331**
South Texas Phone, Inc.	**CC Docket No. 91-332**
TelTrust, Inc.	**CC Docket No. 91-333**
U.S. Fiberline Communications	**CC Docket No. 91-334**
U.S. Long Distance, Inc.	**CC Docket No. 91-335**

ORDER

Adopted: December 12, 1991; Released: December 13, 1991

By the Chief, Common Carrier Bureau:

INTRODUCTION

1. On November 8, 1991, we released orders in the captioned dockets directing certain operator service providers (OSPs) to demonstrate that their rates are just and reasonable and to begin announcing, at the beginning of each call, that their rates are available upon request.[1] The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) authorizes the Commission to impose either or both of these requirements on any OSP whose rates and charges filed pursuant to that Act appear, upon review, to be unjust or unreasonable. *See* 47 U.S.C. § 226(h)(2).

2. We subsequently postponed the effective date of the announcement requirement to December 18, 1991 due to our concerns that the OSPs that received *Rate Review Orders* would encounter difficulties in complying with the announcement requirement within the time originally contemplated.[2] We now further postpone the effective date of the announcement requirement until January 15, 1991 in order to give the captioned OSPs. additional time to comply with the requirements of the *Rate Review Orders.*[3]

3. IT IS THEREFORE ORDERED, that the effective date of the requirement that Advanced Technology Cellular Telecommunications, Capital Network Systems. Inc., Com Systems. Inc., Conquest Telecommunications Services, CPS Operator Services, Inc., International Pacific, Inc., Peoples Telephone Company, Inc., South Texas Phone, Inc., TelTrust, Inc., U.S. Fiberline Communications, and U.S. Long Distance, Inc., announce, at the beginning of each call that they handle that their rates are available upon request IS EXTENDED until January 15, 1992.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

---

[1] Advanced Technology Cellular Telecommunications, CC Docket No. 91-324, DA 91-1379, released Nov. 8, 1991 (Com. Car. Bur.); Capital Network Systems, Inc., CC Docket No. 91-326, DA 91-1381, released Nov. 8, 1991 (Com. Car. Bur.); Com Systems, Inc. CC Docket No. 91-329, DA 91-1384, released Nov. 8, 1991 (Com. Car. Bur.); Conquest Telecommunications Services, CC Docket No. 91-327, DA 91-1382, released Nov. 8, 1991 (Com. Car. Bur.); CPS Operator Services, Inc., CC Docket No. 91-328, DA 91-1383, released Nov. 8, 1991 (Com. Car. Bur.); International Pacific, Inc., CC Docket No. 91-330, DA 91-1385, released Nov. 8, 1991 (Com. Car. Bur.); Peoples Telephone Company, Inc., CC Docket No. 91-331, DA 91-1386, released Nov. 8, 1991 (Com. Car. Bur.); South Texas Phone, Inc., CC Docket No. 91-332, DA 91-1387, released Nov. 8, 1991 (Com. Car. Bur.); TelTrust, Inc., CC Docket No. 91-333, DA 91-1388, released Nov. 8, 1991 (Com. Car. Bur.); U.S. Fiberline Communications, CC Docket No. 91-334, DA 91-1389, released Nov. 8, 1991 (Com. Car. Bur.); U.S. Long Distance, Inc., CC Docket No. 91-331, DA 91-1390, released Nov. 8, 1991 (Com. Car. Bur.). (*Rate Review Orders).*

[2] *See* Advanced Technology Cellular Telecommunications, Inc., *et al.*, CC Docket Nos. 91-324 through 91-335, DA 91-1438, released Nov. 15, 1991 (*Postponement Order).*

[3] The deadlines for pleadings required by the *Rate Review Orders* are not affected by this Order. The Commission will address pending requests for stay of the *Rate Review Orders* and associated applications for review of those Orders at a later date.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 12, 1991

Released: December 12, 1991

Susquehanna Radio Corp.
Licensee of KPLX(FM), Ft. Worth, TX
140 East Market Street
Box 2026
York, PA 17405-2026

Dear Licensee:

This letter constitutes an admonishment for failure to comply with the political programming laws, particularly Section 315(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 315, and Section 73.1940(b) of the Commission's rules, 47 C.F.R. Section 73.1940(b).

BACKGROUND

This action results from the audit, commenced July 16, 1990, of KPLX(FM) to determine whether the station was complying with the political programming laws. On that date, the Commission's field office conducted an audit of your station's political file. A review of the materials collected at the audit, and the material you submitted by letter dated August 17, 1990, raised questions regarding the station's treatment of candidates. Specifically, you were asked to explain some discrepancies between rates paid by candidates and those paid by commercial advertisers. You were also asked to provide all contracts with commercial advertisers which involved sales of time to run from Sunday, March 4, 1990, through Tuesday, March 13, 1990, the date of the primary election.

You submitted your response on November 27, 1990. A review of the materials submitted, however, revealed that the station had provided commercial advertisers with bonus spots which apparently had not been calculated into the station's lowest unit charge, nor had they been provided to any candidates. On July 25, 1991, the Commission asked you to explain these bonus spots.

In your August 23, 1991, response, you explain that the bonus spots listed in the contracts specified by the Commission were all scheduled between midnight and 5:00 a.m., when the station does not sell advertising time. You argue that the spots have little or no value and therefore need not be included in the station's calculation of lowest unit charge. You also admit that these bonus spots were not offered or provided to political candidates. In addition, regarding two commercial advertisers, you acknowledge that several bonus spots were provided in valuable daypart rotations and were not included in your lowest unit charge, but argue that these were 10-second spots aired during the stations traffic report and that you did not consider the spots to be of any value.

DISCUSSION

Political Programming Law and Precedents

Section 315(b)(1) of the Communication's Act provides:

> (b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed --
>
> (1) during the forty-five days preceding the date of a primary or a primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period.

Section 73.1940(b) of the Commission's Rules, which implements Section 315, states, in part, that "[a]ll discount privileges otherwise offered by a station to commercial advertisers shall be available upon equal terms to all candidates for public office." 47 C.F.R. Section 47.1940(b).

Apparent Rate Violations

In order to effectuate the above provisions, the Commission has stated that if a station offers free "bonus" spots to an advertiser as an inducement to buy spots on the station, the bonus spots must be calculated into the station's lowest unit charge. *The Law of Political Broadcasting and Cablecasting; A Political Primer*, 100 FCC 2d 1476, 1517 (1984). Thus, for example, if a station sells 5 spots for $50.00 and provides an additional five bonus spots, the price of each spot is not $10.00, but $5.00.

You admit that, contrary to this policy, you did not include the overnight bonus spots offered commercial advertisers in your calculation of lowest unit charge. Nor were these bonus spots offered to political advertisers. In addition, it appears that at least two 10-second bonus spots were afforded to commercial advertisers during the broadcast day, and neither of those bonus spots were included in the stations calculation of lowest unit charge, nor offered to political candidates. Bonus spots constitute discounts which, if afforded to commercial advertisers, must also be offered to political candidates.

CONCLUSION

Because of the *de minimis* nature of the violations cited herein, and particularly because inclusion of the value of the bonus spots would not have significantly altered the station's lowest unit charge, you are hereby admonished for your actions only. You are advised, however, that failure to include bonus spots in your calculation of lowest unit charge in the future may result in a forfeiture.

Sincerely,

Roy J. Stewart
Chief, Mass Media Bureau
Federal Communications Commission

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

MARK R. NALBONE, RECEIVER
(Assignor)

and File No. BALCT-90015KG

WYOMEDIA CORPORATION
(Assignee)

For Assignment of License of
Television Station KFNB (Channel 20),
Casper, Wyoming

MEMORANDUM OPINION AND ORDER

Adopted: December 11, 1991; Released: December 12, 1991

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned application (FCC Form 314) for assignment of the license of commercial television station KFNB, Channel 20 (ABC), Casper, Wyoming, from Mark Nalbone, Receiver ("Nalbone"), to WyoMedia Corporation ("WyoMedia").[1] On April 5, 1990, the Wyoming Department of Employment, Division of Unemployment Insurance[2] ("Petitioner"), filed a petition to deny the assignment application, to which the applicants filed an opposition.[3] In addition, on August 30, 1991, a pleading was filed against the application on behalf of numerous investors who are plaintiffs in a pending civil lawsuit filed against First National Entertainment Corporation, an entity that once attempted to purchase KFNB.[4]

2. We address the Petitioner's contentions below,[5] but at the outset we must note that in assessing the merits of a petition to deny, a two-step analysis is required under Section 309(d)(1) and (2) of the Communications Act of 1934, as amended, 47 U.S.C. §309(d)(1), (2). *See Astroline Communications Co. v. FCC,* 857 F.2d 1556 (D.C. Cir. 1988). The first test is whether the petition, and its supporting affidavits, have demonstrated by specific allegations of fact that grant of the application would be *prima facie* inconsistent with the public interest, convenience and necessity. If such a *prima facie* case is alleged, the second test is whether -- on the basis of the application, the pleadings filed, or other matters of which the Commission may take official notice -- a substantial and material question of fact is presented to warrant further inquiry in a hearing. Finally, the Commission must determine whether grant or denial of the application would serve the public interest. For the reasons set forth below, we conclude that the matters raised in the petition to deny do not present a *prima facie* case or do not otherwise raise substantial and material questions of fact that would, require resolution in a hearing.[6]

BACKGROUND

3. From the record,[7] the relevant, uncontroverted facts appear as follows. The Commission, on April 30, 1984, issued a construction permit for station KFNB (formerly KXWY-TV) to Channel 20 Casper, Inc. ("Channel 20"), which soon thereafter commenced broadcast operations. The principals of Channel 20, a Florida Corporation, were A. J. Stanton (President, Treasurer, Director and 50% shareholder), Catherine L. Malatesta (Vice President, Secretary, Director and 50% shareholder), and Peter G. Seiler (Vice President, Assistant Secretary and General Manager). On January 22, 1986, Channel 20 filed an application to transfer control of Channel 20 to First National Broadcasting Corporation ("First National").[8] The Commission approved this transfer application on March 19, 1986, but the parties did not consummate the transaction. Channel 20 filed an application for renewal of the KFNB license on May 26, 1988, which was granted on April 21, 1989.

---

[1] Nalbone and WyoMedia are hereinafter collectively referred to as "the applicants."

[2] Formerly Wyoming Employment Security Commission.

[3] The Petitioner did not reply to the applicant's opposition. *See* 47 C.F.R. §73.3584(b) (failure to file a reply will not necessarily be construed as an admission of fact or argument contained in a pleading).

[4] *Joni Beshansky v. First National Entertainment Corp.*, No. 88 Civ. 8200 (PKL) (S.D.N.Y. filed November 17, 1988). The investor's petition, captioned "Petition to Deny," shall be dismissed as untimely since it was filed more than 17 months after public notice of the application's acceptance for filing. 47 C.F.R. §73.3584. Moreover, the investors fail to demonstrate their status as "parties in interest" in this proceeding and have neglected to support their allegations with affidavits of persons with personal knowledge of the facts alleged. 47 U.S.C. §309(d). However, to the extent the investors incorporate the Petitioner's arguments, they will be addressed here.

[5] The applicants assert that the Petitioner is not a "party in interest" as required by Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. §309(d)(1). Because we have decided to treat the Petition to Deny on its merits, however, we need not decide that issue here.

[6] We have also granted this day the uncontested application (BALCT-900412, FCC Form 314) for assignment of the license for television station KLWY, Channel 27, Cheyenne, Wyoming, from Mark Nalbone, Receiver, to WyoMedia Corporation.

[7] In addition to the petition to deny and the applicant's opposition, the Commission's staff solicited further information from the applicants on three separate occasions (Letters to Mark R. Nalbone, Receiver, from Chief, Television Branch, August 20, 1990; March 20, 1991; and June 28, 1991) to which the applicants responded on August 30, 1990; March 26, 1991; and August 1, 1991, respectively. The Petitioner replied by letters dated September 7, 1990, and April 3, 1991. Nalbone replied on April 15, 1991, to new allegations made in the Petitioner's April 3, 1991 letter and the Petitioner again submitted further information in its letter dated May 6, 1991.

[8] File No. BTCCT-860122KI, FCC Form 315. First National, a wholly owned subsidiary of First National Entertainment Corporation, is licensee of KFNE(TV), Riverton, Wyoming, and permittee of KFNR(TV), Rawlings, Wyoming.

4. The record in this proceeding also reveals that from 1985 to early 1988, Channel 20 developed financial difficulties and incurred substantial debts. In an apparent effort to consolidate many of its outstanding debts, Channel 20, and other associated entities, executed and delivered to Marvin Engineering Co., Inc. ("Marvin") a promissory note for $850,000, which was secured by the KFNB broadcasting equipment. The promissory note matured on June 1, 1989, at which time the borrowers were in default for failure to pay Marvin the principal and interest due. On June 26, 1989, Marvin assigned all right, title and interest in the promissory note to WyoMedia, a newly formed Wyoming Corporation.[9] Soon thereafter, WyoMedia initiated a foreclosure action on the secured assets of the station in Wyoming state court. On August 18, 1989, the court appointed Nalbone as Receiver for the station pending the outcome of the foreclosure action.[10] By its order, the court vested with Nalbone," all necessary and convenient powers rights and duties required by custom in the television transmission industry for the protection and preservation of the facilities and the operation of a commercial television transmission facility including the right to contract and the employment of agents and employees...." The court also ordered that WyoMedia "shall be financially responsible and liable for all expenses incurred by the Receiver in the protection, preservation and operation of the transmission facilities, including the Receiver's compensation." On November 9, 1989, the Commission granted a short-form application (FCC Form 316, BALCT-891023KE) approving the involuntary assignment of the KFNB license from Channel 20 to Nalbone, as Receiver. In the meantime, the court, on October 24, 1989, awarded WyoMedia a monetary judgment against Channel 20 and, to satisfy the judgment lien, ordered the Natrona County Sheriff to sell the KFNB television equipment at a public sale. On November 8, 1989, the sheriff offered the secured property for sale to the highest bidder, which was WyoMedia at a bid of $20,000. Finally, by its order of December 7, 1989, the court confirmed the sale of the "audio and video transmission, production and office equipment, together with the transmitting license to WyoMedia" and authorized the Receiver to "execute such other and further documents of conveyance or assignment as may be required to effect a complete transfer of ownership...." Towards this end, Nalbone filed the subject assignment application.

5. It also appears that Channel 20's financial problems caused it, among other things, to neglect its obligations to pay federal and state taxes. For instance, we note that during 1988 and 1989 the Internal Revenue Service ("IRS") seized the station's accounts receivable on several occasions. It appears that the IRS is owed $76,583, and holds liens on all property and rights belonging to Channel 20. Other judgment creditors are collectively owed $73,624 and also have liens attached to Channel 20's real and personal property. These assets are also being pursued by the Petitioner, a state agency responsible for assessing and collecting unemployment taxes from Wyoming employers. In 1987 and 1988, it obtained judgments against Channel 20 for delinquent unemployment taxes plus interest. The Petitioner states that it is Channel 20's largest judgment creditor, and that it is owed $94,605 as of March 31, 1990. It too holds liens on the real and personal property associated with the station against which it commenced foreclosure action soon after the filing of the subject application.[11] We also note that, on April 28, 1989, in an effort to enforce its judgments against Channel 20 for nonpayment of taxes, the Petitioner obtained a court order requiring Channel 20 to cease operating pursuant to Wyoming employment security laws.[12] The Petitioner now seeks to challenge the acquisition of the station's assets by one of Channel 20's other creditors, WyoMedia.

ISSUES/DISCUSSION

6. For the purposes of this decision, we shall categorize the Petitioners contentions into three primary arguments as to why it believes grant of the application would not be in the public interest: (1) that Channel 20, the station's former licensee, and Nalbone, as Receiver and the station's general manager -- the sellers -- have engaged in FCC and non-FCC related misconduct raising questions regarding their qualifications; (2) that, in light of this misconduct, Channel 20 should not be allowed to benefit from the assignment of the station's license at the behest of innocent creditors, such as the Petitioner; and (3) that Nalbone has prematurely transferred control of the station to the assignee, WyoMedia.[13]

---

[9] According to the assignment application, the principals of WyoMedia are Marvin Gussman (100% shareholder), Mark Friedman (President), and Ann Koda (Secretary and Treasurer), all residents of California.

[10] *WyoMedia Corp. v. First National Entertainment Corporation*, Civ. Action No. 64993, Order Appointing Receiver (Wyo. 7th Jud. District August 18, 1989); BALCT-891023KE, Exhibit 2.

[11] *Employment Security Commission of Wyoming v. Casper Channel 20, Inc.*, Civil Action No. 65633 (Wyo. 7th Jud. Dist. filed February 26, 1990).

[12] *Employment Security Commission of Wyoming v. Casper Channel 20, Inc.*, Civ. No. 64535, Order (Wyo. 7th Jud. Dist. April 28, 1989); Petition Exhibit 16.

[13] The Petitioner also argues that granting WyoMedia a Commission license may be contrary to the public interest due to the following factors which reflect adversely on its qualifications: (1) there is total absence of integration of WyoMedia's ownership and management, citing *Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965); *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601, 604 (D.C. Cir. 1984); *Ventura Broadcasting Co. v. FCC*, 765 F2d 184 (D.C. Cir. 1985); (2) the individual owners of WyoMedia appear to have no previous broadcasting experience, nor have they ever participated in local civic affairs, *West Michigan Broadcasting Co. v. FCC, supra.*; and (3) WyoMedia will be unable to carry out its "proposed program service" in light of the fact that the Petitioner, as a judgment creditor, is foreclosing on the station's equipment needed for broadcasting, *Comparative Broadcast Hearings, supra*. The Petitioner's challenges to WyoMedia's qualifications fail to raise a *prima facie* case. Section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §310(d), limits the Commission's consideration of assignment applications only to the qualifications of the assignee that are set out in the application. Integration of ownership with management and broadcast experience, factors used in comparing two or more applicants for a new station, are therefore not relevant in the assignment context, where no comparisons can be made. Moreover, a state court proceeding resulted in the sale of the station's assets to WyoMedia. Petitioner's conflicting claim must be resolved in state courts, not by us, for reasons that will be fully explained

SELLER QUALIFICATIONS

7. The Petitioner's first argument relies on the so-called *Jefferson Radio* policy. The Petitioner correctly points out that under this long-held Commission policy, a transfer or assignment application cannot be granted when there are "unresolved issues" concerning the seller's basic qualifications. *See, e.g., G. A. Richards,* 14 FCC 429, 430 (1950), and cases cited there.[14] The Petitioner calls into question the qualifications of Channel 20, when it controlled KFNB, and Nalbone, in his capacity as Receiver, in light of its allegations that Channel 20 and Nalbone have violated the Commission's Rules in a number of respects and have conducted the station's nonbroadcast affairs in a manner which questions the character of Channel 20. As a general matter, we note that the *Jefferson Radio* policy applies to issues that, if proved, could result in the loss of operating authority or denial of a pending application. *See, e.g., Northland Television, Inc.*, 42 RR 2d 1107, 1110 (1978). Accordingly, we shall consider the issues raised by the Petitioner.

8. *Minimum Operating Schedule.* First, the Petitioner asserts that Channel 20 violated the Commission's Rules by not maintaining a minimum operating schedule. Section 73.1740 of the Rules, 47 C.F.R. §73.1740(a)(3), requires a licensee to notify the Commission within 10 days of discontinuing operations. If causes beyond the licensee's control make it impossible to maintain operations for more than 30 days, a written request shall be made to the Commission for such additional time as may be deemed necessary. As noted above, KFNB went off the air on April 28, 1989, pursuant to a court order requiring Channel 20 to cease operations.[15] Nalbone, then general manager of the station, sent a letter, dated May 19, 1989, to the Commission stating that "KFNB has been off the air for approximately three weeks while we reorganize financially." In response to the staff's August 20, 1990 letter, Nalbone admitted that KFNB remained off the air until January 22, 1990, without requesting the Commission's consent. Nalbone claims that he did not request Commission consent because he was not aware that any further authority was required to remain off the air and that it was Channel 20's obligation -- not his -- to request such consent since he was an employee of Channel 20, not an officer, director, or owner. Nalbone was appointed Receiver, at the request of WyoMedia, three months after he took the initiative, as general manager, to send the notification to the Commission. He became licensee pursuant to the involuntary assignment granted by the Commission on November 9, 1989, while the station was still off the air.

9. There was a violation of the rule. Nevertheless, this is not the type of very serious violation that would result in loss of license. The normal sanction for violations of this type would be a modest monetary forfeiture, but even that sanction would not be imposed against a licensee in financial difficulties. We do, however, admonish Nalbone of his obligation to observe his responsibilities as a Commission licensee.

10. *Local Public Notice.* Second, the Petitioner avers that Channel 20 and Nalbone violated the local public notice requirements of Section 73.3580 of the Rules in connection with the filing of KFNB's license renewal application and the subject assignment application. Regarding Channel 20's 1989 renewal application, the Petitioner believes that because the licensee did not publish a notice of the filing of its renewal application in the local paper, Channel 20 has worked a fraud against all creditors of Channel 20 by denying them and the public a right to challenge the station's renewal. Had publication been done correctly, the Petitioner contends, it would have filed a petition to deny against the renewal. The Petitioner also argues that the local public notice concerning the subject assignment application was similarly deficient. In opposition, the applicants deny any wrongdoing. Nalbone argues that a newspaper notice regarding the filing of a renewal application is not required by the Commission's Rules, and that the newspaper announcement of the filing of the assignment application was published as required. In support of its position, the applicants submitted copies of logs showing the broadcast of renewal announcements and a copy of a official notice of the filing of this assignment application published once in the *Casper-Star Tribune* on February 13, 1990.

11. We agree with Nalbone that Channel 20 was not required to publish a public notice of its filing of a renewal application in the newspaper. Section 73.3580 of the Rules only requires that a station broadcast the requisite pre- and post-filing announcements on its station[16] newspaper publication is not required. 47 C.F.R. §73.3580(d)(1). On the other hand, the Commission's staff has already determined that, in connection with the subject assignment application, that local public notice provided in February 1990 did not comply with Section 73.3580. Therefore, by a letter dated June 28, 1991, the Chief of the Television Branch required Nalbone to republish the assignment application's local public notice. On August 1, 1991, Nalbone submitted proof of publication and affidavits of performance for the proper public notice. These announcements triggered no further objections to the assignment. Accordingly, this matter having been satisfactorily resolved, the Petitioner's allegation lacks the requisite seriousness to institute revocation proceedings.

12. *Public Inspection File.* Third, the Petitioner alleges that Channel 20 and Nalbone failed to maintain a complete local inspection file in violation of Section 73.3526 of the Rules and that Nalbone refused to provide copies of certain requested applications. The Petitioner claims that upon inspection of the KFNB local public file, its agent could not locate, on two separate occasions, either the KFNB renewal application or the 1989 *pro forma* assignment application. According to her affidavit, the

---

below in paragraph 19. Further, there is nothing in the record to establish that WyoMedia cannot acquire its own equipment. Accordingly, the Petitioner's arguments set out in this footnote are not relevant to the disposition of the case before us.

[14] This general policy was upheld in *Jefferson Radio Co. v. FCC*, 340 F.2d 781 (D.C. Cir. 1964), hence the label *"Jefferson Radio"* policy.

[15] This order was sought by the Petitioner.

[16] The Petitioner makes no allegations regarding Channel 20's failure to make the requisite announcements over the air. The logs submitted by the applicants, therefore, are dispositive.

Petitioner's agent was denied access to the applications by Nalbone after she made two separate requests. Nalbone denies that the applications were not in the file when the Petitioner's agent visited the station. In support, several employees of the station, including Nalbone, submitted a sworn affidavit stating that the applications in question were in fact located in the public inspection file and always had been. While Nalbone admits that he declined to mail copies of the requested applications to the Petitioner, he states that he was harassed by the Petitioner's personnel in its quest to obtain the information contained in the applications.

13. Section 73.3526 requires station licensees to maintain for public inspection a file containing, among other materials, those applications filed with the Commission. 47 C.F.R. §73.3526(a). The file shall be available for public inspection at the station's main studio any time during regular business hours. 47 C.F.R. §73.3526(d). Copies of materials required to be in the public file shall also be available for reproduction upon request made in person, provided that the requesting party shall pay the reasonable cost of reproduction. 47 C.F.R. §73.3526(f). The licensee is not required to honor requests made by mail, but may do so if it chooses. *Id.* Here, it appears that at least one of the Petitioner's requests for materials was not made in person and the petitioner has not stated that it would pay reasonable costs for any copies requested. Further, four persons have stated by appropriate affidavit that the renewal and assignment applications were "obvious and prominent in the file" at all relevant times. On balance, therefore, we do not believe that a substantial and material question of fact exists as to the contents of the file. A violation of Commission requirements concerning the public inspection file should be corrected, but even if established, is not so serious as to be license threatening.

14. *Nonbroadcast Misconduct.* Finally, the Petitioner argues that Channel 20's nonbroadcast misconduct raises "a significant character deficiency," citing *Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). The Petitioner claims that this is evidenced by the huge debts owed its creditors and its failure to comply with the State of Wyoming's employment security laws. In their joint opposition, Nalbone and WyoMedia assert that the debt complained of was incurred by Channel 20 between 1985 and February 1988. At that time, Peter Seiler was the station's general manager. When Seiler suddenly left in March 1988, Nalbone was appointed general manager. Since that time, the applicants aver, Nalbone has paid all federal and state payroll taxes and has reduced the trade account debt. With respect to the liens that are attached to the station's equipment, the applicants admit that the Petitioner may have a statutory lien on some of the equipment. However, they state that the majority of the equipment was leased from the station's other judgment creditors and that WyoMedia is financially able, if it so chooses, to redeem any property to which a lien is attached.

15. Over the years, the Commission has identified specific categories of non-FCC misconduct that are most clearly relevant to a licensee's qualifications.[17] As to civil matters, we shall consider adjudicated misconduct relating to fraudulent representations to a governmental unit or mass media related violation of antitrust or anticompetitive laws. Indebtedness, without more, is not the basis for Commission determinations as to character. We shall also consider felony criminal convictions when assessing a licensee's character. The Petitioner here has not indicated that any relevant adverse judgments have been rendered against Channel 20 or the actual parties to the application. Nor has the Petitioner alleged that any proceedings have been commenced involving relevant non-FCC misconduct. Accordingly, after fully assessing the seller's qualifications in light of the Petitioner's allegations, we find that no substantial and material questions of fact have been raised that would bar the grant of this assignment application.

CREDITOR'S CONCERNS (SECOND THURSDAY)

16. The Petitioner's second argument is that the assignment should not be approved because wrongdoers will benefit by not having to pay their debts if the application is granted, *citing Second Thursday Corp.*, 22 FCC 2d 515 (1970), *recon. granted*, 25 FCC 2d 112 (1970), and *LaRose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974). The Petitioner contends that innocent creditors, such as itself, will be harmed because their claims will be destroyed if the assignment is permitted. As noted above, the Petitioner is pursuing foreclosure of the property and equipment used in the station's operation. In opposition, the applicants assert that the principles of *Second Thursday Corp.* are not applicable here because Channel 20 is not a party to this proceeding and it will not receive any benefit from the approval of this transaction.

17. The *Second Thursday* doctrine cited by the Petitioner evolved as an exception to the *Jefferson Radio* policy discussed above. In *Second Thursday*, the Commission was seeking to accommodate the policies of federal bankruptcy law with the Communications Act and developed a special policy for the disposition of licensees held by trustees in bankruptcy or receivers. In this situation, the Commission will grant assignment applications that would normally be denied under *Jefferson Radio* if the individuals charged with misconduct will have no part in the proposed operations of the station and will derive either no benefit from the favorable Commission action or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors.[18] The equitable principles of this policy have been extended to state foreclosure proceedings conducted under state court supervision.[19]

---

[17] *See Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986) (*"1986 Character Policy Statement")on reconsideration*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom. National Association for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987). *See also Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252 (1990) (*"1990 Character Policy Statement"*), *on reconsideration*, 6 FCC Rcd 3448 (1991), *petitions for further reconsideration pending*.

[18] *Second Thursday*, 22 FCC 2d at 516. *LaRose v. FCC* held that the Commission must consider the factors recognized in *Second Thursday*, including the interests of creditors.

[19] *Davis Broadcasting Company, Inc.*, 67 FCC 2d 872 (1977).

18. For reasons set out above, we have concluded that the petitioner has failed to allege or establish license-threatening activity by Channel 20 or Nalbone that would trigger the applicability of the *Jefferson Radio* policy. Accordingly, the *Second Thursday* exception to *Jefferson Radio* is not specifically relevant here. Nevertheless, even if *Second Thursday* were applicable, its equitable factors have been met. Channel 20 and its principals will not be involved in the operation of the station after the license is assigned. Moreover, the claims against Channel 20 appear to exceed its assets, so the Petitioner has not established that corporation or its principals will benefit from the assignment under consideration here. *See LaRose v. FCC*, above. Further, it appears that the Petitioner in this case is in fact advancing the *Second Thursday* principals to accord it (as one of Channel 20's creditors) a preference over another creditor (WyoMedia). Determining priorities among secured and unsecured creditors is a question left solely for the court overseeing the respective foreclosure proceedings, not the Commission. In this same vein, we believe that the Petitioner's objections to the proposed assignment are founded primarily in its private dispute with the station's former licensee and in its efforts to collect unpaid unemployment taxes. The Commission has consistently held that it is not the proper forum for the resolution of private disputes and that any redress should be sought in a local court of competent jurisdiction. *John L. Runner, Receiver (KBIF)*, 36 R.R. 2d 773, 778 (1976)." The Commission has neither the authority nor the machinery to adjudicate claims arising out of private contractual agreements between parties." *Transcontinent Television Corp. (WROC-TV)*, 21 R.R. 945 (1961). Thus, as a matter of long-standing policy, the Commission does not assume jurisdiction in controversies involving broadcast licensees unrelated to our regulatory authority, recognizing that such matters are generally private in nature and appropriately left to local courts for resolution. In this connection, we note that the Petitioner has already been rejected as an intervenor in the WyoMedia foreclosure action and has commenced its own action against Channel 20, which has been proceeding through the discovery stages. It should be noted that our action approving the assignment application is permissive only, and does not compel the transaction to go forward. Thus, the Commission's action taken in this application proceeding is not intended in any way to prejudice the outcome of the Petitioner's foreclosure proceedings before the Wyoming courts. *See Chief Washakie TV*, 46 RR 2d 1594, 1598, n. 7 (1980). Finally, we note that Nalbone, under the supervision of the court, is the licensee of the station. A denial of the application would not put Channel 20 back in control. Instead, if the assignment is not approved, we would expect the court to take other action to protect creditors, including finding another buyer. In those circumstances, the Petitioner has failed to explain why denying the assignment application would affect the rights of creditors against Channel 20 under state law. Importantly, WyoMedia is willing, and appears to have the resources, to keep the station operating so that it can continue to serve the public. For all of the above reasons, we reject the Petitioner's contentions regarding the *Second Thursday* policy.

CONTROL OF KFNB

19. The third major issued raised in this assignment proceeding is whether WyoMedia has taken premature control of the station. In noting that Nalbone was employed as Channel 20's general manager and was appointed Receiver at WyoMedia's request, the Petitioner charges that Nalbone has also become general manager of WyoMedia and is holding out WyoMedia as the station's licensee. In support of these allegations, the Petitioner has shown that when Nalbone signs correspondence and checks he does so as general manager of WyoMedia. The Petitioner has submitted a copy of a letter to it and a copy of an Employer's Quarterly Contribution filed with it, both of which were signed by Nalbone as general manager of WyoMedia. The Petitioner also points to information contained in certain industry publications which indicate that WyoMedia is the current licensee of the television station.[20]

20. In response, the applicants assert that Nalbone is operating the station in compliance with the Court's order appointing him Receiver, and his relationship with WyoMedia is strictly financial and in compliance with the court's order. Nalbone does note, however, that some programming agreements had to be approved by WyoMedia because the programming suppliers refused to deal with a Receiver. In addition, he points out that, because of the financial support provided by WyoMedia, he meets with WyoMedia to discuss financing, he uses its checks drawn on a special account to cover the stations operational costs, and he pays the payroll taxes of the station's employees, who, even though controlled by him, are shown as employees of WyoMedia for the purposes of Wyoming unemployment compensation requirements. Nonetheless, Nalbone states that he, alone, decides the programming to be broadcast; he hires and fires the station's personnel, and he directs the station's operations. In that regard, Nalbone points out, as Receiver, he signed the ABC affiliation agreement, which provides for transfer to WyoMedia if the Commission approves the assignment of the station's license. Further, responding to the listing of WyoMedia as licensee in trade publications, he asserts that this was an error beyond his control.

21. Section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §310(d), prohibits the transfer of control of a station license without prior Commission

---

[20] The Petitioner has also speculated that there is some improper connection between Nalbone, WyoMedia, and First National. As noted in paragraph three, First National at one time sought to buy control of Channel 20, but did not close the transaction. First National's parent has been accused of civil fraud by a number of its investors and is a Commission licensee and permittee of two television stations located in Wyoming. See footnote eight. No facts have been submitted to support the Petitioner's allegations, which are not properly supported by affidavits of persons with actual knowledge as required under Section 309(d) of the Communications Act. 47 U.S.C. §309(d). Nor are any substantial and material questions raised by the information that we may officially notice. While Nalbone has disclosed in the application that he is an officer of First National, the Petitioner's allegations as to First National point to its other principals who are not parties to this application, and no specific facts regarding Nalbone's involvement with First National have been offered. Further, there has been no adjudication of these matters by a court of competent jurisdiction. Nor is it relevant that First National once attempted to purchase KFNB because that transaction was never consummated. These matters, therefore, do not form the basis for Commission action.

consent. We have often recognized that there is no exact formula by which "control" of a broadcast authorization can be determined. In determining whether a transfer of control has occurred, we have traditionally looked beyond the legal title to whether there are any actions reflecting a new entity or individual with the right to determine the basic policies and ultimate control of the station. *See WHDH, Inc.*, 17 FCC 2d 856 (1969), *aff'd sub nom. Greater Boston Television Corp. v. FCC,* 444 F.2d 841 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971). In most instances, the issue of control involves a question of fact that must be resolved by the specific circumstances presented. *See, e.g., Stereo Broadcasters, Inc.*, 55 FCC 2d 819, 821 (1975). Nevertheless, over the years, the Commission has established certain guidelines in this area and have generally examined whether ultimate control of the station's policies regarding (1) programming, (2) personnel matters and (3) station finances have shifted to a new entity or individual. *See Southwest Texas Public Broadcasting Council,* 85 FCC 2d 713, 715 (1981). Generally, the Commission has advised prospective purchasers from taking any actions which may result in the premature exercise or assumption of control. *Phoenix Broadcasting Co.*, 44 FCC 2d 838 (1973). However, an exception to that general policy exists when purchasers have acted, under the supervision of a court-appointed trustee or receiver, in order to assure continued service. *Id.* at 840.

22. In this case, we find that Nalbone controls the station's programming policies. It is significant that Nalbone negotiated the terms of all the station's programming agreements including the ABC network affiliation agreement. WyoMedia was only involved when program suppliers refused to deal with Nalbone in his capacity as the Receiver. As to the station's personnel policies, the court bestowed upon Nalbone the sole responsibility for all hiring and firing decisions. There is no indication in the record that WyoMedia was involved in any personnel decisions. With regard to finances, the basic financial policy for the station was established by the court overseeing the appointment of the Receiver when it ordered WyoMedia to be financially responsible and liable for all expenses incurred by the Receiver. We find that this arrangement is consistent with cases such as *Phoenix,* above. We stated there: "Prospective purchasers or their principals have... been allowed to furnish funds and act in varying capacities in the operation of the stations involved, under supervision of court appointed Trustees in Bankruptcy in order to assure continuance of service." *Id.* at 840. That same principle applies to receivers appointed under state law. Further, as Nalbone notes, each of WyoMedia's principals resides in California and have no day-to-day responsibilities or involvement with the station. Moreover, we find that Nalbone's "mistakes" regarding his references to WyoMedia as licensee, and himself as general manager of WyoMedia, were misstatements that do not outweigh the other substantial evidence that establishes that Nalbone was carrying out the court's directives. Accordingly, we find no substantial and material questions of fact regarding a premature assumption of control.

CONCLUSION

23. Accordingly, based on the foregoing, we find that the Petitioner has failed to raise a substantial and material question of fact requiring resolution in a hearing. We further find that the applicants are fully qualified and grant of the application will serve the public interest, convenience and necessity.

24. IT IS ORDERED, That the petition to deny filed by the Wyoming Department of Employment, Division of Unemployment Insurance (formerly Wyoming Employment Security Commission), IS DENIED.

25. IT IS FURTHER ORDERED, That the petition filed on behalf of the investors of First National Entertainment Corporation IS DISMISSED.

26. IT IS FURTHER ORDERED, That the application for assignment of the license for television station KFNB, Channel 20, Casper, Wyoming, from Mark Nalbone, Receiver, to WyoMedia Corporation (File No. BALCT-900215KG) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Services Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELESPHERE NETWORK, INC.,
Complainant,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-89-426
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-89-427
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-89-428
WISCONSIN BELL, INC.,	File No. E-89-429
PACIFIC BELL TELEPHONE COMPANY,	File No. E-89-430
PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	File No. E-89-431
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-89-432
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-433
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-434
BELL TELEPHONE COMPANY OF PENNSYLVANIA,	File No. E-90-160
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-90-161
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	File No. E-90-162
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	File No. E-90-163
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	File No. E-90-164
THE DIAMOND STATE TELEPHONE COMPANY,	File No. E-90-165
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-90-166
INDIANA BELL TELEPHONE COMPANY,	File No. E-90-167
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-90-168
OHIO BELL TELEPHONE COMPANY,	File No. E-90-169
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-170
NEVADA BELL TELEPHONE COMPANY,	File No. E-90-174
PACIFIC BELL TELEPHONE COMPANY,	File No. E-90-175
SOUTH CENTRAL BELL TELEPHONE COMPANY and	File No. E-90-176
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-177

Defendants.

ORDER

Adopted: December 16, 1991; Released: December 23, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On January 25, 1991, the Enforcement Division, Common Carrier Bureau, issued an Order holding the captioned cases in abeyance pending further Commission consideration of certain issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit.[1] *Order*, 6 FCC Rcd 653 (1991).

2. On October 15, 1991, the Commission adopted a decision acting upon the Court's remand. *Decision on Remand*, CC Docket No. 86-497, FCC 91-324 (released October 31, 1991) (*Rate Base Decision*). In light of the Commission's *Rate Base Decision*, there is no further need to hold the captioned cases in abeyance. Accordingly, the pleading and discovery schedules will recommence upon release of this Order. Dates for filing pleadings should be calculated, based on the timetable provided in the rules, from the release date.[2]

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

---

[1] *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990).

[2] For example, in a proceeding where no answer has been filed, an answer would be due 30 days from release of this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

RAO LETTER 19

Released: December 23, 1991

Responsible Accounting Officer

Re: CC Docket No. 86-111 Cost Allocation Manual - Format and Filing Procedures

In the *Joint Cost Order,*[1] the Commission required certain telephone companies to file manuals containing the methods they use to separate the costs of providing regulated telephone service from the costs of nonregulated activities. These manuals must include: (a) a description of each of the company's nonregulated activities; (b) a list of all incidental activities and the justification for treating each as incidental; (c) a chart showing all of its corporate affiliates; (d) a statement which identifies affiliates that engage in or will engage in transactions with the carrier entity and which describes the nature, terms, and frequency of such transactions; and (e) for each USOA account and subaccount, detailed specifications of the cost categories to which amounts in the account or subaccount will be assigned and the basis on which each cost category will be apportioned.[2] In accordance with the *Joint Cost Order,* the local exchange carriers and the American Telephone and Telegraph Company filed cost allocation manuals (CAMs) containing the required information. However, the Order provided no format specifications, and therefore, the presentation of information in the CAMs differed widely. After a thorough review of the CAMs and of the numerous revisions made since their initial filing, we have determined that a uniform format and filing procedure would greatly improve the CAM review process. We also have determined that adding a matrix in the nonregulated activities section would enhance our regulatory review. In addition, we have found that a more detailed transmittal letter explaining the revisions would be helpful. The purpose of this letter is to establish the uniform format of the CAM and the standard procedure for filing revisions. These are included in the Appendix to this letter. This letter is issued pursuant to authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. §0.291. Applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §1.115 must be filed within 30 days of the date of this letter. See 47 C.F.R. §1.4(b)(2).

If you have any questions, please contact Alicia Dunnigan at (202) 634-1861.

Sincerely,

Kenneth P. Moran
Chief, Accounting and Audits Division
Common Carrier Bureau

APPENDIX

A. Format of Cost Allocation Manual

1. Each Cost Allocation Manual (CAM) must contain seven sections as set forth below. Each section must be separated by a divider. Each section must contain a glossary of terms in the instances where the carrier uses technical terms or acronyms not readily understood. Any additional information a carrier deems necessary to the understanding of its manual must be included in the appropriate section of the CAM.

Table of Contents
I. Introduction
II. Nonregulated Activities
III. Incidental Activities
IV. Chart of Affiliates
V. Transactions With Affiliates
VI. Cost Apportionment Tables
VII. Time Reporting Procedures

2. Each page of the CAM must contain the company name, a page number indicating the section number in Roman numerals and the Arabic page number (e.g., V-3) and the date the page was filed with the Commission. This information must be placed at the bottom of the page.

3. Section II, Nonregulated Activities, must contain a matrix which shows each nonregulated product and the accounts associated with that nonregulated product.

4. Section V, Transactions With Affiliates, must be arranged by affiliate and not by type of transaction provided. The transactions must be grouped into two categories:

a. Transactions from the telephone company to its affiliates.

b. Transactions from the affiliates to the telephone company.

This section must also contain a matrix which shows each type of affiliate transaction and the affiliates involved.

5. Section VI, Cost Apportionment Tables, must have a comments column on each page for explanatory information on apportionment procedures. This must be the last column on the page.

---

[1] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, 2 FCC Rcd 1298 (*Joint Cost Order*), *recon.*, 2 FCC Rcd 6283 (1987), *further recon.*, 3 FCC Rcd 6701 (1988), *aff'd sub nom.* Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir. 1990).

[2] *Id.* at 1328.

6. Section VII, Time Reporting Procedures, must have a matrix which shows the time reporting method used by each employee group.

B. Procedures for Filing Revisions

1. Each carrier must submit five copies of each CAM revision to the Commission on punched paper so that the pages fit into the binders provided by the company. Each copy must indicate all revisions with a vertical line in the right-hand margin. In addition, all revised language must be in bold-face type on each of the five copies. A copy of the transmittal letter must accompany each copy of the revision. Four copies must be filed with the Office of the Secretary. The fifth copy must be delivered to the Chief, Accounting Systems Branch, Accounting and Audits Division, 2000 L Street, N.W., Room 812, Washington, D.C. 20554. An additional copy must be delivered to the Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036.

2. The transmittal letter that accompanies each revision must have an attachment that lists each page and the last filing date for each page. This attachment should be similar to the check sheet in the tariff filings. The transmittal letter must also have an attachment that provides the following information for each revision: the page number of the revision; the USOA account number, if applicable; the CAM language to be revised; the proposed CAM language; and, a detailed explanation of the reason for the change. This information must be presented in the following format:

PAGE/ USOA ACCOUNT	CHANGE FROM	CHANGE TO	REASON FOR CHANGE

3. Pages that are deleted should be left in the CAM and labeled "This Page Intentionally Left Blank." Deletion of several continuous pages may be indicated on one page; for example, "Pages 10-20 have been deleted." Any deletions should appear as blank space so that the deletion is apparent.

4. Pages that are added during the year should be renumbered as A, B, C, etc. For example, if a carrier added a new page after page 6 in Section II, this new page will be identified as Page II-6A.

5. By December 31, of each year each carrier must submit a revised CAM that has been reformatted to eliminate blank spaces and repaginated to include pages added during the calendar year. The fourth quarter revisions should be indicated as explained in B.1., above. The copy delivered to the Chief, Accounting Systems Branch and one additional copy must be submitted in three-ring binders with each section separated by dividers.

6. With the exception of the fourth quarter when all companies must file a revised CAM, if a company has no quarterly revisions, it must file five copies of a letter with the Commission indicating that there are no changes. Four copies must be filed with the Office of the Secretary. The fifth copy must be delivered to the Chief, Accounting Systems Branch, Accounting and Audits Division, 2000 L Street, N.W., Room 812, Washington, D.C. 20554. An additional copy must be delivered to the Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cincinnati Bell
Telephone Company
Transmittal No. 600

Revisions to Tariff F.C.C. No. 35

ORDER

Adopted: December 13, 1991; Released: December 16, 1991

By the Chief, Common Carrier Bureau:

1. Cincinnati Bell Telephone Company (CBT) filed Transmittal No. 600 on October 18, 1991, to increase its common line and switched traffic sensitive access rates which became effective July 1, 1991. CBT contends these rate increases are justified by significant declines in usage, which were not anticipated when CBT filed those rates in April 1991. CBT estimates that these rate increases will have a revenue effect of approximately $2.6 million during the remainder of the 1991-1992 tariff year. Even with these adjustments, CBT claims its earnings will be below the targetted rate of return for interstate access during that period. *See* CBT, Tr. 600, Description and Justification (D&J), Section I.

2. MCI Telecommunications Corporation (MCI) filed a petition to reject the above transmittal on October 25, 1991 (MCI Petition); CBT replied to that petition on November 8, 1991 (CBT Reply). These CBT tariff revisions are scheduled to become effective December 17, 1991.

3. MCI first contends that CBT fails to provide required cost support data and fails to provide the required 45 days' notice. MCI Petition at 2, 3-5. MCI notes that while 12 months of data is required, CBT provides merely nine months of data, only three of which are under the new rates. *Id.* at 3. Second, MCI claims that CBT provides no new Carrier Common Line (CCL) demand data to support the requested rate increases and that the Interstate Directory Assistance (IDA) data provided by CBT are also inadequate. *Id.* at 3-5.

4. Next, MCI contends that CBT fails to account for the costs and separations changes that must be made in the intrastate jurisdiction when modifications are made in a LEC's forecasts for traffic sensitive (TS) demand. *Id.* at 5-6 (claiming CBT fails to address any reductions in its costs which might be anticipated as a result of these reductions in its demand). Finally, MCI says that CBT's current demand forecasts do not show enough variance from CBT's original forecasts to justify any change in CBT's access rates. *Id.* at 7-8 (claiming that there is only a variance of 1.45 percent between CBT's original and current forecasts).

5. On the cost support and notice issues, CBT responds that it obtained waivers of these requirements and that its filing therefore meets applicable requirements. CBT Reply at 3.[1] Regarding the CCL issue, CBT contends that an increased CCL charge is justified because actual experience since its April 1991 filing demonstrates that only 98.2 percent of CBT's total TS MOUs are CCL MOUs, rather than the 98.8 percent originally estimated. *Id.* at 3-4. With regard to IDA demand, CBT provides in its reply additional demand data to support its reduced IDA demand forecast and increased IDA rates. *Id.* at 4-5.

6. Regarding the costs and separations issue, CBT disputes MCI's claim that CBT should decrease its allocation of costs to the interstate jurisdiction due to the reduction in interstate demand relative to intrastate demand. In fact, CBT contends, intrastate demand declined more than interstate demand so that, to maintain the proper separations treatment, there should actually be an increased allocation of costs to the interstate jurisdiction. However, CBT notes that its transmittal seeks relief only from revenue shortfalls resulting from misstated demand and not those resulting from increased costs. *Id.* at 7. Finally, regarding the magnitude of CBT's forecasting variance, CBT says that MCI's calculation of a 1.45 percent error is misleading. According to CBT, the forecast error will likely be greater than 2.5 percent by year end and the cumulative effect of the continued downward trend through the end of the access period would, under current conditions, result in an average variance of 4.3 percent, or a shortfall of 84.5 million MOUs. *Id.* at 7-9.

7. The Common Carrier Bureau has reviewed CBT Transmittal No. 600 and all related submissions. We conclude that no compelling argument has been presented that the tariff is so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

8. Accordingly, IT IS ORDERED that the petition to reject Cincinnati Bell Telephone Company Tariff F.C.C. No. 35, Transmittal No. 600, filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

---

[1] In addition to the six months of actual TS MOU data under the CBT rates prior to July 1, 1991, and the three months of such data under the July 1, 1991, rates provided with its transmittal, CBT also furnished an additional month of such data to the Bureau. *See* Letter to Chief, Tariff Division, Common Carrier Bureau, FCC, from D. Davidson, Federal Docket Management, CBT, dated Nov. 22, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-410

In re Applications of

SCOTTSDALE TALKING MACHINE AND WIRELESS CO., INC.	File No. BPH-870909MF
GIL L. LYONS	File No. BPH-870910MC
HOPE VALLEY FM LIMITED PARTNERSHIP	File No. BPH-870910ME
Julia S. Zozaya d/b/a AMERICAN INTERNATIONAL DIVERSIFIED	File No. BPH-870910NH
Philip C. Davis and Lisa M. Davis d/b/a PARADISE VALLEY BROADCASTERS	File No. BPH-870910NK

For Construction Permit for
New FM Station, Channel 290A,
Paradise Valley, Arizona

Appearances

Nathaniel F. Emmons on behalf of Scottsdale Talking Machine and Wireless Co., Inc.; *Russell C. Powell* on behalf of Gil L. Lyons; *Stephen Diaz Gavin* on behalf of Hope Valley FM Limited Partnership; *Margot Polivy* on behalf of Julia S. Zozaya d/b/a American International Diversified; and *Raymond J. Kimball* on behalf of Philip C. Davis and Lisa M. Davis d/b/a Paradise Valley Broadcasters.

DECISION

Adopted: December 11, 1991; Released: December 27, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Member Blumenthal concurring with statement.
Board Chairman MARINO:

1. The five remaining applicants have all filed exceptions to the *Initial Decision* of Administrative Law Judge Gonzalez, 6 FCC Rcd 1668 (1991) (I.D.), which concluded that Scottsdale Talking Machine and Wireless Co., Inc. (Scottsdale) was the superior comparative applicant. I.D., para. 100. Only Scottsdale and Gil L. Lyons (Lyons) were awarded 100% "integration credit" for the full time participation of owners in the management of the proposed station, a comparative factor of substantial importance. *Id.* Ultimately, the ALJ held that Scottsdale was the superior comparative applicant because its 100% long term local residence was further enhanced by a slight to moderate degree of involvement in civic affairs within the service area, whereas "Mr. Lyons is just a short-term, part-time resident of Paradise Valley, Arizona with no civic involvement." *Id.* In addition to its substantial superiority on the residence-civic activity factor, Scottsdale was also considered superior because of its 40% minority, and 100% female ownership, (of which Lyons had no comparable preferences), and because Scottsdale is also entitled to some credit for broadcast experience, para. 20 below.

2. At the oral argument held July 19, 1991, counsel for Lyons indicated that Scottsdale would have been recognized as the superior comparative applicant if only it had acknowledged the role of Elliott Klein as a "principal" or "partner". Tr. 1284-85. The other competing applicants, Hope Valley FM Limited Partnership (Hope Valley), Br. 35-43, Julia S. Zozaya (Zozaya), Br. 10-16, and Paradise Valley Broadcasters (Paradise Valley), Br. 4-13, join Lyons, Br. 6-17, in arguing that Scottsdale should be awarded no integration credit because of Elliott Klein's substantial involvement and financial interest in the Scottsdale application. Thus, the questions presented are: (1) whether the ALJ erred in fully crediting the integration proposal of Scottsdale; and (2) whether he correctly evaluated the proposals of the remaining applicants: Lyons, Hope Valley, Zozaya, and Paradise Valley. Based on our review of the record, we affirm the ALJ's selection of Scottsdale as the superior comparative applicant.

SCOTTSDALE

3. Scottsdale was incorporated in 1983 some fours years before its application was filed on September 9, 1987. Its voting stock is now owned by Katherine Klein (60%), and Randy Baca Hensel (40%), whose husbands have executed disclaimers of any community property interest in their corporate shares. I.D., para. 7. After reviewing the qualifications of Mrs. Klein and Mrs. Hensel and their activities since 1976, I.D., paras. 9-15, the ALJ concluded that "they are capable of assuming responsibilities at the station to which they are committed." *Id.*, para. 24.

4. At hearing a question had been raised as to whether Elliott Klein, Katherine's husband, was in a position to exercise control over Scottsdale. In his findings, the ALJ reviewed in some detail the corporation's history beginning with its incorporation on December 5, 1983. Klein and his wife were original incorporators, and both were involved in securing the allocation of the present FM channel to Paradise Valley. I.D., para. 19. Klein was initially awarded 20% of the stock in return for engineering work done by him to secure the channel for the community. I.D., para. 20.

5. In 1984, some three years before the Commission announced that it would accept applications for the Paradise Valley channel, Klein decided to formally withdraw and sell his shares back to the corporation for a nominal sum ($100.00) "because he was unable to integrate into

Scottsdale's management due to the demand and growing success of his consulting business." I.D., para. 20. The ALJ accepted this explanation because:

> At the time this occurred, the Federal Communications Commission had not yet announced a filing window for Paradise Valley, Arizona applications. The corporation was then, simply, a legal entity that might acquire, sometime in the future, an asset worth a considerable amount of money. Mr. Klein's decision to devote his energies to his consulting business and strengthen his wife's chances of securing the Paradise Valley facility by giving up his ownership interest in the applicant, appears to have been a perfectly reasonable and credible action under the circumstances. *Id.*

6. In his findings, I.D., paras 21 and 22, the ALJ described the financial, engineering, and other assistance Mr. Klein provided to his wife and the Scottsdale applicant after he withdrew from the corporation. But after finding that both Mrs. Klein and Mrs. Hensel had been actively involved in prosecuting the application, the ALJ concluded that their integration pledges are "credible," I.D., paras. 23-24, and that "Scottsdale is entitled to a 100 percent quantitative integration credit for its proposal to integrate its two principals into management of the station . . . " I.D., para. 25.

7. The four applicants filing exceptions to the award of 100% integration credit to Scottsdale have cited nearly a dozen cases in support of their arguments. *See* para. 2 *supra*. These cases are dutifully distinguished in Scottsdale's Reply, pp. 18-22. All parties agree that the general standards which are to be utilized in ascertaining the *bona fides* or credibility of an integration proposal were summarized in the Commission's decision in *Royce International Broadcasting*, 5 FCC Rcd 7063 (1990), and recently reaffirmed by the Commission in *Evergreen Broadcasting Co.*, 6 FCC Rcd 5599 (1991), at paras. 14-16. Those standards have been applied by the Board in many factual situations involving husbands and wives where integration credit was denied. *See e.g. N.E.O. Broadcasting Company*, 103 FCC 2d 1031, 1032-36 (Rev. Bd. 1986), *rev. denied*, 1 FCC Rcd 380 (1986), and *Progressive Communications, Inc.*, 3 FCC Rcd 5758, 5760-62 (Rev. Bd. 1988), *rev. denied*, 5 FCC Rcd 7058 (1990), upon which Scottsdale's competitors principally rely.

8. In *N.E.O, supra*, we concurred "with the ALJ that the record pellucidly reveals that Edna M. Smith is merely a figurehead and that her husband, Donald A. Smith, is the controlling principal and moving force behind NEO", 103 FCC 2d at para. 7. There the husband had claimed that he withdrew after the application had been prepared and filed; the wife had acquiesced in all of his actions; and she knew little about the vital aspects of the application. We rejected her claim to manage and control the operation of the station as "simply not credible." NEO's application was found to be "a mere facade to obfuscate Donald Smith's *de facto* control," and we held that the ALJ did not err in finding that the husband was "the controlling force behind NEO and discounting NEO's integration proposal accordingly." *Id.*

9. In *Progressive*, *supra*, the ALJ had found that at the outset Mr. and Mrs. Watts had agreed that the husband would be the head of the company (the "boss") because that image was important for doing business in their local community; however, in their FCC application they made it appear that Mrs. Watts was in control. After the application was filed, Mr. Watts allegedly withdrew, but the ALJ found that his withdrawal was "in name only" and that thereafter he continued to exercise significant control over that applicant's business affairs. 3 FCC Rcd 5761, paras. 16-19. On appeal, the Commission affirmed the Board's decision, and following *Royce*, *supra*, completely discounted integration credit because Mr. Watts "a person with no disclosed interest . . . is in a position to exercise significant control over the applicant." 5 FCC Rcd at paras. 5-6.

10. Here, crucial differences distinguish Scottsdale's application from *NEO* and *Progressive*. First, Mrs. Klein and Mrs. Hensel are not mere figureheads; they are accomplished career women with nearly a decade of broadcast experience and we recall that, as a general matter, the Commission has recognized a "significant increase in the number of married couples in which both spouses pursue separate and independent careers." *Spousal Attribution*, 6 FCC Rcd 2492, 2493 (1991).

11. Second, unlike *NEO* and *Progressive*, the ALJ here found that the husband's withdrawal from the corporation several years before the Commission called for the filing of applications was both "reasonable" and "credible." *See* para. 5, *supra*. This pivotal finding is sharply challenged by Scottsdale's competitors who urge that it is both contrary to sound business practice and "patently unreasonable on its face" for Elliott Klein to sell his interest in a potentially valuable broadcast station for the token sum of $100. Lyons Br. 15. Zozaya urges that this aspect of the case furnishes "a clear . . . element to fraud . . . " Br. 17, n. 8. On this point, we agree with Scottsdale's Reply, p. 16, that the ALJ correctly found that:

> Mr. Klein's withdrawal in 1984 was a "perfectly reasonable and credible action under the circumstances." *ID*, ¶ 20. Scottsdale did not have an asset worth $3 million. It had nothing. It did not even have a pending application, for the filing window had not opened and did not open until almost three years later. Moreover, there was no way of assessing Scottsdale's chances of ultimately winning the grant, since there were certain to be many qualified contenders. Nor was there any way to know *when* a grant would be made, except that it would surely not be soon. Thus, as the ALJ aptly observed, Scottsdale "was then, simply, a legal entity that *might acquire sometime* in the future, an asset worth a considerable amount of money." *Id.* (emphasis added).

Moreover, there has been no showing to contradict the ALJ's additional finding that Klein withdrew in 1984 because of a legitimate business reason, namely, "the demands and growing success of his consulting business." I.D., para. 20.

12. Third, in reviewing the totality of the evidence, the ALJ found that while Mr. Klein had provided financial and other assistance to his wife after he withdrew from the corporation, I.D., paras. 21 and 22, the record also supports his finding that the two women remained active in the prosecution of the application, and that their integration proposal was credible and entitled to full credit. The ALJ found, *inter alia*, that Mrs. Klein was active in securing the transmitter site, that Mrs. Klein and Mrs.

Hensel secured the loan commitment, that they worked on the preparation of a financial plan for the station, that they have dealt with local counsel and have a relationship with him independent of his representation of Mr. Klein's consulting business. I.D., para. 23. Also, there has been no showing that Mr. Klein at any time assumed significant control of the proposal, as was the case in *NEO* and *Progressive, supra. See Evergreen, supra*, at 5600. Moreover, the Commission has long recognized that familial relationships may have attributes which would otherwise raise questions in non-family relationships situations, it does not assume that these family relationship necessarily "suggest an unspoken interest in the applicant." *Sound Broadcasting Co.*, 6 FCC Rcd 3626, 3628 (Rev. Bd. 1991); *Oliver Kelley and Mary Ann Kelley*, FCC 91R-110, adopted November 26, 1991, para. 13.

13. In the financial area, the ALJ found that Mr. Klein did introduce the Scottsdale principals to his banker. However, he also found that they declined a loan he offered the corporation, and they negotiated their own loan from the bank. All expenses paid by Mrs. Klein did come from joint funds, and Mr. Klein agreed to provide his personal guarantee for any loan extended to Scottsdale. Past precedent recognizes, however, that no issue of spousal control arises "simply because one spouse assists another spouse with financing." *A. P. Walters, Jr.* 6 FCC Rcd 875, 879 (Rev. Bd. 1991). It is also recognized that "the use of joint funds for prosecuting the application and constructing the proposed station is not itself determinative." *Richard D. Bott, II*, 4 FCC Rcd 4924, 4929 (Rev. Bd. 1989). Banks commonly require the personal guarantee not only of the borrower but her spouse.

14. We also agree with the ALJ that the other assistance provided by Klein after he withdrew does not bar the award of full integration credit to the two principals. Klein helped his wife to find a site which they purchased. Tr. 345-347, ID. para. 21. At his wife's request he prepared an engineering memo listing the equipment cost estimates before the application was filed. Tr. 415-18. On his own initiative, in 1989, he did update an equipment cost memo. Tr. 420-21, ID. para. 21. He also attended a group meeting where equipment cost estimates were discussed along with Scottsdale's "five year plan." Present at that meeting were Mrs. Klein, Mrs. Hensel and her husband, and Mrs. Hensel's step-daughter "who had extensive knowledge of broadcast facilities around the nation." Tr. 415-418, ID. para. 21. It was Mrs. Hensel's step-daughter, and not Mr. Klein, who helped Scottsdale to come up with its "five year plan . . . She took the previous data and turned it into a formula." Tr. 418, I.D., para. 23. In sum, the written record, and controlling precedent, support the ALJ's credibility determination and his award of 100% integration credit to Scottsdale. On this factual record there is no legal basis for Paradise Valley's contention, (Br. 10-13) that the ALJ erred in failing to specify a real party in interest issue against Scottsdale, an issue which had not been sought by any of the exceptors. *See Millar* v. *FCC*, 707 F.2d 1530, 1537-38 (D.C. Cir. 1983). *See also Las Misiones De Bejar*, 93 FCC 2d 191, 196-97 (Rev. Bd. 1983). We therefore turn to the other applicants to ascertain whether the ALJ correctly concluded that Scottsdale is the superior comparative applicant on both quantitative and qualitative grounds.

LYONS

15. Gil L. Lyons is a sole proprietor who was credited with 100% integration based on his proposal to work full-time as General Manager of the proposed station. I.D., paras. 29, 37. Despite his quantitative proposal, as Lyons candidly conceded before the Board, para. 2, *supra*, unless Scottsdale is eliminated from the comparative contest, he could not prevail qualitatively over the well-enhanced Scottsdale proposal. We agree with Lyons that, because we have fully credited Scottsdale, his proposal is qualitatively far inferior and cannot prevail. Briefly stated, Lyons' proposal is only minimally enhanced in the barest way by his local residence in Paradise Valley, to which community he moved in August 1987, one month prior to the filing of his application. I.D., para. 30. His proposal is not enhanced in any other aspect. By contrast, Scottsdale's proposal is enhanced by its owners' long-term local or service area residence, civic participation, broadcast experience, 40% minority ownership, and 100% female ownership. I.D., para. 100. In view of Scottsdale's clear qualitative superiority over Lyons, it is unnecessary for us to reach the exception of Paradise Valley (Br. at 23-28), which contends that Lyons' comparative stance must be even further reduced because his integration proposal is not credible and should receive no quantitative credit.

HOPE VALLEY

16. Hope Valley is a limited partnership comprised of Hope H. Ozer, the sole general partner who owns 20% of the partnership's equity, and B. Scott Reardon III, the only limited partner, who holds 80% of the partnership's equity. I.D., para. 39. Although Hope Valley claims 100% integration credit based on Ms. Ozer's proposal to serve as full-time general manager of the station, the ALJ found that, because Reardon was not an insulated principal, Hope Valley could receive only 20% integration credit (reflecting Ozer's ownership) and, moreover, Reardon's 50% interest in a Hayesville, Kansas FM station was attributable to Hope Valley under the diversification criterion. I.D., para. 41, 45, 53. Hope Valley strenuously objects to these conclusions. (Br. at 10-35). On the other hand, Scottsdale, in its Contingent Exceptions, pp. 5-6, makes the additional basic point that Hope Valley can receive no integration credit whatsoever because Ozer's proposal is incapable of effectuation.

17. First, there is no basis for reversing the ALJ's findings that: Reardon has not remained an insulated principal; he was the prime mover in creating and funding the partnership; shortly before the application was filed he selected the general partner (who had no broadcast experience); he provided her with a draft of the limited partnership agreement; and their partnership agreement was fatally flawed because it did not prohibit the partner from communicating with the limited partner relating to the day to day operations. I.D., paras. 46-52. Hope Valley's factual situation is controlled by *Poughkeepsie Broadcasting Limited*, 6 FCC Rcd 2497 (1991), where the Commission indicated that when an individual like Reardon, who was the driving force behind the application, purports to be "giving away control or ownership in a manner that is patently unreasonable on its face . . . it is unrealistic to conclude that an applicant's proposed grant of exclusive and integrated control to nominally active principals is reliable." 6 FCC Rcd at 2498;

See also Metroplex Communications, Inc., 4 FCC Rcd 8149, 8159 (Rev. Bd. 1989), *modified*, 5 FCC Rcd 5610 (1990). Reardon's give away was illusory and fatally flawed, because the limited partnership agreement did not contain basic insulation provisions required by the Commission. *See also Evergreen*, at para. 8 (citing *Cotton Broadcasting*, 4 FCC Rcd 1781, 1784). The belated attempt to amend the agreement was violative of the principle against comparative ungrading. *See Doylan Forney*, 3 FCC Rcd 6330, 6332 (Rev. Bd. 1988), *rev. denied*, 5 FCC Rcd 5423 (1990).

18. Second, since the cited precedent establishes that these grounds are sufficient to hold that Hope Valley should receive no quantitative integration credit, we do not reach the additional contention that Ms. Ozer has not met her burden of establishing how her proposal can be effectuated. Scottsdale's Br. pp. 5-6. We have not discussed these matters at length because even if Hope Valley is awarded 100% quantitative credit it would not prevail qualitatively over Scottsdale. In terms of local residence, Ozer has resided in Paradise Valley since December 1984. I.D., para. 42. On the other hand, both of Scottsdale's stockholders have longer term residence; Ms. Klein has lived in Paradise Valley since the Fall of 1981 and in the service area since August 1980, and Ms. Hensel has lived within the service area since 1976. I.D., paras. 10, 12. Because service area residence closely follows in importance community of license residence, we believe Scottsdale, by virtue of its principals' somewhat longer residence, is slightly ahead in this area. *See Policy Statement On Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965) *Colonial Communications, Inc.*, 6 FCC Rcd 2296 (1991); *Vacationland Broadcasting Co., Inc.*, 97 FCC 2d 485, 496 (Rev. Bd. 1984).

19. As to community involvement, Ozer has been civically active since shortly after moving to Paradise Valley in 1984, largely in school and education organizations, such as the Cherokee Elementary School Association of Parents and Teachers, the Scottsdale Parent Council, and the Arizona Citizens for Education, and has also served on the Board of Adjustment for the Town of Paradise Valley. I.D., para. 42. Scottsdale's Ms. Klein has been active since 1985 in Toby House, an organization serving the needs of mentally ill young adults, and has served on the board of the Phoenix Chapter of American Women in Radio and Television, which engages in both professional and charitable activities. Ms. Hensel has been civically active since January 1977 in such organizations as the Arizona Women's Employment & Education, Inc., the Private Industry Council for Maricopa County, the Citizens Bond Committee, and the Arizona Women's Commission. I.D., paras. 10, 12-15. The ALJ concluded that Hope Valley's proposal was enhanced for "some" civic involvement by Ozer (I.D., para. 53), whereas Scottsdale's proposal received "minor" civic enhancement for Ms. Klein's activities and "moderate" enhancement credit for Ms. Hensel's civic involvement. I.D., para. 25. Although he was perhaps somewhat stinting in his award of credit in this regard, we will not quibble with the ALJ's characterization, but will add to it the observation that Ms. Hensel's activities cover more years than Ozer's, albeit Ozer is a 100% owner as opposed to Ms. Hensel's 40% ownership.

20. On balance, combining the local residence and civic participation factors, *see Ronald Sorenson*, 6 FCC Rcd 1952 (1991), we find that although Scottsdale may be slightly ahead, there are no substantial differences between the applicants such as to accord either a clear preference. The applicants also have equal credit for 100% female participation. While Hope Valley's Ozer offers no broadcast experience, the ALJ overlooked the broadcast experience of Scottsdale's principals -- nine years for Ms. Klein and eight years for Ms. Hensel. (Scottsdale Exhs. 2, 3) -- which affords Scottsdale a minor preference. *Policy Statement On Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965) at *supra*, at 396. The only remaining difference is Scottsdale's entitlement to 40% minority enhancement (Ms. Hensel) as opposed to 0% for Hope Valley. This is a significant difference because minority credit, like local residence, is a "fundamental consideration" of broadcast licensing, and must be accorded "substantial weight." *Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945-6 (1985). Thus, because of this significant difference in their proposals, in addition to Scottsdale's broadcast experience advantage, even if Hope Valley were considered slightly superior under the combined factor of Ozer's residence background and civic activities, Scottsdale's unquestioned solid preferences for minority participation and broadcast experience would prevail. *See Coastal Broadcasting Partners*, 6 FCC Rcd 4242, 4247 (Rev. Bd. 1991).

21. In view of Hope Valley's inferior comparative position, it is unnecessary to address Paradise Valley's Contingent Petition to Enlarge Issues which seeks to reopen the record on financial qualifications and false certification issues against Hope Valley. We also need not consider exceptions to the ALJ's refusal to specify financial qualifications and related issues against Hope Valley, or Hope Valley's petition to reopen the record to report the withdrawal of its financial commitment letter and the substitution of a new bank commitment letter.

ZOZAYA

22. *Julia S. Zozaya*, a sole proprietor, proposes to work at least thirty hours a week as general manager of her proposed station. This is in addition to her simultaneous commitment to work forty hours a week at another proposed station in Flagstaff, Arizona. She expects to be physically present at the Paradise Valley station one day a week and to devote approximately two hours weekday mornings and three hours each evening to Paradise Valley station management. In addition to her station duties, Zozaya plans to spend approximately twenty-five hours a week on her Phoenix, Arizona civic activities. I.D., para. 73.

23. The ALJ took cognizance of the Board's Decision affirming the I.D. in the Flagstaff proceeding (*Julia S. Zozaya*, 5 FCC Rcd 856 (Rev. Bd. 1990)), where Zozaya was denied integration credit because her plans were found to be unrealistic and inherently unachievable. *Id.* at 857-858. He concluded that the same finding applies with equal force in this proceeding; that her proposal is inherently implausible; and that she could not be awarded any integration credit because it is impossible to know how many hours, if any, she would actually spend managing the Paradise Valley facility. I.D., para. 74.

24. Although Zozaya excepts to the ALJ's rejection of her integration proposal as inconsistent with Commission precedent, we affirm the ALJ's conclusion and find further that even if Zozaya's proposal were credited, she could not prevail as the comparative winner in this proceeding. The I.D. in Paradise Valley preceded the Com-

mission's affirmance of the Board's Decision in the Flagstaff proceeding. *See Julia S. Zozaya*, 5 FCC Rcd 6607 (1990), *recon. denied*, 6 FCC Rcd 4416 (1991). There, rejecting arguments virtually identical to those raised here by Zozaya, the Commission agreed with the Board that Zozaya had not met her evidentiary burden of demonstrating persuasively how her integration plans could be effectuated. Those plans are no more credible or capable of effectuation now when viewed from the perspective of her Paradise Valley proposal than they were then from the perspective of her Flagstaff proposal. Moreover, as clarified in the Commission's Flagstaff affirmance, 5 FCC Rcd at 6609 n. 2, an applicant may receive part-time integration credit -- such as that proposed for Paradise Valley by Zozaya --only for the actual hours spent at the station. *See Mid - Ohio Communications, Inc.*, 5 FCC Rcd 4596, 4597 (1990). Obviously, Zozaya could not possibly accomplish her thirty hour work proposal by virtue of her current plan to be physically present at the Paradise Valley station only one day a week. Finally, even if these effectuation problems could somehow be overcome, Zozaya still could not prevail comparatively because her substantial part-time integration proposal is nevertheless inferior to the full-time proposal of the winning applicant, Scottsdale. *See Julia S. Zozaya*, *supra*, at 6608; *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1965) (Commission is primarily interested in full-time proposals, and as participation moves away from full time, credit will drop sharply); *Jarad Broadcasting Co., Inc.*, 1 FCC Rcd 181, 189 (Rev. Bd. 1986); *accord*, *Georgia Mountain Corp.*, 57 RR 2d 1020 (Rev. Bd. 1985), *rev. denied*, FCC 85-559, released October 18, 1985. *See also Omaha TV 15, Inc.*, 4 FCC Rcd 730 (1988)(Commission integration calculus applied to part-time proposals), pursuant to which Zozaya would receive a 5625 score as compared to 10000 for Scottsdale, a significant disparity in the latter's favor.

PARADISE VALLEY

25. Paradise Valley is a general partnership comprised of Philip C. Davis and Lisa M. Davis, who each own 50% partnership interests and are husband and wife. Although Paradise Valley claimed 100% integration credit based on Mr. Davis' proposal to serve as full-time general manager and Mrs. Davis' proposal to work as full-time station manager, the ALJ, finding that Mrs. Davis will not share in the setting and implementation of station policy or be actively involved in the management of the station apart from serving as assistant to her husband, allowed Paradise Valley only 50% credit based on Mr. Davis's role. I.D., paras. 77, 80, 83, 91, 92. Paradise Valley has excepted on the grounds that the ALJ erroneously faulted Mrs. Davis for a lack of previous broadcast experience and her non-involvement in her husband's trust business managing the trust's broadcast properties, that he dismissed her proposed station duties as merely administrative or secretarial, and that he ignored her unchallenged proposal to perform a specific managerial role in the sales and business operation of the station. (Br. at 13-20). While we tend to agree with Paradise Valley that the ALJ may have minimized Ms. Davis' proposed role at the station, we find that even if we restored Paradise Valley's credit to 100%, it would not prevail qualitatively compared to the winning applicant, Scottsdale. In view of this ultimate conclusion, we will only deal briefly with Ms. Davis' quantitative proposal.

26. As Paradise Valley's proposed station manager, Ms. Davis "will be responsible for the day-to-day operation of the station . . . ", " . . . will consult with [Mr.] Davis in establishing the station's operating, programming and sales policies and procedures . . . ", and " . . . will be responsible for supervising the sales and administrative staff." (Paradise Valley Exh. 3, p. 1) The ALJ's criticism of this proposal was largely premised on a finding that Mr. Davis had overall responsibility for the application and had prosecuted it without meaningful involvement by Mrs. Davis (Tr. 1146, 1257, I.D., para. 88), and that Mrs. Davis' proposed role would be similar to the limited assistance she provided to her husband in the past in the management of his trust properties (I.D. paras. 89-90). In so holding, however, the ALJ appears to have overlooked other testimony that Mrs. Davis would be responsible for supervising and managing the sales staff. In this regard, she specifically testified that "as station manager . . . I am also in charge of sales," that she will "have sales meetings at least once or twice a week," that she plans to sell time, and also will train the sales staff. She further stated that her administrative functions will "include the traffic function of the station," "acting as an office manager," "keeping the station's books," and "overseeing receptionists and secretaries." Tr. 1100-1103. She also answered the following question regarding her supervision of the sales staff (Tr. 1157):

> Q. In your exhibit three, Ms. Davis, you say that you will supervise the sales staff. Can you tell me what your understanding of supervising the sales staff would entail?
>
> A. It would be educating them, sales meetings, the going out and making calls with them, making sure they understand the rate card, that they are not going to give away our time, that the time is what keeps us on the air, that they sell.

27. It thus appears from her testimony that Ms. Davis' station management duties will encompass at least sales management, which is a discrete managerial function traditionally credited by the Commission, *Policy Statement*, *supra*, at 395, and accorded full weight even where, as here, "sales activities have accompanied the sales supervision." *Voce Intersectario Verdad America, Inc.*, 100 FCC 2d 1607, 1616-17 (Rev. Bd. 1985), *recon. denied*, 102 FCC 2d 465 (Rev. Bd. 1985). Furthermore, to a lesser extent, insofar as Mrs. Davis "will be responsible for supervising the . . . administrative staff" (Paradise Valley Exh. 3, p. 1), and this "include[s] the traffic function of the station" (Tr. 1100), she may be entitled to some additional credit. *See Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5065 (1989); *compare Evergreen Broadcasting Co.*, FCC 91-267, released September 20, 1991, para. 5 n. 7. Nevertheless, without further addressing the ALJ's findings, it is clear that even a fully credited Paradise Valley proposal is inferior to that of Scottsdale.

28. With respect to local residence, the ALJ credited Paradise Valley's owners, Mr. and Mrs. Davis, with continuous residence within the community since 1974, except for approximately a two year period when they were spending three to four days a week in San Francisco in connection with Mr. Davis' trustee responsibilities. I.D., paras. 81, 84. As noted earlier, Scottsdale's 40% owner, Ms. Hensel, has lived in the service area since 1976 (which equals the residence period of the Davises after

their two years part-time residence is subtracted), and its 60% owner, Ms. Klein, has lived in Paradise Valley since 1981, and in the service area since 1980. Thus, both applicants offer long-term local residence with Paradise Valley marginally ahead in total years. This putative advantage is eliminated, however, once the associated element of civic participation is factored in. The ALJ denied Paradise Valley any credit in this area because its principals' claimed activities amounted only to donations of money without any active participation in the organizations' activities. I.D., para. 93. Paradise Valley does not except to this finding. On the other hand, Scottsdale was awarded credit for its principals' civic activities, particularly those of Ms. Hensel, who has participated in numerous organizations in the area since 1977. This clear contrast overcomes any marginal residence advantage Paradise Valley may hold, and requires that the preference under the combined attributes of local residence and civic participation be awarded to Scottsdale. *See Ronald Sorenson, supra,* at 1953 (residence advantage outweighed by substantial advantage for civic activities indicating greater overall knowledge of and interest in the community); *Naguabo Broadcasting Co.*, 6 FCC Rcd 4879, 4880 (1991) (fundraising activities outweighed by more significant participation in assessing local familiarity). Scottsdale also enjoys comparative advantages over Paradise Valley on the equally important factor of minority ownership and participation (40% vs. 0%), as well as for female credit (100% vs. 50%). Although Paradise Valley excepts to the ALJ's refusal to award Mr. Davis credit for broadcast experience, Scottsdale's principals also have broadcast experience, and whatever advantage Paradise Valley might claim for this minor factor could not outweigh the other weightier preferences awarded Scottsdale. *See Beach Broadcasting Ltd. Partnership*, 6 FCC Rcd 4485 (1991). Finally, Paradise Valley does not except to the ALJ's award of a slight coverage preference to Scottsdale.

29. In sum, a grant of Scottsdale's comparatively superior application will best serve the public interest, convenience, and necessity.

30. ACCORDINGLY, IT IS ORDERED, That the petition to reopen the record and for leave to amend, filed July 18, 1991, and supplement thereto, filed July 19, 1991, by Hope Valley FM Limited Partnership, and the contingent petition to enlarge issues and reopen the record, filed July 24, 1991, by Paradise Valley Broadcasters, ARE DISMISSED; and the petition for leave to amend filed August 21, 1991 by Paradise Valley Broadcasters IS GRANTED and the amendment IS ACCEPTED; and

31. IT IS FURTHER ORDERED, That the application of Scottsdale Talking Machine and Wireless Co., Inc. (File No. BPH-870909MF) for a construction permit for a new FM station in Paradise Valley, Arizona IS GRANTED; and the applications of Gil L. Lyons (File No. BPH-870910MC), Hope Valley FM Limited Partnership (File No. BPH-870910ME), Julia S. Zozaya d/b/a American International Diversified (File No. BPH-870910NH), and Philip C. Davis and Lisa M. Davis d/b/a Paradise Valley Broadcasters (File No. BPH-870910NK) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

SEPARATE STATEMENT OF BOARD MEMBER NORMAN B. BLUMENTHAL

Although the facts make this a very close case, *compare Richard P. Bott, II*, 4 FCC Rcd 4924, 4928-30 (Rev. Bd. 1989) (subsequent affirmances omitted), I would gingerly concur with the majority that the evidence is insufficient (albeit barely) to conclude that the husband of Scottsdale Wireless principal Katherine Klein is a real-party-in-interest in the applicant. I write on this matter because, although the exceptors would have us regard the husband as a principal, none sought a real-party-in-interest issue. *See Tequesta Television Inc.*, 64 RR 2d 497, 498 (Rev. Bd. 1987); *compare also Rayne Broadcasting Co., Inc.*, 5 FCC Rcd 3350 (Rev. Bd. 1990)(real-party-in-interest issue added based on husband's activity); *Sound Broadcasting Co.*, 6 FCC Rcd 3626, 3627 (Rev. Bd. 1991) (same). *Cf. Richard P. Bott, supra.* I recognize that language in recent Commission decisions indicates that integration credit can be denied where an "undisclosed" principal may exercise significant control, *see, e.g.*, Royce International Broadcasting, 5 FCC Rcd 7063, 7064 (1990)[1]; but my preference would be to require a discrete issue so that discovery and trial could be properly focused.

FOOTNOTE TO STATEMENT

[1] The Board had generally theretofore reserved the total discrediting of integration proposals to situations in which all of the principals *were* disclosed, but where allegedly passive principals were active to the point of domination. In other words, *sham* cases. *See, e.g., Fresno Limited Partnership*, FCC 91-375, released November 27, 1991 (and numerous sham cases cited therein). As it is now, the purpose of a real-party-in-interest issue in comparative cases is difficult to perceive, save as a disqualifying matter, something rarely necessary in comparative cases if all comparative integration credit is denied anyway.

Before the
Federal Communications Commission
Washington, D.C. 20554

FO Docket No. 91-171

In the Matter of

Inquiry into Possible Technical
Improvements in the Emergency
Broadcast System

ORDER

Adopted: December 16, 1991; Released: December 18, 1991

By the Chief, Field Operations Bureau:

1. On November 27, 1991, the Commission received a request from the Primary Entry Point Advisory Committee (PEPAC) to extend the time in which comments may be filed in response to the Notice of Inquiry in the above-captioned proceeding, 6 FCC Rcd 4264 (1991), from December 31, 1991, until June 30, 1992. PEPAC is an incorporated association of broadcast stations organized to provide the President of the United States a means to broadcast Emergency Broadcast System (EBS) messages in times of national emergency.

2. PEPAC states that an extension of time to submit comments will greatly facilitate firm recommendations by PEPAC and others for revisions and improvements to EBS technical capabilities. Additionally, there are other systems that PEPAC has become aware of during the course of its testing, and the preparation of meaningful comments about those systems will require additional time. On November 26, 1991, PEPAC was granted an extension of authority for the testing of EBS tones and Weather Radio Specific Area Message Encoder (WRSAME) codes over radio station KCMO in Kansas City, Missouri. The testing authority was extended until April 30, 1991.

3. Based on the above, we conclude that an extension of time is in the public interest and will allow for more complete comments by PEPAC and others. However, we will extend the comment period for only three months until March 31, 1992, since we wish to present comment summaries to the national level EBS Advisory Committee at its meeting on April 23, 1992, in Washington, D.C.

4. Even though the NOI will have a closing date of March 31, 1992, for comments, we will also consider any test results and comments filed after the closing date. Reply comments will be due June 30, 1992.

5. Accordingly, IT IS HEREBY ORDERED, based on the authority in Section 0.311 of the Commission's Rules and Regulations, 47 C.F.R. § 0.311, that the deadline for filing comments in the subject Notice of Inquiry IS EXTENDED to March 31, 1992, and the deadline for filing reply comments IS EXTENDED to June 30, 1992.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-213

In the Matter of

Transport Rate Structure
and Pricing

ORDER

Adopted: December 18, 1991; Released: December 19, 1991

Reply Comment Date: January 22, 1992

By the Chief, Common Carrier Bureau:

1. On December 9, 1991, the Competitive Telecommunications Association (CompTel) filed a Motion for Modification of Schedule requesting that the date for filing reply comments in this proceeding be extended to February 6, 1992. In this Order, we grant CompTel's motion in part.

2. In the Order and Further Notice of Proposed Rulemaking instituting this proceeding, the Commission proposed to adopt a new rate structure for local exchange carrier switched transport. The proposed rate structure consists of a flat-rate dedicated transport charge, a usage-based common transport charge, and a usage-based interconnection charge.[1] The Commission also asked the Bell Operating Companies and GTE to prepare analyses of the effects of various pricing scenarios. The Bureau modified the initial pleading cycle to establish November 22, 1991 and December 23, 1991 as the respective dates for filing comments and reply comments.[2]

3. In its motion, CompTel argues that an extension of forty-five days for filing reply comments is needed so that CompTel and other interested parties can thoroughly review and analyze the pricing analyses filed by the local exchange carriers in their comments.[3] CompTel asserts also that informal coordination between interexchange carriers and local exchange carriers will be required in evaluating the data, and that this cannot be accomplished under the current pleading schedule. CompTel states that an extension of time should not delay the ultimate resolution of this proceeding.[4]

4. On December 12, 1991, the International Communications Association (ICA) also filed a Motion for Amendment of Schedule, requesting that the date for reply comments be extended to February 6, 1992. Like CompTel, ICA argues that additional time is needed to coordinate discussions between interexchange carriers and local exchange carriers and to analyze properly the pricing data filed by the local exchange carriers. ICA asserts that additional time for filing reply comments will aid the Commission in its resolution of this proceeding.[5]

5. Comments in support of CompTel's motion were filed by Cable & Wireless Communications, Inc. (Cable & Wireless), MCI Telecommunications Corporation (MCI), Allnet Communication Services, Inc. (Allnet), Bell Atlantic, and Metromedia Communications Corporation (Metromedia). Williams Telecommunications Group, Inc. (WilTel) also filed comments in support of CompTel's motion, but WilTel requested that the reply comment deadline be extended by sixty days, to February 21, 1992.

6. Cable & Wireless, MCI, Allnet, Metromedia, and WilTel argue that the comments filed in this proceeding are voluminous and complex, requiring additional time for full analysis.[6] In particular, MCI and Allnet state that the parties need additional time because the local exchange carriers vary in the assumptions and calculations underlying their pricing analyses, and these analyses must be reconciled.[7] WilTel also emphasizes that such an extension would provide time for discussion of transport pricing issues among the parties, noting that the upcoming holidays are likely to delay work on these issues.[8] Metromedia and Bell Atlantic state that an extension is warranted by the critical impact that this proceeding will have on the interexchange industry.[9]

7. We believe that an extension of the deadline for filing reply comments in this proceeding is appropriate in light of the volume and complexity of the local exchange carrier data. While we believe that interexchange carriers and others must have a reasonable opportunity to evaluate the local exchange carrier pricing analyses,[10] we are not persuaded that the forty-five day period requested by CompTel and ICA, or the sixty days requested by WilTel in its comments, is necessary, particularly when thirty days have already been allowed for the filing of reply comments. We are, therefore, extending the deadline for filing reply comments to January 22, 1992.

8. Accordingly, IT IS ORDERED, pursuant to sections 4(j) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(j) and 155(c), and authority delegated thereunder pursuant to Sections 0.91 and 0.291

---

[1] Transport Rate Structure and Pricing, Order and Further Notice of Proposed Rulemaking, CC Docket Nos. 78-72 and 91-213, 6 FCC Rcd 5341, at para. 14 (1991) (*Transport Order and Further Notice*).

[2] Transport Rate Structure and Pricing, Order, CC Docket No. 91-213, DA 91-1330, released October 25, 1991 (*Extension Order*). Comments and reply comments were initially due on October 29 and November 28, 1991, respectively. *Transport Order and Further Notice*, 6 FCC Rcd 5341.

[3] Motion for Modification of Schedule, filed December 9, 1991, page 1.

[4] *Id*. at 2-3.

[5] Motion for Amendment of Schedule, filed December 12, 1991, at 1-2.

[6] Cable & Wireless Comments at 1; MCI Comments at 1-2; Allnet Comments at 1; Metromedia Comments at 1-2; WilTel Comments at 3-5.

[7] MCI Comments at 1-2; Allnet Comments at 1.

[8] WilTel Comments at 3-5.

[9] Metromedia Comments at 1; Bell Atlantic Comments at 2.

[10] Extension Order at para. 8.

of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, that the motion of the Competitive Telecommunications Association for modification of schedule and the motion of International Communications Association for amendment of schedule ARE GRANTED to the extent described herein, and ARE otherwise DENIED.[11]

9. IT IS FURTHER ORDERED that reply comments in this proceeding are to be filed by January 22, 1992.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

---

[11] To the extent that the filing by WilTel constitutes a request for extension of time, it also is granted in part and denied in part.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Whale Communications of Colorado, Inc. File No. BRH-900122YS

For Renewal of the License of FM
Station KKMG, Pueblo, Colorado

MEMORANDUM OPINION AND ORDER

Adopted: December 18, 1991; Released: December 27, 1991

By the Chief, Audio Services Division:

1. This proceeding involves the application of Whale Communications of Colorado, Inc. (Whale) to renew the license of FM radio station KKMG, Pueblo, Colorado. Michael Haman, General Manager of competing station KIKX, Colorado Springs, Colorado, filed an informal objection against the application. Haman maintains that we should not renew Whale's license due to: (1) KKMG's unauthorized editing and broadcast of a telephone conversation between KKMG and KIKX employees; (2) a KKMG employee's use of profanity and alleged sale of illegal drugs on station premises; and (3) an alleged conflict of interest involving a principal of Whale. Whale filed a letter responding to each of these allegations.

DISCUSSION

2. Pursuant to Section 73.3591(a) of our rules, we will grant a renewal application without a hearing if the application presents no substantial and material questions of fact. *See* 47 C.F.R. § 73.3591(a). Upon consideration of the record of this case, we do not find questions of fact sufficient to warrant a hearing on Whale's renewal application. We do, however, find that Whale violated our rules and, therefore, shall grant Whale's renewal application without prejudice to whatever further action, if any, the Commission may deem appropriate.

3. *Telephone Conversation*. Section 73.1206 of our Rules requires that licensees must, before recording a telephone conversation for broadcast, inform any party to the call of the licensee's intention to broadcast the conversation, except where such party is aware, or may be presumed to be aware, that it is likely to be broadcast. 47 C.F.R. § 73.1206. The intent of this rule is to avoid embarrassment to the party called and to prevent invasions of privacy. *See Heftel Broadcasting-Contemporary, Inc.*, 52 FCC 2d 1005, 1006 (1975); *Public Notice*, 35 FCC 2d 940, 941 (1972).

4. It is undisputed that during the week of April 15, 1990 the KKMG "Morning Zoo" announcers telephoned the competing morning announcer at KIKX and taped the conversation without prior notice. The KKMG announcers who placed the call state that they disguised their voices and requested a song that they knew their competitor would not play. KKMG then edited the tape to make it seem as if the competing disc jockey did not know the sum of 2 + 2, and aired the edited version. KKMG's Morning Zoo (ZOO) announcers recall the telephone conversation they recorded as follows:

> KIKX: Hello, KIKX
>
> ZOO: Is this KIKX?
>
> KIKX: Yes it is!
>
> ZOO: Do you have any "Public Enemy?"
>
> KIKX: Uh, no.
>
> ZOO: So you can't play "Public Enemy?"
>
> KIKX: Sorry, can't help you with that.
>
> ZOO: O.k., bye!

The edited version, which aired on KKMG was as follows:

> KIKX: Hello, KIKX!
>
> ZOO: Is this KIKX?
>
> KIKX: Yes it is!
>
> ZOO: Could you please tell us what the sum of 2 + 2 is?
>
> KIKX: Uh, no.
>
> ZOO: So you don't know the sum of 2 + 2?
>
> KIKX: Sorry, can't help you with that.

5. Whale suggests that the KIKX disc jockey must have been aware of KKMG's intention to broadcast the conversation because KIKX was able to tape KKMG's broadcast which occurred shortly thereafter. Nevertheless, Whale admits that its announcers' conduct was unprofessional and states that it placed the announcers on probation for 30 days. It also submits a statement from its announcers describing the incident as an attempt at humor that was an "error in judgment, committed with little forethought and consideration, |that| occurred in the heat of an intense rating battle."

6. The incident described clearly involves the taping and broadcasting of a telephone conversation without first informing the other party. There is no indication that the KIKX disc jockey was actually aware that the conversation was being taped for later broadcast and, therefore, we reject Whale's suggestion that the incident falls within an exception to the notice requirement of Section 73.1206.[1]

7. *Indecency/Narcotics Sale*. Haman further alleges that, at approximately 2:00 a.m. on Sunday, April 22, 1990 a KKMG announcer, apparently unaware that his microphone was open, engaged in a stream of profanities. Shortly thereafter the announcer, still unaware that his statements were being broadcast, allegedly conducted a narcotics sale in KKMG's control room.

8. The licensee admits to the announcer's use of one expletive but stresses that the announcer was unaware that his microphone was on and that the broadcast was unintentional. The licensee also concedes that the announcer was visited by an acquaintance during his shift and said to the friend "I have some Coke, do you want some Coke?" The licensee denies, however, that a sale of cocaine took place, choosing instead to believe the announcer's explanation that he was offering the friend a soft drink. Nevertheless, the station fired the announcer at the con-

clusion of his shift because, by allowing a guest in the control room and by using an expletive over the air, he breached station policy.

9. With respect to the allegation of broadcast indecency, we note that a federal court has held unconstitutional a Commission rule that would have prohibited the broadcast of indecent material 24 hours a day. *Action for Children's Television v. FCC*, 932 F.2d 1504 (1991). The court remanded that case with the instructions that the Commission establish a "safe harbor" during which material that may be indecent, but is nevertheless constitutionally protected, may be broadcast. Until such time as a new safe harbor goes into effect, the Commission's enforcement authority against indecent broadcasts does not extend to material broadcast between the hours of 8 p.m. and 6 a.m. *See Action for Children's Television*, 852 F.2d 1332 (D.C. Cir. 1988). Thus, KKMG's alleged broadcast of indecent language at 2 a.m. would not be actionable under current standards.[2]

10. Next, we consider the announcer's alleged sale of narcotics in the KKMG control room. Illegal drug use by station employees, either on or off station premises, is a matter of grave concern to the Commission, and we have encouraged licensees to make the maximum effort to stem any such drug activity. *See Metroplex Communications, Inc. (WHYI-FM)*, 5 FCC Rcd 5610, 5613 n.3 (1990); *Public Notice*, 4 FCC Rcd 7533 (1989). In the case of a licensee that was, among other things, ineffective at stopping frequent and ongoing drug use on station premises, we have denied the licensee's renewal application. *See Trustees of the University of Pennsylvania Radio Station WXPN (FM)*, 69 FCC 2d 1394, 1411 (1978); *recon. denied*, 71 FCC 2d 416 (1978). Our action in that case was based on a finding that the licensee had abdicated licensee control over station operations.

11. If allegations of drug use are contested, such allegations should be resolved initially not by the Commission but, rather, in courts of competent jurisdiction with all of the protections applicable to criminal proceedings. *Alan K. Levin*, 97 FCC 2d 1, 5 (Rev. Bd. 1984). In the present case, the record contains no adjudicated finding or undisputed evidence that an illegal drug sale took place in KKMG's control room or that the announcer in question used drugs. Thus, we do not find the allegation to raise any questions appropriate for resolution in a Commission hearing.[3]

12. *Conflict of Interest*. Haman also alleges that there may be a conflict of interest concerning Gary Goodell who, until his resignation in January 1990, was President of Whale and General Manager of KKMG. After resigning from these positions, Goodell returned to his former occupation of independent record promoter. Haman alleges and Whale admits that Goodell currently consults with KKMG on record promotions for artists on whose behalf he is working, while maintaining a 10% stock interest in Whale. Whale maintains that the relationship between the station and Goodell is and has always been proper and professional and no different from relationships with other record promoters.

13. The fact that a minority stockholder is working as a record promoter is not *per se* a violation of Commission rules. A station with such an arrangement must be careful, however, that the relationship does not lead to "plugola," *i.e* a situation where a person responsible for including promotional material in a broadcast has an undisclosed financial interest in the goods or services being promoted. *See Report and Order*, Docket No. 14119, Announcements of Financial Interests of Broadcast Stations, 76 FCC 2d 221 (1980). "Plugola" violates our sponsorship identification rule, which requires that a broadcast station that transmits any matter as the result of direct or indirect receipt of money or other consideration must disclose this fact to its listeners. *See* 47 C.F.R. § 73.1212(a); *see also* 47 U.S.C. §§ 317 and 507.

14. We are unable to determine from the information provided that Whale's relationship with Goodell resulted in any violation of our rules.[4] For example, it is not alleged that Goodell is responsible for selecting records played on the station or that KKMG's selection of programming is in any way the result of undisclosed financial interests. Whale indicates that it is dealing at arms length with Goodell and demonstrates awareness of our sponsorship requirements. We expect that Whale will continue to conduct its relationship with Goodell in a manner that complies with our rules, and that the station will disclose to its listeners any consideration or financial interests that might shape KKMG's future program selections.

15. *Renewal Implications of Whale's Rule Violation*. As discussed earlier, Whale violated Section 73.1206 of our rules by taping and broadcasting a telephone conversation without first informing the other party. When, in the course of the renewal process, we learn of a rule violation by a licensee, we examine the situation on a case-by-case basis to determine a response appropriate to the circumstances. A finding of violation will not necessarily warrant designation of a renewal application for hearing. *See Kaye-Smith Enterprises*, 71 FCC 2d 1402, 1413 (1979), *aff'd*, 90 FCC 2d 27 (1982).

16. A single unauthorized broadcast of a telephone conversation is not generally significant enough to raise a substantial and material question of fact requiring a hearing on a renewal application. The editing of the conversation in the current case so as to embarrass a competitor, compounded the violation but did not elevate it to a level at which we might question the licensee's continued ability to operate in the public interest. The licensee's handling of the matter shows that it did not tolerate its employee's misconduct, and raises no questions as to the licensee's control over station operations. Accordingly, we do not view KKMG's broadcast of the edited telephone conversation as an impediment to renewing the station's license. Our renewal action shall, however, be without prejudice to whatever further action, if any, may be appropriate.

CONCLUSION

17. For the reasons discussed above, we conclude that the informal objection fails to raise a substantial and material question of fact with respect to Whale's renewal application. Furthermore, we find that renewal of Whale's license for KKMG would serve the public interest, convenience, and necessity.

18. Accordingly, IT IS ORDERED that the informal objection of Michael Haman, General Manager of KIKX, IS DENIED.

19. IT IS FURTHER ORDERED that the application of Whale Communications of Colorado, Inc. for renewal of the license of FM Station KKMG, Pueblo, Colorado IS GRANTED WITHOUT PREJUDICE to whatever further action, if any, may be appropriate.

20. This action is taken pursuant to delegated authority. *See* 47 C.F.R. §§ 0.61(c) and 0.283.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads
Chief, Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] In fact, the KKMG announcers disguised their voices so the disc jockey would not suspect their intentions. Although it is possible that someone at KKMG tipped KIKX off to the impending broadcast, enabling KIKX to tape it, this would not negate KKMG's violation. As we have said repeatedly, notification must occur prior to taping, not just prior to broadcast. *See Public Notice*, 35 FCC 2d 940, 941 (1972); *Report and Order*, Broadcast of Telephone Conversations, MM Docket No. 85-37, 3 FCC Rcd 5461, 5463 (1988).

[2] Furthermore, as the allegation of indecency focuses solely on the use of expletives and it has not been shown that the alleged use was repetitive, deliberate, and patently offensive, the allegation would be insufficient for a finding of indecency. *See Pacifica Radio (KPFK-FM)*, 2 FCC Rcd 2698, 2699 (1987); *Pacifica Foundation (WPFW FM)*, 95 FCC 2d 750, 760 (1983).

[3] Even assuming, arguendo, that the alleged drug use did occur, the unique circumstances of this case would not reflect negatively on the licensee's control over station operations or on its ability to operate in the public interest. The KKMG employee who allegedly engaged in a drug transaction had just been hired that day and was only two hours into his first shift when the incident allegedly occurred. Thus, the licensee had no record on which to suspect that the announcer was involved in drugs. When the licensee learned of the announcer's violation of its "no guests" policy, which in itself could thwart drug activity on the premises, the licensee took swift action to prevent any recurrence of the alleged conduct.

[4] To the extent that the objector may be arguing that the Commission should apply a conflict of interest policy that goes beyond the statutory prohibitions of payola and plugola, we note that the Commission in 1985 eliminated such a policy as unnecessarily restrictive. *See Policy Statement and Order,* Unnecessary Broadcast Regulation, MM Docket No. 83-842, 57 RR 2d 913, 917-18 (1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 90-312

In the Matter of

Amendment of Part 1 of the
Commission's Rules to
Implement Section 5301 of
the Anti-Drug Abuse Act
of 1988

REPORT AND ORDER

Adopted: December 11, 1991; Released: December 27, 1991

By the Commission:

I. INTRODUCTION

1. In this Report and Order, we adopt rules implementing section 5301 of the Anti-Drug Abuse Act of 1988.[1] Specifically, under the new rules, in order to be eligible for any instrument of FCC authorization, an applicant must certify that neither the applicant nor any party to the application is subject to a denial of Federal benefits under section 5301.

II. BACKGROUND

2. Section 5301 provides Federal and state court judges the discretion to deny Federal benefits to individuals convicted of offenses consisting of the distribution or possession of controlled substances. Federal benefits include the "issuance of any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States."[2] FCC licenses are clearly included within the scope of the statute. [3] In addition, the Office of National Drug Control Policy (ONDCP) plan for implementation of section 5301, submitted by the President to the Congress on August 30, 1989, calls for a two-pronged approach by agencies: (1) use of the General Services Administration's (GSA's) "Debarment List"; and (2) use of an applicant certification.

3. Consistent with the ONDCP plan, the Notice of Proposed Rule Making (NPRM) in this proceeding proposed rules requiring applicants to certify as to their eligibility under section 5301.[4] The proposed rules also required licensees to inform the Commission if they or their principals become ineligible under section 5301 during the course of the license term. Six parties filed comments in this proceeding and five parties filed reply comments. Further, on September 11, 1990, the United States Department of Justice issued its Guideline on section 5301, which reiterates the ONDCP implementation procedures for Federal agencies previously submitted to Congress by the President. The issues raised by the commenters and the details of the rules we adopt are discussed below.[5]

III. DISCUSSION

A. Licenses Subject to Section 5301

4. In the NPRM, we proposed to apply the definition of "license" contained in the Administrative Procedure Act to determine the scope of the term "license" under section 5301 and thus the scope of our implementing rules.[6] Under that definition, "license includes the whole or part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission."[7] With one exception, we proposed that the rules apply to all forms of Commission instruments of authority, including, for example, authorizations for the use of radio spectrum, radio operator authorizations, equipment certification, type acceptances or type approvals, and certificates of authority to construct communications lines under 47 U.S.C. § 214. Because section 5301 applies only to "professional" and "commercial" licenses, we proposed to exempt amateur authorizations, which may not be used for professional or commercial purposes.[8] We also noted that "[b]ecause they do not involve applications or the issuance of individual authorizations or licenses by the Commission," individual users of a blanket license (*e.g.*, cellular radio users) are not covered by section 5301.[9]

5. We adopt these proposals without change.[10] We reject the suggestion of Brown and Schwaninger (B&S) that amateur authorizations be included within the scope of our rules.[11] As noted above, since amateur authorizations cannot be used for professional or commercial purposes, they are outside the scope of section 5301. We also reject the request of The New York Times Company (Times) to exempt "most" private radio services and receive-only satellite authorizations from the rules.[12] Licenses for these services fall squarely within the definition of Federal benefits in section 5301, and we therefore have no discretion to exempt them.[13]

6. We also reject the suggestion of the National Association for the Advancement of Colored People (NAACP) that end users under a blanket license, such as owners of cellular telephones, beepers and pagers, should be subject to the rules because the FCC could license them individually.[14] While we are sensitive to the concerns of the NAACP that these devices may be used in furtherance of the drug trade, section 5301 applies only to the "issuance of any . . . [Federal] license." As noted above, end users under a "blanket" authorization neither apply for nor receive licenses from the Commission and are therefore outside the scope of section 5301.[15]

B. Certification Requirement

7. In the NPRM, we proposed that applicants for any new, modified or renewed instrument of authorization from the Commission must certify that neither the applicant nor any party to the application is subject to a denial of federal benefits pursuant to section 5301.[16] We will adopt this requirement as proposed, with a minor transitional adjustment discussed below.[17]

8. B&S is the only commenter who opposes the certification requirement.[18] We agree with B&S that neither section 5301 nor the ONDCP plan mandates adoption of a certification requirement.[19] Nevertheless, we continue to believe, consistent with the ONDCP plan, that use of both the GSA Debarment List and an applicant certification will maximize our ability to enforce section 5301 effectively. In particular, certification will not only identify parties to an application that are subject to a section 5301 bar, but will identify applicants subject to a section 5301 bar that have not yet appeared on the Debarment List.[20] The fact that certification imposes some additional burden on applicants does not persuade us to dispense with it. We note, however, that B&S has overstated the burden in that separate certifications need not be filed for each party to the application.[21] Rather, only a single certification, covering all parties to the application, must be filed.

9. We are, however, sensitive to B&S's concern that there could be some confusion as to the certification requirement until FCC forms are amended to contain a certification provision, which could take some time.[22] Accordingly, to provide for an orderly transition to this certification requirement, we are amending the proposed rule with respect to applications that require submission of a specific FCC form. As to these applications, until such time as the FCC application form contains a certification provision, the applicant shall be deemed to have certified as to its eligibility by signing the application,[23] unless an exhibit is included stating that the signature does not constitute such a certification and explaining why the applicant is unable to certify.[24] In situations where no FCC application form is involved, *e.g.*, requests for Special Temporary Authority pursuant to 47 U.S.C. § 309(f), section 214 applications filed pursuant to 47 C.F.R. Part 63, cable registration pursuant to 47 C.F.R. §76.12, applications for Direct Broadcast Satellite service pursuant to 47 C.F.R. Part 100, a certification must be included with the application upon the effective date of the new rules.[25]

C. Impact of Failure to Certify

10. Section 1.2002 of the proposed rules[26] provides that failure to certify that neither the applicant nor any parties to the application are subject to a denial of Federal benefits under section 5301 will lead to automatic dismissal of an application. A number of commenters express concern that this provision is too harsh in that it would unfairly penalize an applicant who is unable to certify because of the misdeeds of one minority shareholder or partner.[27] Although some of the commenters argue that this situation could be remedied by applying section 5301 to individuals only (*see* ¶ 13, *infra)*, most contend, as an alternative, that the Commission should either provide applicants with an opportunity to arrange for divestiture or removal of the involved party, or itself order such divestiture or removal.[28]

11. We agree with the commenters that the proposed rules may be unduly harsh in automatically depriving corporations or partnerships of FCC licenses without giving them an opportunity to seek the removal of the offending individual. Accordingly, we are modifying the proposed rule to provide that an application will not be automatically dismissed for failure to contain a certification that no party to the application is subject to a section 5301 bar. Instead, section 1.2002 provides that failure to certify will result in an application being ineligible for grant. Applicants will have 90 days from the date the application was filed to come into compliance with the rule through divestiture or removal of the offending party. Applicants who are unable to certify will presumably want to apprise the Commission of the circumstances in their applications. In cases where a certification has been incorporated into the application form, however, applicants must answer the question in the certification form either affirmatively or negatively, and failure to do so will lead to dismissal pursuant to the relevant processing rules.

12. Some commenters express concern that statutory or contractual obligations may make it impossible to sever a relationship with the offending individual, or even to obtain information from individuals regarding their convictions.[29] Based on our experience with our policies regarding character qualifications in broadcast licensing,[30] we do not anticipate any problems in this regard. To the extent that any such problems do occur, applicants are free to use the 90-day period referenced above to come into compliance with the rules or to seek other Commission action.

D. Parties to the Application

13. The proposed rules define "party to the application" as follows: 1) an individual applicant; 2) if the applicant is a corporation, all officers, directors or persons holding 5% or more of the outstanding voting and/or non-voting stock; and 3) if the applicant is a partnership, all non-limited partners and any limited partners holding a 5% or more interest.[31] Several commenters argue that section 5301 applies only to individuals and that the Commission is improperly extending its terms to cover corporations and partnerships.[32] In support of their position, a number of commenters cite a floor statement made by Senator Gramm, in which he discussed the possible unintended effects of a section 5301 denial on third parties:

> If you had several people who were under contract with the Federal Government to do something, and one of them [was] convicted of being a drug pusher and is thus denied the ability to enter into a contract with the Federal Government, it would require that that individual be excluded from the contract with the Federal Government. But it would not invalidate the ability of the other parties involved to be engaged in a contract with the Federal Government.[33]

14. We disagree with the commenters that our rules implementing section 5301 should not apply to individuals who are part of a corporate or partnership applicant. Senator Gramm's statement evidences a clear congressional intent that an individual who has been denied Federal benefits under section 5301 not be permitted to receive a Federal benefit. It would be contrary to congressional intent to assume that individuals denied Federal benefits under section 5301 could hide behind the veil of a corporation or partnership in order to obtain benefits they would otherwise have been denied. In the context of FCC licenses, we believe the best way to prevent such a result is to make an entity ineligible if any parties to the application, as defined herein, are subject to a section 5301 bar. Under this approach, the "innocent" parties to an application will have every incentive to ensure the divestiture or removal of the ineligible party. We note that the commenters' concerns should be allayed

substantially by our decision not to require automatic dismissal when an applicant cannot certify as to all parties, but rather to provide 90 days for divestiture or removal of any non-eligible parties, or other action that is appropriate in the particular circumstances. *See* ¶¶ 11, 12 *supra*. Thus, the ineligibility of one individual party to an application should not adversely affect the interests of innocent parties to the application.

15. B&S, GTE and Rochester Telephone Corporation (Rochester) propose that, even if parties to the application are included in the certification, the 5% or more of voting or non-voting stock threshold is too inclusive.[34] They argue that there is no public policy reason to deny benefits to a corporation if a minor shareholder who exercises no control over the corporation is ineligible under section 5301. They maintain that a higher (50%) threshold would more accurately reflect a level of stock ownership at which the shareholder would be able to affect the affairs of the licensee.[35]

16. We will adopt our definition of party to an application as proposed. Contrary to the suggestions of B&S, GTE and Rochester, the purpose of our threshold for who constitutes a party to an application is not to determine who exercises influence or control over the applicant. Rather, it is to implement the section 5301 purpose of ensuring that an individual who is denied Federal benefits under section 5301 not receive, in whole or in part, an FCC license or other Federal benefit. We believe an individual with a 5% or greater share in an FCC application (as well as the other individuals included as parties in the rule) clearly benefits from grant of a license. Accordingly, we think it would be inconsistent with the purpose of section 5301 to grant a license to such a person. As noted above, *see* ¶¶ 11, 12, 14, *supra*, harm to "innocent" parties to an application will be ameliorated by our decision not to require automatic dismissal, but rather to provide an opportunity for the applicant to remove the ineligible individual from his or her status as a party to the application or to request other appropriate action.[36]

E. Termination of Licenses

17. In the NPRM, we asked for comment on whether section 5301 provides authority for revocation of existing authorizations if the licensee becomes subject to a section 5301 denial of Federal benefits.[37] In this regard, we also proposed a rule requiring all holders of Commission authorizations to notify the Commission of any section 5301 bar imposed on them or any of their principals within 30 days of the issuance of such judicial order.[38] We agree with the commenters that since section 5301, by its terms, covers only "issuance" of Federal benefits,[39] it cannot be read to authorize revocation.[40] Therefore, we will not impose the proposed reporting requirement.[41]

IV. CONCLUSION

18. Accordingly, IT IS ORDERED that Part 1 of the Commission's rules are amended as shown in Appendix A, effective 30 days from publication of a summary of this Report and Order in the Federal Register.[42]

19. This action is taken pursuant to authority contained in sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j) and 303(r), and the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 823a.

20. A Final Regulatory Flexibility Analysis is contained in Appendix B. The Secretary shall cause a copy of that analysis to be sent to the Chief Counsel for Advocacy of the Small Business Administration at the time of the publication of a summary of this Report and Order in the Federal Register.

21. For further information, contact Sharon Diskin, Office of General Counsel, (202) 632-6990.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Part 1, Title 47 of the Code of Federal Regulations is amended to read as follows:

I. Part 1 - Practice and Procedure

1. The authority citation for Part 1 is revised to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303: Implement, 5 U.S.C. 552, unless otherwise noted; Implement 21 U.S.C. 853a.

2. A new Subpart P is added to read as follows:

TABLE OF CONTENTS

Subpart P - Implementation of the Anti-Drug Abuse Act of 1988

1.2001 Purpose.
1.2002 Applicants required to submit information.
1.2003 Applications affected.

§ 1.2001. Purpose.

To determine eligibility for professional and/or commercial licenses issued by the Commission with respect to any denials of Federal benefits imposed by Federal and/or state courts under authority granted in 21 U.S.C. 853a.

§ 1.2002. Applicants required to submit information.

(a) In order to be eligible for any new, modified, and/or renewed instrument of authorization from the Commission, including but not limited to, authorizations issued pursuant to sections 214, 301, 302, 303(l), 308, 310(d), 318, 319, 325(b), 351, 361(b), 362(b), 381, and 385 of the Communications Act of 1934, as amended, by whatever name that instrument may be designated, all applicants shall certify that neither the applicant nor any party to the application is subject to a denial of Federal benefits that includes FCC benefits pursuant to section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 853a. If a section 5301 certification has been incorporated into the FCC application form being filed, the applicant need not submit a separate certification. If a section 5301 certification has not been incorporated into the FCC application form being filed, the applicant shall be deemed to have certified by signing the application, unless an exhibit is included stating that the signature does not constitute such a certification and explaining why the applicant is unable to certify. If no FCC application form is involved, the applicant must attach a certification to its written application. If the applicant is unable to so certify, the applicant shall be ineligible for the authorization for which it applied, and will have 90 days from the filing of the application to comply with this rule. If a section 5301 certification has been incorporated into the FCC application form, failure to respond to the question concerning certification shall result in dismissal of the application pursuant to the relevant processing rules.

(b) A party to the application, as used in paragraph (a) of this section shall include:

(1) if the applicant is an individual, that individual;

(2) if the applicant is a corporation or unincorporated association, all officers, directors, or persons holding 5% or more of the outstanding stock or shares (voting and/or non-voting) of the applicant; and

(3) if the applicant is a partnership, all non-limited partners and any limited partners holding a 5% or more interest in the partnership.

(c) The provisions of paragraphs (a) and (b) of this section are not applicable to the Amateur Radio Service, the Citizens Band Radio Service, the Radio Control Radio Service, or to users in the Public Mobile Services and the Private Radio Services that are not individually licensed by the Commission.

§ 1.2003. Applications affected.

The certification required by § 1.2002 must be filed with the following applications as well as any other requests for authorization filed with the Commission, regardless of whether a specific form exists.

FCC 301	Application for Construction Permit for Commercial Broadcast Station;
FCC 301-A	Application for Authority to Operate a Broadcast Station by Remote Control or to Make Changes in a Remote Control Authorization;
FCC 302	Application for New Broadcast Station License;
FCC 303-S	Application for Renewal of License for Commercial and Noncommercial AM, FM or TV Broadcast Station;
FCC 307	Application for Extension of Broadcast Construction Permit or to Replace Expired Construction Permit;
FCC 308	Application for Permit to Deliver Programs to Foreign Broadcast Stations;
FCC 309	Application for Authority to Construct or Make Changes in an International or Experimental Broadcast Station;
FCC 310	Application for an International, Experimental Television, Experimental Facsimile, or a Developmental Broadcast Station License;
FCC 311	Application for Renewal of an International or Experimental Broadcast License;
FCC 313	Application for Authorization in the Auxiliary Radio Broadcast Services;
FCC 313-R	Application for Renewal of Auxiliary Broadcast License;
FCC 314	Application for Consent to Assignment of Broadcast Station Construction Permit or License;
FCC 315	Application for Consent to Transfer of Control of Corporation Holding Broadcast Station Construction Permit or License;
FCC 316	Application for Consent to Assignment of Radio Broadcast Station Construction Permit or License or Transfer of Control of Corporation Holding Radio Broadcast Station Construction Permit or License;
FCC 327	Application for Cable Television Relay Service Station Authorization;
FCC 330	Application for Authorization to Construct New or Make Changes in an Instructional Television Fixed and/or Response Station(s), or to Assign or Transfer Such Stations;
FCC 330-L	Application for Instructional Television Fixed Station License;
FCC 330-R	Application for Renewal of Instructional Television Fixed Station and/or Response Station(s) and Low Power Relay Station(s) License;
FCC 340	Application for Construction Permit for Noncommercial Educational Broadcast Station;
FCC 345	Application for Transfer of Control of a Corporate Licensee or Permittee, or Assignment of License or Permit, for an FM or TV Translator Station, or a Low Power Television Station;
FCC 346	Application for Authority to Construct or Make Changes in a Low Power TV, TV Translator or TV Booster Station;
FCC 347	Application for a Low Power TV, TV Translator or TV Booster Station License;
FCC 348	Application for Renewal of License for Translator or Low Power Television Broadcast Station;
FCC 349	Application for Authority to Construct or Make Changes in an FM Translator or FM Booster Station;

FCC 350	Application for an FM Translator or FM Booster Station License;
FCC 401	Application for New or Modified Common Carrier Radio Station Authorization Under Part 22 of this chapter;
FCC 402	Application for Station Authorization in the Private Operational Fixed Microwave Radio Service;
FCC 402-R	Renewal Notice and Certification in the Private Operational Fixed Microwave Radio Service;
FCC 403	Application for Radio Station License or Modification Thereof Under Parts 23 or 25 of this chapter;
FCC 404	Application for Aircraft Radio Station License;
FCC 405	Application for Renewal of Radio Station License;
FCC 405-A	Application for Renewal of Radio Station License and/or Notification of Change to License Information;
FCC 405-B	Ship/Aircraft License Expiration Notice and/or Renewal Application;
FCC 406	Application for Ground Station Authorization in the Aviation Services;
FCC 407	Application for New or Modified Radio Station Construction Permit;
FCC 409	Airborne Mobile Radio Telephone License Application;
FCC 410	Registration of Canadian Radio Station Licensee and Application for Permit to Operate (Land Mobile);
FCC 442	Application for New or Modified Radio Station Authorization Under Part 5 of this chapter - Experimental Radio Service (Other than Broadcast);
FCC 490	Application for Assignment or Transfer of Control Under Part 22 of this chapter;
FCC 493	Application for Earth Station Authorization or Modification of Station License (Proposed);
FCC 494	Application for a New or Modified Microwave Radio Station License Under Part 21 of this chapter;
FCC 494-A	Certification of Completion of Construction Under Part 21 of this chapter;
FCC 503	Application for Land Radio Station License in the Maritime Services;
FCC 506	Application for Ship Radio Station License;
FCC 574	Application for Private Land Mobile and General Mobile Radio Services;
FCC 574-R	Application for Renewal of Radio Station License;
FCC 701	Application for Additional Time to Construct a Radio Station;
FCC 702	Application for Consent to Assignment of Radio Station Construction Permit or License;
FCC 703	Application for Consent to Transfer Control of Corporation Holding Station License;
FCC 704	Application for Consent to Transfer of Control of Corporation Holding Common Carrier Radio Station Construction Permit or License;
FCC 730	Application for Registration of Equipment to be Connected to the Telephone Network;
FCC 731	Application for Equipment Authorization;
FCC 753	Restricted Radiotelephone Operator Permit Application;
FCC 755	Application for Restricted Radiotelephone Operator Permit - Limited Use;
FCC 756	Application for Commercial Radio Operator License.

APPENDIX B

List of Commenters

Brown and Schwaniger

GTE Service Corporation

E Z Communications et al.

National Association for the Advancement of Colored People

National Association of Broadcasters

Rochester Telephone Corporation

List of Reply Commenters

Bell Atlantic Telephone Companies

Centel Cellular Company

National Telephone Cooperative Association

Telocator

The New York Times Company

APPENDIX C

FINAL REGULATORY FLEXIBILITY ANALYSIS

I. Need and Purpose of this Action:

These rules are being promulgated to implement section 5301 of the Anti-Drug Abuse Act of 1988 relating to denials of Federal benefits, including authorizations issued by the Federal Communications Commission, to persons barred from such benefits under section 5301.

The rules will require applicants to collect information on any denials of Federal benefits imposed under section 5301 after the applicant, or any party thereto, has been convicted of drug possession or trafficking. Each covered applicant will be required to certify that neither it nor any party to the application is subject to a section 5301 bar. Applicants subject to a section 5301 denial of federal benefits will be ineligible for licenses.

II. Summary of Issues Raised in Response to the Initial Regulatory Flexibility Analysis

No comments were filed in response to the Initial Regulatory Flexibility Analysis.

III. Significant Alternatives Considered and Rejected

Comments were filed objecting to automatic dismissal of noncertifying applicants. The rule replaces this provision with a requirement that non-certifying applicants will not be eligible for grant, and provides an applicant with 90 days to come into compliance with the rule.

Comments were also received proposing a rule amendment to eliminate the need for a certification. This proposal was generally rejected as inconsistent with the purpose of section 5301. With respect to application forms into which certification has not yet been incorporated, however, the rule states that an applicant will be deemed to have certified as to eligibility by signing its application. Other commenters opposed the requirement that licensees be required to report to the Commission on any section 5301 bars imposed during the license term within 30 days of the effective date of the bar. The reporting requirement was eliminated. No other significant alternatives were considered.

FOOTNOTES

[1] 21 U.S.C. § 853a.

[2] 21 U.S.C. § 853a(d)(1).

[3] *See, e.g.*, 134 Cong. Rec. S15964, S15969 (daily ed. Oct. 14, 1988) (statements of Sen. Gramm).

[4] 4 FCC Rcd 4500, 55 Fed. Reg. 37,438 (1990). We note that our use of the GSA Debarment List may be implemented without rule changes. Further, no rule changes are necessary to implement section 5301 with respect to contracts entered into by the Commission.

[5] A list of commenters and reply commenters is set forth in Appendix B.

[6] 5 FCC Rcd at 4501 (¶ 7).

[7] 5 U.S.C. § 551(8).

[8] 5 FCC Rcd at 4501 (¶ 8), citing 47 C.F.R. §§97.110, 97.112.

[9] *Id.* at 4505 n.6. The proposed rules also exempted the Citizens Band Radio Service and Radio Control Radio Service, which do not involve individual FCC licensing. Those proposed exemptions will also be adopted.

[10] We are clarifying the rule, however, to reflect that certain private radio services other than land mobile services that also have non-licensed users are similarly not covered.

[11] *See* B&S Comments at 9-10.

[12] *See* Times Reply Comments at 2.

[13] 21 U.S.C. § 853a(d)(1).

[14] *See* NAACP Comments at 3.

[15] The NAACP refers to its pending Petition for Rule Making, in which it requested the Commission to develop rules and policies to prevent the use of FCC licensed or authorized beepers and pagers in the illegal drug trade. This petition will be addressed separately, and our action here is without prejudice to our disposition of that petition.

[16] 5 FCC Rcd at 4500 (¶ 4).

[17] We are also making minor word changes in the rules to make more explicit that the eligibility requirement in these rules applies only if a section 5301 denial of benefits includes FCC licenses. If specific enumerated benefits denied by a judge do not include FCC licenses, the applicant may certify that it is not subject to a denial of benefits under section 5301. If an applicant's status under section 5301 changes during the pendency of its application, it is, of course, required to update its application. *See* 47 C.F.R. §1.65.

[18] *See* B&S Comments at 1-5.

[19] As B&S notes, the ONDCP plan states that it "expects" agencies to require certification. *See id.* at 1.

[20] For these reasons, we also reject the suggestion of GTE Service Company (GTE) that the language of the certification be revised merely to reflect whether the applicant appears on the Debarment List. *See* GTE Comments at 3. In response to GTE's concern that an applicant will be unable to certify even if its denial of benefits has been waived or suspended by a court pursuant to section 5301, *see id.*, we note that such an applicant would not be subject to a section 5301 bar and could so certify. We also note that there is nothing in section 5301 to suggest that denial of Federal benefits should be postponed pending appeal. *See* GTE Comments at 3 n.1.

[21] *See* B&S Comments at 2-3.

[22] *See* B&S Comments at 4.

[23] We note that applicants who intentionally falsely certify may be subject to sanctions for misrepresentation.

[24] Such an exhibit would put an applicant in the same position as an applicant that answers no to a certification incorporated in an FCC application form. *See* ¶ 11, *infra*.

[25] GTE questions whether if someone other than an applicant files on behalf of an applicant, the filing entity is responsible for the accuracy of the certification. GTE Comments at 10. The Communications Act requires that all Title III applications be signed by the applicant. 47 U.S.C. 304, 308(b), 319(a). In other situations, signature by an applicant's agent may be permitted. In either case, the applicant is the entity the Commission will hold responsible for any misstatements in the application.

[26] 5 FCC Rcd at 4500 (¶ 4) and App. A (§1.2002(a)).

[27] Joint Comments of EZ Communications, Great American Television and Radio Company, Inc., McGraw Hill Broadcasting Company, Inc. and Renaissance Communications Corporation (EZ) at 2; *cf.* Telocator Reply Comments at 10; Centel Cellular Company (Centel) Reply Comments at 7.

[28] *E.g.*, Telocator Reply Comments at 10; EZ Comments at 2; National Association of Broadcasters (NAB) Comments at 5; Centel Reply Comments at 8.

[29] *E.g.*, GTE Comments at 5; National Telephone Cooperative Association (NTCA) Reply Comments at 4-6.

[30] *See generally Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, *recon. granted in part, denied in part*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom. National Association for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987); *see also Policy Regarding Character Qualifications in Broadcasting Licensing*, 5 FCC Rcd 3252 (1990), *recon. granted in part, denied in part*, 6 FCC Rcd 3448 (1991), *petitions for further recon. pending*. Our character policies are, of course, unaffected by the rules adopted herein.

[31] 5 FCC Rcd at 4500 (¶¶ 5, 6) and App. A (§1.2002(b)).

[32] *E.g.*, Comments of NAB at 2-6; Reply Comments of the Bell Atlantic Telephone Companies at 2; NTCA Reply Comments at 3.

[33] 134 Cong. Rec. S15973 (daily ed. Oct. 14, 1988).

[34] *See* B&S Comments at 5; GTE Comments at 4-5; Rochester Comments at 3-4.

[35] *E.g.*, B&S Comments at 4; Rochester Comments at 4. Rochester also proposes, in the case of closely held corporations, a subjective threshold based on whether or not a party exercises "substantial influence and control." *Id.*

[36] GTE asks for guidance regarding the treatment under the rules of corporations who are parties to an application. GTE Comments at 10. Officers and directors of such corporate parties will be considered parties to the application for purposes of the rules. Shareholders will be considered parties if, through use of the multiplier approach we currently use in our broadcast attribution rules, *see* 47 C.F.R. §73.3555 Note 2(d), they have a 5% or greater interest in the applicant. Rochester is concerned that publicly traded corporations are unlikely to be aware of the status of their shareholders, especially when stock is held in "street name." Rochester Comments at 2. We believe that corporations should take whatever steps are reasonably necessary to comply with the rules. We believe it is unlikely that a corporation will be unable to determine the identity of holders of 5% or more of its stock. If this occurs, the applicant should bring the matter to the Commission's attention.

[37] 5 FCC Rcd at 4501 (¶ 9).

[38] *Id.*

[39] 21 U.S.C. §853a(d)(1).

[40] *E.g.*, GTE Comments at 9; Telocator Reply Comments at 13; NTCA Reply Comments at 6-7. The Commission retains discretion, of course, to initiate revocation proceedings under 47 U.S.C. § 312(a) pursuant to its character qualifications policies.

[41] We note that broadcast licensees are required to report felonies and certain other adjudications under our broadcast character policies. *See* 47 C.F.R. §1.65(c). (The effectiveness of this requirement has been suspeded pending further reconsideration. *See Order*, 6 FCC Rcd 4787 (1991); *Errata*, 6 FCC Rcd 5017 (Gen. Counsel 1991)).

[42] By letter dated November 1, 1990, the Office of Management and Budget indicated that its approval is not required under the Paperwork Reduction Act for an applicant certification requirement.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cencom of Kentucky,
Complainant,

v.

File No. 86-0001

South Central Bell
Telephone Company,
Respondent.

ORDER

Adopted: December 18, 1991; Released: December 26, 1991

By the Chief, Accounting and Audits Division:

1. On October 28, 1985, Cencom of Kentucky, filed the above-captioned complaint pursuant to Section 224 of the Communications Act, 47 U.S.C. § 224, seeking a Commission determination that South Central Bell Telephone Company was charging pole attachment rates in excess of the maximum lawful rate.

2. On December 6, 1991, counsel for the complainant advised that there is no longer any need to pursue the complaint and requested dismissal of the pending complaint.

3. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the expenditure of further time and resources by the parties and this Commission.

4. Accordingly, IT IS ORDERED, pursuant to Section 4 (i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154 (i), and authority delegated by Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§0.91, 0.291, that the complaint filed by Cencom of Kentucky IS DISMISSED and this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran, Chief
Accounting and Audits Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Raystay Company, *et al.*
Complainant,

v. File No. 87-0011

United Telephone Company
of Pennsylvania,
Respondent.

ORDER

Adopted: December 18, 1991; Released: December 26, 1991

By the Chief, Accounting and Audits Division:

1. On July 24, 1987, Raystay Company, *et al.*, since renamed as Helicon Group, Ltd. filed the above-captioned complaint pursuant to Section 224 of the Communications Act, 47 U.S.C. § 224, seeking a Commission determination that United Telephone of Pennsylvania had imposed unjust and unreasonable rates for cable television pole attachments.

2. On May 23, 1988, counsel for both parties advised that this matter could be resolved without any additional Commission resources and requested dismissal of the pending complaint.

3. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the expenditure of further time and resources by the parties and this Commission.

4. Accordingly, IT IS ORDERED, pursuant to Section 4 (i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154 (i), and authority delegated by Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§0.91, 0.291, that the complaint filed by Raystay Company, *et al.*, IS DISMISSED and this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran, Chief
Accounting and Audits Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

SOUTHWESTERN BELL
GTE SERVICE CORPORATION

AAD 91-80

Notification of Intent to
Adopt Statement of Financial
Accounting Standards
No. 106, Employers'
Accounting for Postretirement
Benefits Other Than Pensions

ORDER

Adopted: December 19, 1991; Released: December 26, 1991

By the Chief, Common Carrier Bureau:

1. Southwestern Bell and GTE have filed, pursuant to Section 32.16 of the Commission's rules,[1] notices of intention to adopt Statement of Financial Accounting Standards No. 106 (SFAS-106), "Employers' Accounting for Postretirement Benefits Other Than Pensions". SFAS-106 was adopted by the Financial Accounting Standards Board (FASB) in December 1990. Section 32.16 requires carriers to apply new standards adopted by the FASB and provides for automatic Commission approval of a new standard unless the Commission notifies carriers within 90 days after receiving notice of intention to follow a new standard that the new standard should not be adopted.

2. SFAS-106 establishes new accounting and reporting standards for postretirement benefits other than pensions, especially health care benefits. This statement requires companies to change from the cash basis of accounting (pay as you go) to the accrual basis of accounting for postretirement benefits. The effective date of SFAS-106 is for fiscal years beginning after December 15, 1992, although earlier implementation is encouraged by the FASB.

3. The Commission has decided that it would incorporate changes in generally accepted accounting principles provided that such changes do not conflict with its regulatory objectives.[2] After reviewing SFAS-106, we have concluded that its adoption for accounting purposes will not conflict with the Commission's regulatory objectives. Accordingly, we are authorizing carriers to implement SFAS-106 on or before January 1, 1993.

4. Under SFAS-106 companies have two basic options regarding recognition of the transition obligation.[3] They can either use a flash-cut approach, i.e., recognizing the embedded liability as an expense immediately, or a deferral and amortization approach. Under the deferral and amortization approach, companies are permitted to amortize the transition obligation over a period of 20 years or more, depending on the average remaining service period of active plan participants. We believe the incremental effects on interstate expenses of using the flashcut approach would be so large as to seriously distort the carriers' operating results.[4] Therefore, we direct the carriers to defer and amortize the embedded liability in accordance with SFAS-106.

5. ACCORDINGLY, IT IS ORDERED, pursuant to Section 32.16 of the Commission's rules, as amended, 47 C.F.R. §32.16, that all subject carriers ARE HEREBY AUTHORIZED to adopt SFAS-106 accounting on or before January 1, 1993, using the amortization method of recognizing the transition obligation.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

---

[1] 47 C.F.R. §32.16.

[2] Revision of the Uniform System of Accounts for Telephone Companies to Accommodate Generally Accepted Accounting Principles, 50 F.R. 48408, November 25, 1985.

[3] The transition obligation is the carrier's unfunded liability for benefits earned in the past as of the date SFAS-106 is implemented. SFAS-106 defines the transition obligation as "the unrecognized amount, as of the date this Statement is initially applied, of (a) the accumulated postretirement benefit obligation in excess of (b) the fair value of plan assets plus any recognized accrued postretirement benefit cost or less any recognized prepaid postretirement benefit cost."

[4] For example, GTE projects that immediate recognition of the transition obligation would increase its interstate costs by $549 million, compared with a $27 million annual increase if its transition obligation is deferred and amortized.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Mark W. Dobronski
On Request for Inspection
of Records

FOIA Control No. 91-84

MEMORANDUM OPINION AND ORDER

Adopted: December 18, 1991; Released: December 20, 1991

By the Commission:

1. The Commission has before it an Application for Review filed by Mark W. Dobronski, appealing a May 20, 1991 Freedom of Information (FOIA) decision by the General Counsel. The General Counsel denied Mr. Dobronski's request for access to certain records of a Commission employee. As discussed herein, we affirm the General Counsel's ruling.

BACKGROUND

2. By request dated April 13, 1991, Mr. Dobronski sought access to three categories of records. First, he asked for all requests for expense reimbursement submitted by the employee during the period of January 1, 1989, through April 13, 1991 (the date of the FOIA request). Second, he requested all of the employee's attendance records for the same period of time, including records identifying absences for annual leave, vacation, compensatory time, holiday or illness. Third, Mr. Dobronski sought access to records concerning any investigation by the FCC, or its Inspector General, of unauthorized disclosure by the employee of confidential drafts of Commission documents to persons outside the Government.

3. The General Counsel released the expense reimbursement records requested.[1] However, the General Counsel found that the request for leave records raised substantial privacy interests protected by Exemption 6 of the FOIA.[2] Because Mr. Dobronski stated no public interest reasons that would warrant disclosure, the General Counsel denied access to the leave records. Finally, the General Counsel declined to confirm or deny the existence of the investigatory records requested by Mr. Dobronski.

DISCUSSION

4. On review, Mr. Dobronski first argues that the FOIA does not require requesters to state public interest reasons warranting disclosure of records. Nonetheless, Mr. Dobronski states that he seeks access to the employee's leave records "to investigate certain allegations of corruption within the agency."

5. At the outset, we find that the leave records at issue meet the threshold requirement of Exemption 6 of the FOIA. This exemption protects personnel, medical, and similar files. 5 U.S.C. § 552(b)(6). The leave records requested fall within the ambit of Exemption 6 because they are personnel files maintained by the agency. In evaluating a request for records under Exemption 6, however, an agency must identify and balance the privacy interest served by withholding the records at issue, and the public interest that would be furthered by disclosing such records. *See Department of Justice v. Reporters Committee for Freedom of the Press (Reporters Committee)*, 489 U.S. 749, 762-764 (1989); *Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976); *Painting and Drywall Work Preservation Fund v. HUD*, 936 F.2d 1300, 1302 (D.C. Cir. 1991); *Church of Scientology v. U.S. Department of the Army*, 611 F.2d 738, 745-46 (9th Cir. 1979). In this connection, the term "privacy" has been defined as embodying "the individual's control of information concerning his or her person." *Reporters Committee*, 489 U.S. at 763 (1989). Further, applicable case law has established that the balancing of the privacy and the public interests does not depend on the identity or specific purpose of the FOIA request. Rather, the balancing is based on whether the requested information will shed light on the agency's performance of its duties. *See Reporters Committee* 489 U.S. at 749.

6. The employee's leave records at issue here reflect choices concerning the use of annual, sick, and other types of leave. In some instances, the records contain particular reasons given by the employee for the absences. We agree with the General Counsel's finding that the employee has a privacy interest in controlling the dissemination of these personnel records reflecting the types of leave chosen during the period of time at issue.

7. In his initial request, Mr. Dobronski did not set forth any reason why disclosure of the employee's leave records would serve the public interest. Therefore, we believe that the General Counsel's initial decision properly concluded that disclosure of the records was not warranted. On review, Mr. Dobronski states that "the purpose of [the] request is to investigate certain allegations of corruption within the agency." We conclude, however, that Mr. Dobronski's bare allegations of corruption are insufficient to justify the disclosure of the leave records at issue. Mr. Dobronski has failed to explain how disclosure of the employee's leave records would elucidate the agency's performance of its duties. *See Reporters Committee*, 489 U.S. at 773-74. In the circumstances, we find no reason to disturb the General Counsel's ruling.

8. With respect to the investigatory records requested, Mr. Dobronski notes that the General Counsel did not specify the FOIA exemption invoked for declining to confirm or deny the existence of the records. The General Counsel cited *Dunkelberger v. Department of Justice*, in support of his determination. 906 F.2d 779 (D.C. Cir. 1990). That case involved the application of FOIA Exemption 7(C). For the reasons that follow, we find no reason to modify the General Counsel's initial decision.

9. Exemption 7(C) shields records compiled for law enforcement purposes to the extent that disclosure of such records could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(7)(C). Thus, in invoking this FOIA exemption for law enforcement records, an agency must conduct the same balancing of private and public interests that is involved in evaluating a request for records under FOIA Exemption 6. *See Reporters Committee*, 489 U.S. at 763-69; *Castaneda v. United States*, 757 F.2d 1010 (9th Cir. 1985); *Wilkinson v. F.B.I.*, 633 F. Supp. 336 (C.D.Cal. 1986).

10. The documents requested in *Dunkelberger*, the case cited by the General Counsel, were generated as part of the agency's inquiry into allegations that an employee had engaged in misconduct while participating in the agency's investigation of a state legislator. In particular, the FOIA requester sought access to records reflecting any administrative disciplinary action that may have been taken against the employee as a result of the agency's inquiry into the allegations of misconduct. The agency responded that it could not confirm or deny the existence of the requested records. Moreover, it stated that, even if the records existed, their disclosure would constitute an unwarranted invasion of personal privacy and thus the records would be protected under Exemption 7(C). The district court agreed with the agency's determination. *Dunkelberger v. Department of Justice*, Civ. No. 88-1432, slip op., 1988 WL 104959 (D.D.C. Sept. 30, 1988), *aff'd*, 906 F.2d 779 (1990). [3]

11. On appeal, the court found that the employee had a privacy interest in not being associated unwarrantedly with the misconduct. Moreover, the court found that the employee had an interest in protecting the privacy of his employment records, whether the information contained in the records was favorable or unfavorable. 906 F.2d at 781-82. After examining the agency's files *in camera*, the court concluded that there was nothing in the files that would support the FOIA requester's claim that disclosure would be in the public interest. Therefore, the court upheld the agency's determination and ruled that an action confirming or denying the existence of the records would have constituted an unwarranted invasion of personal privacy. Accordingly, the court held that Exemption 7(C) had been properly invoked.

12. The instant case presents similar considerations. Mr. Dobronski surmises that the employee engaged in misconduct by making unauthorized releases of confidential Commission documents. Nonetheless, he offers only bare allegations of agency corruption in support of his FOIA request. In these circumstances, we conclude that Mr. Dobronski has not demonstrated that disclosure of the requested records would be in the public interest, even if the records exist, nor do we have any independent basis for so concluding. Moreover, based on the governing case law, we find that the General Counsel's refusal to confirm or deny the existence of the investigatory records requested by Mr. Dobronski was appropriate.

CONCLUSION

13. In view of the foregoing, the Application for Review filed by Mark W. Dobronski IS DENIED. Mr. Dobronski may seek judicial review of this decision pursuant to 5 U.S.C. § 552(a)(4)(B).

14. The officials responsible for this action are the following Commissioners: Alfred C. Sikes, Chairman, James H. Quello, Sherrie P. Marshall, Andrew C. Barrett, Ervin S. Duggan.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Portions of these records containing the employee's home address, social security number, and date of birth were withheld. The General Counsel determined that this information did not appear to fall within the scope of the FOIA request and that, in any event, it would be protected from mandatory disclosure by Exemption 6 of the FOIA, *see* note 2, *infra*. Mr. Dobronski does not seek review of this determination.

[2] Exemption 6 permits the withholding of "personnel and medical files and similar files" where disclosure of such records "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).

[3] The agency also invoked Exemption 6 of the FOIA, *see* n.2, *supra*, but the district court did not find it necessary to address this aspect of the agency's decision.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-567

In the Matter of

Amendment of Section 73.202(b), RM-7028
Table of Allotments,
FM Broadcast Stations.
(Electra, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 12, 1991; Released: December 26, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of Albert L. Crain ("petitioner"), permittee of Station KWTA-FM, Channel 236A, Electra, Texas, the Commission has before it the *Notice of Proposed Rule Making,* 4 FCC Rcd 8540 (1989), proposing the substitution of Channel 235C2 for Channel 236A at Electra, and the modification of Station KWTA(FM)'s construction permit to specify operation on the higher powered channel. Petitioner filed comments stating his intention to apply for channel, if allotted. Communicorp, Inc. ("Communicorp"), licensee of Station KQLI-FM, Channel 232A, Lawton, Oklahoma, filed comments, and petitioner filed a reply.

2. Communicorp filed comments supporting the allotment of Channel 235C2 at Electra, but requests that the Commission impose a site restriction which would prohibit any northerly relocation of petitioner's tower. Communicorp states that it filed a petition for rule making to substitute Channel 232C3 for Channel 232A at Lawton. Although Communicorp's request would be fully spaced to petitioner's proposal, it requests that petitioner's station be prohibited from moving its transmitter site any closer to Lawton. In reply, petitioner states that his proposed allotment can be made in compliance with the Commission's minimum mileage separation requirements. Furthermore, he argues that if there was a conflict between the proposals, his proposal should prevail since it advances a first local service, whereas Communicorp's upgrade "would increase its service area in a region already serviced by at least four other FM stations."

3. We note that there is no request pending for an upgrade of Station KQLI-FM, and it is not Commission policy to protect possible future allotment requests. Therefore, we need not consider Communicorp's comments.[1]

4. We believe the public interest would be served by the substitution of Channel 235C2 for Channel 236A at Electra, since it would provide the community with a wide coverage area FM service. Channel 235C2 can be allotted to Electra in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.3 kilometers (5.2 miles) northwest to accommodate petitioner's desired transmitter site.[2] As proposed, we will also modify petitioner's construction permit for Station KWTA(FM) to specify operation on Channel 235C2 in accordance with the provisions of Section 1.420(g) of the Commission's Rules.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 10, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Electra, Texas	235C2

6. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Albert L. Crain for Station KWTA(FM), Electra, Texas, IS MODIFIED to specify operation on Channel 235C2, in lieu of Channel 236A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

---

[1] A Commission engineering analysis indicates that a substitution of Channel 232C3 for Channel 236A at Station KQLI-FM's present site would be short-spaced to vacant Channel 232A, Elk City, Oklahoma, and to Station KSEY(FM), Channel 232A, Seymour, Texas.

[2] The coordinates for Channel 235C2 at Electra are North Latitude 34-06-03 and West Longitude 98-57-15.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-261

In the Matter of

Amendment of Section 73.202(b), RM-7789
Table of Allotments,
FM Broadcast Stations.
(Callahan, Florida, and)
St. Marys, Georgia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 13, 1991; Released: December 26, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of Rowland First City Radio, Inc. ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 5319 (1991), proposing the reallotment of Channel 227C2 from St. Marys, Georgia, to Callahan, Florida, and the modification of Station WAIA(FM)'s license to specify Callahan as its community of license. Petitioner filed comments restating its intention to apply for Channel 227C2 at Callahan. No other comments were received.

2. We believe the public interest would be served by reallotting Channel 227C2 from St. Marys, Georgia, to Callahan, Florida, and modifying Station WAIA(FM)'s license accordingly. We believe that petitioner has demonstrated that the reallotment of Channel 227C2 to Callahan will result in a preferential arrangement of allotments. Callahan will receive its first local FM transmission service, and its first operating aural transmission service since Station WELX(AM), Callahan, is not on the air. In addition St. Marys will continue to local transmission service from Station WECC(AM).

3. Channel 227C2 can be allotted to Callahan, Florida, in compliance with the Commission's minimum distance separation requirements with a site restriction 26.5 kilometers (16.5 miles) east of the community at petitioner's current transmitter site.[1] As proposed, we will also modify the license for Station WAIA(FM) to specify Channel 227C2 at Callahan, Florida, in accordance with Section 1.420(i) of the Commission's Rules.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 10, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Callahan, Florida	227C2
St. Marys, Georgia	---

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Rowland First City Radio, Inc., for Station WAIA(FM), St. Marys, Georgia, IS MODIFIED to specify operation on Channel 227C2 at Callahan, Florida, in lieu of St. Marys, Georgia, as its community of license, subject to the following conditions:

> (a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;
>
> (b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and
>
> (c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Rowland First City Radio, Inc., licensee of Station WAIA(FM), is required to submit a rule making fee in addition to the fee required for the application to effect the change of community of license.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

---

[1] The coordinates for Channel 227C2 at Callahan are North Latitude 30-33-22 and West Longitude 81-33-13, the authorized site of Station WAIA(FM).

Before the
Federal Communications Commission
Washington, D.C. 20554

Petition for review and supplement to
the petition for review of delegated
authority which denied action
on a complaint filed by Lee Richter
d/b/a Nu-Page of Winder against
Digital Paging Systems of Georgia, Inc.

MEMORANDUM OPINION AND ORDER

Adopted: December 12, 1991; Released: December 27, 1991

By the Commission: Commissioner Quello concurring in the result.

I. INTRODUCTION

1. The Commission has before it a petition for review and a supplement to the petition for review, filed by Mr. Lee Richter d/b/a Nu-Page of Winder (Richter). The petitions request review of a March 2, 1990, letter from the Private Radio Bureau's (PRB) Land Mobile and Microwave Division (staff) which refused to find fault and evidence of interference with the operating procedure of Digital Paging Systems of Georgia, Inc. (Digital). The March 2, 1990, document responded to Richter's complaint requesting that the staff investigate Digital's alleged disruption of the frequency 152.480 MHz, a frequency shared by the two private carrier paging systems, in violation of Section 90.403(e) of the Commission's Rules, 47 C.F.R. § 90.403(e). Section 90.403(e) requires that licensees who share a frequency take reasonable precautions to avoid causing harmful interference.

II. BACKGROUND

2. On September 11, 1989, Richter filed a complaint with the Commission's staff that Digital's co-channel Station WNKS-881 was transmitting when Richter's Station WNFY-442 was sending messages on the channel and requested that the Commission investigate and demand compliance from Digital.[1] In response to Richter's complaint, Digital stated by letter dated October 25, 1989, that, contrary to Richter's allegations, state-of-the-art Motorola voting receivers had been installed and that it was monitoring the frequency before transmitting.[2] According to Digital's response, these receivers listen for transmissions from Richter's station to monitor for traffic on the frequency. When traffic is apparent, Digital's transmitters will not key up.[3] In addition, Digital stated that they maintained a formal sharing agreement with two other co-channel users and that although Richter had been invited to join the agreement, he had declined to do so citing an unwillingness to expend the funds for such a hook-up.[4] In the absence of evidence to the contrary, the staff relied upon Digital's statements as to the equipment in use to conclude that Digital had complied with Section 90.403(e) of the Commission's Rules by taking "reasonable precautions" to avoid causing harmful interference. The Chief, Land Mobile and Microwave Division advised Richter by letter dated March 2, 1990, that no Commission action would be taken against Digital.

3. On March 14, 1990, Richter filed a petition for review of the March 2, 1990, letter. On April 2, 1990, Digital filed an opposition to Richter's petition. On April 4, 1990, the Private Radio Bureau staff requested that the Powder Springs, Georgia, office of the Commission's Field Operations Bureau (FOB) monitor and inspect Digital's facilities to determine whether Digital maintained appropriate equipment and was properly monitoring the frequency before transmitting. During on-site inspections the week of May 21-25, 1990, an FOB engineer detected five instances of interference to Richter's system despite Digital's installation of a Motorola Spectra TAC Voting Receiver system adapted as a signal sampling system.[5]

4. In response to the now apparent interference, the Commission staff initiated a series of conferences and attempts at negotiations between the two parties. Two meetings were held in June of 1990, one at Commission headquarters with all parties and counsel present, and the second at the Digital facility with technical representation for both parties, as well as FOB engineers, present. During the first conference, on June 8, 1990, Digital was advised that despite the installation of the Motorola automatic monitoring system, its station interfered with Richter's station during the week of May 21, 1990.[6] In an effort to alleviate this interference, Digital agreed to employ in its monitoring method a three second delay before transmitting. The parties also agreed to a second meeting, to take place at Digital's transmitting site.[7] Following this second meeting, on June 20, 1990, the FOB engineer reported to PRB staff that Digital's system appeared to be operating correctly with the exception of a minor technical problem, which Digital agreed to remedy. The FOB

---

[1] *See* letter from Robert H. Schwaninger, counsel for Richter, to Commission staff, August 25, 1989, pp. 2-3. Richter had been in informal contact with the Commission's Powder Springs, Georgia Field Office beginning in May of 1989.

[2] *See* letter from Henry A. Solomon, counsel for Digital, to Commission staff, October 25, 1989, 1.

[3] *Ibid*, 2.

[4] *See* letter from Mr. Lee Richter to FOB, Powder Springs, Georgia, June 26, 1990.

[5] FOB EMS, Case No. 90-I-2417, June 1, 1990.

[6] On or about May 15, 1990, Richter submitted to the Atlanta, Georgia Office of the Commission's FOB a tape recording purporting to demonstrate Digital's interference to his operation. The tape recording has since become an issue in a complaint Richter has filed with the Commission's Inspector General because Richter alleges that a portion of the tape has been erased by Commission employees. Because of the many technical factors that potentially affect electrical interference, any such tape would not be particularly reliable as evidence of harmful electrical interference. In all cases of such electrical interference, a tape recording submitted by a private party would be secondary to FOB's own official investigation and monitoring records. In this case, FOB's own investigation and monitoring records do, indeed, indicate that interference to Richter's operation occurred during the week of May 21, 1990.

[7] *See* letter from Henry A. Solomon to Commission staff, June 11, 1990, 1; and letter from Robert H. Schwaninger to Commission staff, June 14, 1990, 2.

engineer noted that, by informal monitoring during the five-hour conference, he observed no conflict between the Richter and Digital transmissions.[8]

5. On July 13, 1990, without notifying either party, FOB engineers conducted a second on-site monitoring of Digital facilities. In a report dated July 16, 1990, FOB stated that "No interference was observed to Nu Page by transmissions from Digital."[9] The case was subsequently marked closed by FOB. In light of FOB's resolution of the case, the matter was considered by the staff to be settled, and Richter's petition for review was considered by the staff to have been de facto dismissed as now moot.[10] On March 22, 1991, however, Richter filed a supplement to his petition for review, alleging that the Commission had not acted on the petition, thereby hindering a civil law suit Richter had filed against Digital and others, alleging damages caused by business torts and antitrust violations.[11] Richter now again seeks written reversal of the March 2, 1990, determination. Richter states that the U.S. District Court for the Northern District of Georgia, Gainesville Division, has stayed his civil case pending the Commission's decision on the petition.[12]

III. DISCUSSION[13]

6. Operations in the Private Land Mobile Radio Services, including private carrier paging operations, are governed by Part 90 of the Commission's Rules. A fundamental characteristic of licensees operating in the private carrier paging operations bands, or radio services bands below 470 MHz, is that the frequencies are assigned on a shared basis. Because these channels are shared, licensees must cooperate in their use. Among other things, licensees are required to (i) restrict transmissions to the minimum transmission time; and (ii) take reasonable precautions to avoid causing interference, which include monitoring the transmitting frequency for communications in progress and such other measures that may be necessary to minimize the potential for causing interference. 47 C.F.R. § 90.403(c) and (e). Because the frequency is shared, however, initial interference, even harmful interference, is possible, particularly when a new licensee such as Digital begins sharing with existing licensees. Such interference does not, standing alone, constitute a prima facie violation of Section 90.403 of the Commission's Rules. *Id.* Rather, as licensees on shared spectrum, operators are expected to cooperate with other channel users, on a continuing basis, to eliminate that interference, as it periodically occurs. *See* 47 C.F.R. § 90.173(b).[14]

7. Our inquiry into this matter reveals that Digital's conduct towards Richter has been reasonable and cooperative, and thus complies with Sections 90.403(e) and 90.173(b). During the period that began with Richter filing a complaint with PRB staff on September 11, 1989, until the case was marked closed by FOB on July 16, 1990, and considered dismissed by PRB, Digital (i) entered into satisfactory channel sharing agreements with two co-licensees other than Richter; (ii) used an automatic monitoring system; (iii) proposed a *bona fide* sharing arrangement to Richter which included, as a consideration, an offer to pay a portion of Richter's connection costs; (iv) met with the PRB and FOB staff and representatives of Richter and accommodated monitoring and on-site inspections throughout the investigation, and (v) apparently resolved all or virtually all interference problems.[15] There have been no substantiated allegations of willful or malicious interference caused by Digital and no claims of interference to Richter's system since July of 1990. Sections 90.403(e) and 90.173(b) of the Commission's Rules require parties to a shared channel to take reasonable precautions to avoid harmful interference, but *both* parties must be cooperative and flexible in arriving at a mutually satisfactory channel sharing arrangement. The first licensee on the channel has no greater right than subsequent licensees with regard to satisfactory sharing of the channel. We find that Digital has fulfilled its obligations under Sections 90.403(e) and 90.173(b) of our Rules.[16] Digital's conduct, therefore, poses no basis for censure or revocation as Richter's petitions propose.[17]

---

[8] *See* Commission staff notes, June 21, 1990.

[9] FOB, EMS, Case No. 90-I-2417, July 16, 1990.

[10] In addition, the record reflects that on July 30, 1990, Richter notified the FOB's Powder Springs office that his system was experiencing interference from Digital. The staff notes on this call suggest that the interference might have been caused by Richter's faulty equipment and that Richter had new equipment on order that was due in September. Richter was invited to call again should the interference continue. There is no indication in the record that any calls or complaints against Digital were made after this date in response to FOB's invitation.

[11] This Order addresses issues raised in both the petition for review and the supplement to the petition.

[12] *Lee Richter d/b/a Nu Page of Winder v. Digital Paging Systems of Georgia, Inc., et al.*, No. 2: 90-CV-133-WCO (D. Ga. filed October 1, 1990).

[13] This matter was initially ruled on in an Order adopted by the Bureau's Land Mobile and Microwave Division, which was never released, and later vacated. We note that this matter should have been referred to the Commission for action. *See* 47 C.F.R. § 0.331(a)(2).

[14] *Compare* Texidor Security Equipment, Inc., 4 FCC Rcd 8694 (1989).

[15] The one allegation of interference from Digital since FOB marked the case closed was possibly due to Richter's faulty equipment, and apparently was not repeated. *See* note 10, *supra.*

[16] We think that it is relevant to note, with respect to the reasonableness of Digital's behavior, that two licensees other than Richter joined in sharing agreements with Digital during the period when interference first occurred on frequency 152.480 MHz. *See* FOB Case Activity Report, October 27, 1989.

[17] Petition for review, 21. Richter has raised other generalized allegations which we have considered and are denying because they do not provide support for Richter's allegations, particularly in light of the overall record of cooperative conduct by Digital. One example is an affidavit in which he stated that a Digital employee asked what would prevent Digital from avoiding interference with Richter's system, only as long as necessary to resolve the latter's complaint and then resuming the interference later. We note that the statement referred to in the affidavit was phrased as a question rather than as a planned course of action. There is no evidence to show that Digital in fact engaged in the conduct described by the Digital employee. Absent any evidence of the conduct described by the Digital employee and given the evidence of Digital's cooperative conduct throughout this proceeding, we do not regard Mr. Richter's affidavit as probative.

8. Despite Digital's satisfactory conduct, FOB observed harmful interference to Richter's operation after the petition for review was filed. The record reflects, however, that the parties apparently resolved all (or virtually all) of the interference conflict by July of 1990, and that there has been no complaint of subsequent interference. Accordingly, the petition filed by Richter is granted in part to the extent that we note the occurrence of interference by Digital to Richter at the time the petition was filed. This interference occurred despite the staff's appropriate presumption at the time of the March 2, 1990 letter that, with a state-of-the-art monitoring system in place, Digital was monitoring the frequency before transmitting and, therefore, was taking "reasonable precautions" to ensure against interference. In light of the July 1990 apparent resolution of the interference from Digital, and lack of subsequent interference complaints, however, we conclude that the remaining claims raised by the petitions should be denied. In sum, we conclude that Digital has taken reasonable precautions to avoid interference and cooperated to resolve interference as required by the rules.

IV. DECISION

9. In view of the foregoing, and pursuant to the authority contained in Sections 1.115(g) and 1.115(h)(1)(i) of the Commission's Rules, 47 C.F.R. §§ 1.115(g) and 1.115(h)(1)(i), and 47 U.S.C. § 155(c)(5), IT IS ORDERED THAT the petition for review and supplemental petition for review filed by Mr. Lee Richter d/b/a Nu-Page IS GRANTED IN PART, AND DENIED IN PART.

10. IT IS FURTHER ORDERED THAT this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Separate Statement
of
Commissioner James H. Quello

RE: Petition for review and supplement to the petition for review of delegated authority which denied action on a complaint filed by Lee Richter d/b/a Nu-Page of Winder against Digital Systems of Georgia.

I am writing to express my concern generally about interference complaints, and how these complaints are processed by the Commission. If the communications industry is to operate according to our rules, then the Commission must assure the public that its rules will be enforced. In this particular situation involving the shared use of channels, a complaint of interference was made to the Commission. After an additional complaint of interference was filed was an investigative action taken by Field Operations Bureau's staff. That action revealed that interference did occur.

Generally, the lapse of time between reporting interference and the resolution of interference problems could prove disruptive to licensees, especially those licensees subjected to interference. It is important to recognize that on shared channels all licensees have an obligation to cooperate to resolve interference problems, and consistent with my overall concern regarding use of spectrum, I encourage all licensees to use spectrum efficient technology. I recognize that in the course of an average year the Bureau may receive several hundred complaints, if not more, regarding interference. Furthermore, the Commission has limited resources. Nonetheless, the Commission should do all that it can to address interference complaints.

I concur with this item since according to the Commission's rules (Section 90.403(e)) regarding shared use of channels, co-channel licensees must take "reasonable precautions" to assure that one's transmissions do not interfere with a co-channel licensee's activity. Although it is difficult to determine what precisely constitutes "reasonable precautions," I understand that once interference was observed by the FCC in this particular case, reasonable precautions were made to resolve the problem. Nonetheless, I remain concerned about the overall complaint process.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-132

In the Matter of

Competition in the Interstate
Interexchange Marketplace

MEMORANDUM OPINION AND ORDER

Adopted: November 25, 1991; Released: November 25, 1991

By the Commission: Commissioner Quello concurring; Commissioner Barrett concurring and issuing a separate statement.

I. INTRODUCTION

1. On August 1, 1991, we adopted a *Report and Order* in this docket that modified certain of our regulations and policies to reflect the growth of competition in the interstate interexchange marketplace.[1] We there adopted a contract carriage policy that permits interexchange carriers (IXCs) to offer services pursuant to tariffs reflecting individually negotiated contracts.[2] We also found that the lack of 800 number portability is an impediment to full competition in 800 services and that AT&T may have the ability to leverage market power in 800 or inbound services in order to gain an advantage in the provision of other services. Accordingly, pending 800 number portability, we prohibited AT&T from including in contract-based tariffs and future Tariff 12 options any 800 service or inbound component. However, in light of our order in the 800 access proceeding limiting the lack of 800 number portability to approximately 18 months,[3] and in order to avoid serious customer dislocation, we decided to grandfather Tariff 12 options on file as of August 1, 1991, and to require AT&T to permit customers to terminate these packages without termination liabilities at the time that 800 numbers become portable.[4]

2. In the week following our adoption of the *Report and Order,* AT&T filed 15 additional Tariff 12 options.[5] Each of these options contains an inbound component in violation of the prohibition adopted in our *Report and Order.* AT&T has not filed any more Tariff 12 options since August 8, but has withdrawn four of the 15 options filed between August 2 and August 8.

3. On September 23, 1991, AT&T filed a Petition for Limited Waiver asking the Commission to waive the effective date of the grandfathering provision of the *Report and Order* in order to allow VTNS options 93-107 to become effective. Petitions for Limited Waiver were also filed, on September 24, 1991, by United Air Lines, Inc. and Covia Partnership, the initial customers for option 93; and, on October 4, 1991, by Northwest Airlines, Inc., the initial customer for option 94.[6]

II. DISCUSSION

4. Although AT&T and its VTNS customers style their requests as petitions for waiver, we believe that it is more appropriate to address the issue they present in the context of reconsideration of our *Report and Order.*[7] Upon reconsideration, we find that the public interest will be served by revising the grandfathering date to include Tariff 12 options that contain inbound service filed before September 1, 1991.

5. In adopting August 1, 1991, as the cut-off date for the grandfathering provision in the *Report and Order,* we were balancing our competing goals of avoiding hardship for Tariff 12 customers while preventing improper leveraging of market power by AT&T. We sought to establish a date that would not be arbitrary "by requiring us to evaluate the status of negotiations or the relative burdens of renegotiations for Tariff 12 options that were not filed by that date. We were also concerned that allowing AT&T a window of opportunity in which to negotiate and file additional Tariff 12 options with inbound components would undermine the effectiveness of our bundling restriction.[8]

6. We are now in a better position to evaluate the effect that grandfathering options filed during a limited period after August 1 will have on the policies we adopted in the *Report and Order.* In order for AT&T to have filed these options within thirty days after the adoption of the *Report and Order,* we believe that the lengthy negotiations typically required to develop such options would have to have been completed or substantially completed by August 1, 1991. Under the circumstances, denying these customers the opportunity to reap the fruits of their negotiations would be unduly harsh and unfair. Additionally, we conclude that a limited extension of the grandfathering date, which would allow only this small number of additional Tariff 12 options to become effective, is consistent with our goal of avoiding customer disruption and will not significantly affect competition in the marketplace or undermine the policy concerns underlying the bundling restrictions.[9]

---

[1] Competition in the Interstate Interexchange Marketplace, Report and Order, 56 Fed. Reg. 55235 (October 25, 1991), 6 FCC Rcd 5880 (1991) (hereinafter "Report and Order").

[2] 6 FCC Rcd at 5897.

[3] Provision of Access for 800 Service, Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 5421 (1991).

[4] 6 FCC Rcd 5905-5906.

[5] AT&T filed Virtual Telecommunications Network Service (VTNS) options 93-96 on August 2, 1991, option 97 on August 5, 1991, options 98 and 99 on August 6, 1991, and options 100-107 on August 8, 1991.

[6] Opposition to one or more of the petitions were filed by MCI Telecommunications Corporation, Williams Telecommunications Group, Inc., US Sprint and Competitive Telecommunications Association.

[7] *See* 47 C.F.R. § 1.108.

[8] 6 FCC Rcd at 5906, n. 237.

[9] Because AT&T did not file any additional Tariff 12 options

III. ORDERING CLAUSE

7. Accordingly, IT IS ORDERED THAT, pursuant to authority contained in Section 4 of the Communications Act of 1934, as amended, 47 U.S.C. § 154, and Section 1.108 of the Commissions Rules, 47 C.F.R. § 1.108, the August 1, 1991 cut-off date of grandfathering provision of the *Report and Order* IS HEREBY EXTENDED, effective immediately upon release of this Memorandum Opinion and Order, to include Tariff 12 options filed before September 1, 1991.[10]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

SEPARATE STATEMENT OF COMMISSIONER ANDREW C. BARRETT

In Re: Competition in the Interstate Interexchange Marketplace (CC Docket No. 90-132).

In this proceeding, I agreed with my colleagues that changes should be made to further streamline the regulation of AT&T in light of competition in the interexchange market. In making this determination, I have been concerned with the ability of AT&T to leverage their position in the 800 services market.[11] I concluded that this market was not sufficiently competitive to permit the bundling of 800 services with Tariff 12 filings. My objective in restricting the use of 800 service bundling with Tariff 12s was to ensure that competition could exist between all the interexchange carriers. I believe this notion of "genuine" competition in these services will enure to the long term benefit of customers. Once the Commission made a determination that the bundling of 800 services in Tariff 12 filings should not be permitted, it was reasonable to immediately implement the new prohibition. I supported the August 1, 1991 deadline for the grandfather of Tariff 12s as a reasonable approach. I determined that existing customers would not be disadvantaged through the grandfather of these Tariff 12 filings. At the same time, I concluded that competitors would not be harmed if the Commission allowed existing contractual arrangements filed before August 1 to go forward. I continue to believe the Commission made the correct determination.

Today's decision permitting the extension of the grandfather period should not be interpreted as a lessening of the concern expressed over the bundling issue or its long term impact on competition and customers. Instead, I join my colleagues out of a recognition for the potential adverse effect the August 1, 1991 deadline may cause Tariff 12 customers. It is these customers, through no fault of their own, who could possibly be caused economic harm and disruption and who will bear the brunt of the Commission not granting this relatively limited extension. I am cognizant of the amount of time and energy that must have been expended negotiating these contracts. For the Tariff 12 customers, this extension of the time period will mean the ability to effectuate these agreements that either were complete or substantially complete by our deadline. I have always believed that one of the roles of regulation is to be helpful as opposed to being a hindrance.

As a federal regulator, I can not be blind to the economic impact our decisions may have on users. I am aware that failure to extend the deadline would result in each of these parties spending perhaps several months renegotiating a deal with AT&T. These users have chosen to seek a reasonable extension of the deadline. Due to the nature of a Tariff 12 filing, it is unlikely that any of these were filed with the goal of undermining our prohibition on bundling. On balance, I must agree with my colleagues to reconsider our earlier determination. I believe that an extension is warranted in this instance. The limited filing extension appropriately balances my concern for customer equity with the assurance that the underlying competitive policy objectives are not unduly compromised.

---

after August 8, our concerns about the arbitrariness of alternative grandfathering dates are mitigated insofar as there will be no need to consider additional options.

[10] Because this action involves relieving affected parties of a restriction, it is permissible to make the change effective within less than 30 days from the time it is published in the Federal Register. 5 U.S.C. § 553(d)(1); 47 C.F.R. § 1.427(b).

[11] *See Report and Order* in CC Docket No. 90-132, adopted August 1, 1991 (Separate Statement of Commissioner Andrew C. Barrett).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 91-381
38281

In the Matter of)
)
Computer III Remand Proceedings:) CC Docket No. 90-623
Bell Operating Company Safeguards)
and Tier 1 Local Exchange Company)
Safeguards)

REPORT AND ORDER

Adopted: November 21, 1991 Released: December 20, 1991

By the Commission: Commissioner Duggan issuing a statement.

Table of Contents

Paragraph No.

I. Introduction 1

II. Background 3

III. Regulatory Safeguards Governing BOC Provision of Enhanced Services 6

  A. Safeguards Against Cross-Subsidization 12

    1. Adoption of Strengthened Cost Accounting Safeguards 14

      a. Nonregulated Treatment of Enhanced Services for Federal Accounting and Jurisdictional Separations Purposes 15

      b. Independent Audits 21

      c. Uniformity in Cost Allocation Manuals 25

      d. Quantification of the Effects of Cost Allocation Manual Changes 30

      e. Materiality Threshold of Errors and Omissions 37

2. Use of Strengthened Accounting Safeguards to Protect Against Cross-Subsidization 42

B. Safeguards Against Discrimination 57

1. Open Network Architecture 59

2. Nondiscrimination Reporting Requirements 65

3. Network Disclosure Rules 68

4. Capitalization Plan Requirement and Software Development 71

C. Customer Proprietary Network Information 75

D. Public Interest Analysis 90

IV. Preemption 110

V. Ordering Clauses 132

I. Introduction

1. In this Report and Order, we reverse our determination in Computer II and the BOC Separation Order to impose structural separation requirements for the provision of enhanced services by the Bell Operating Companies (BOCs). In place of structural separation, we adopt effective regulatory safeguards that will permit the BOCs to provide enhanced services to the public in ways that will best further the public interest and serve American consumers. After close examination, we decline to preempt all the state regulation preempted in Computer III, but do preempt certain forms of state regulation that would thwart or impede federal objectives.

2. A technologically innovative and economically efficient telecommunications infrastructure is central to continued United States prominence in an increasingly information-oriented global economy. We should remove unnecessary regulatory barriers that impede the responsiveness of American companies to marketplace incentives that foster increasing use and advancement of the nations's telecommunications assets. At the same time, it is critical to the development of full and fair competition to establish and maintain effective regulatory safeguards against anticompetitive conduct by regulated communications common carriers when they seek to participate in the enhanced services industry. Further, this Commission has a duty under the Communications Act to protect regulated service ratepayers by guarding against cross-subsidy between basic and enhanced services. We initiated this proceeding in response to the Ninth Circuit's decision in California v. FCC, which vacated three Computer III orders.

II. Background

3. In Computer II the Commission determined that enhanced services and customer premises equipment (CPE) should not be provided as tariffed services pursuant to Title II of the Communications Act, and established rules to govern the participation of telecommunications common carriers in those activities.[1] The Commission required AT&T to establish subsidiaries for enhanced services and CPE that were fully separated from all of AT&T's common carrier operations.[2] After the United States District Court for the District of Columbia adopted the Modification of Final Judgment (MFJ),[3] which resulted in the divestiture by AT&T of the BOCs, the Commission adopted an order requiring the BOCs to adhere to the structural separation requirements for CPE and enhanced services that Computer II had imposed upon the predivestiture AT&T. The Commission committed to review those requirements in two years.[4]

4. More than two years after the divestiture occurred, the Commission re-examined the Computer II separate subsidiary requirements in light of the changes in the industry and the difficulties that the requirements had created for the day-to-day operations of the affected companies. In a series of orders, the Commission removed the CPE and the enhanced service separation requirements for both AT&T and the BOCs. The enhanced service separate subsidiary requirements were replaced with a regime of Open Network Architecture (ONA) requirements and accounting and other nonstructural safeguards. Although removal of AT&T separation requirements and BOC CPE separation requirements were not challenged, the decision to permit the BOCs to provide enhanced services on an integrated basis provoked appeals that led to an opinion by the Court of Appeals for the Ninth Circuit, which vacated three orders in the Computer III proceeding.[5] The Court of Appeals concluded that the Commission decision to rely on nonstructural safeguards in lieu of structural separation to protect against cross-subsidization of enhanced services by the BOCs had not been adequately justified when adopted.[6] The Court noted, however, that the Commission could have justified its decision on the grounds "that the national interest in allowing the BOCs to compete more efficiently in the enhanced services industry justified reduced regulatory protection against cross-subsidization," but stated that "this is not the case before us."[7]

---

[1] Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II), 77 FCC 2d 384, 428-430, paras. 114-118 (1980) (Final Decision), modified on recon., 84 FCC 2d 50 (1981) (Reconsideration Order), modified on further recon., 88 FCC 2d 512 (1981) (Further Reconsideration Order), affirmed sub nom., Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

[2] Final Decision, 77 FCC 2d at 475-486, paras. 233-260; Reconsideration Order, 84 FCC 2d at 75-86, paras. 72-105; 47 C.F.R. § 64.702.

[3] United States v. AT&T, 552 F.Supp. 131 (D.D.C. 1982), affirmed sub nom., Maryland v. United States, 460 U.S. 1001 (1983).

[4] Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Equipment by the Bell Operating Companies, CC Docket No, 83-115, Report and Order, 95 FCC 2d 1117, 1120, para. 3 (1984) (BOC Separation Order), affirmed sub nom. Illinois Bell Telephone Co. v. FCC, 740 F.2d 465 (1984), affirmed on recon., FCC 84-252, 49 Fed. Reg. 26056 (1984) (BOC Separation Reconsideration Order), affirmed sub nom., North American Telecommunications Association v. FCC, 772 F.2d 1282 (7th Cir. 1985).

5. The Commission subsequently issued a Notice in this remand proceeding, proposing to permit the BOCs to provide enhanced services pursuant to a strengthened set of nonstructural safeguards that would effectively protect against cross-subsidization and discrimination, while furthering the Commission's goals of a technologically innovative and economically efficient telecommunications infrastructure. The Notice also proposed to preempt only those state regulations differing from federal safeguards that would thwart or impede federal policy, such as permitting the integrated provision of interstate basic and enhanced services by the BOCs, AT&T, and the independent telephone companies (independents).[8] The Notice granted an interim waiver to the BOCs to permit them to provide enhanced services pursuant to previously approved Comparably Efficient Interconnection (CEI) plans pending the completion of this proceeding.[9]

---

[5] Amendment of Sections 64.702 of the Commission's Rules and Regulations, (Computer III), CC Docket No. 85-229, Phase I, Report and Order, 104 FCC 2d 958 (1986) (Phase I Order), recon., 2 FCC Rcd 3035 (1987), (Phase I Reconsideration Order), further recon., 3 FCC Rcd 1135 (1988) (Phase I Further Reconsideration Order), second further recon., 4 FCC Rcd 5927 (1989) (Phase I Second Further Reconsideration Order), Phase I Order and Phase I Reconsideration Order vacated sub nom., California v. FCC, 905 F. 2d 1217 (9th Cir. 1990) (California); Phase II, CC Docket No. 85-229, 2 FCC Rcd 3072 (1987) (Phase II Order), recon., 3 FCC Rcd 1150 (1988) (Phase II Reconsideration Order), further recon., 4 FCC Rcd 5927 (1989) (Phase II Further Reconsideration Order), Phase II Order vacated sub nom., California v. FCC, 905 F.2d 1217 (9th Cir. 1990), pet. for rev. pending, BellSouth Corp. v. FCC (9th Cir. No. 88-7290, filed April 20, 1988).

[6] California v. FCC, 905 F.2d 1217 (1990) (California).

[7] Id. at 1238-1239.

[8] Computer III Remand Proceedings: Bell Operating Company Safeguards; and Tier 1 Local Exchange Company Safeguards, Notice of Proposed Rulemaking and Order, CC Docket No. 90-623, 6 FCC Rcd 174 (1990) (Notice).

[9] A list of parties filing comments and replies is contained in Appendix A.

III. Regulatory Safeguards Governing BOC Provision of Enhanced Services

6. A regulatory framework that permits the BOCs to provide enhanced services pursuant to safeguards that will both effectively protect against cross-subsidization and discrimination and encourage efficient use of BOC resources to provide enhanced services will best serve the public interest. Eliminating all structural separation requirements and allowing the BOCs to provide enhanced services pursuant to nonstructural safeguards will permit the BOCs to realize fully their vast potential to provide enhanced services to the public, especially to the consumer market. Removal of structural separation requirements will permit the BOCs to use their extensive resources, including geographically dispersed facilities and the associated management and operational resources, to provide a variety of enhanced services throughout the country. Such an approach will permit the BOCs to use existing marketing contacts with virtually every household within their regions to market enhanced services to consumers inexpensively, to use the same personnel to repair and install the services and equipment necessary to provide basic and enhanced services, and to use their expertise to engage in research and development for enhanced services.

7. Our experience over the last ten years demonstrates that removal of structural separation requirements has resulted and will result in greater BOC participation in the provision of enhanced services. Under the nonstructural safeguards in place through CEI plans and market trials, the BOCs have provided voice mail service, E-Mail, gateways, electronic data interchange, data processing, voice store-and-forward, and fax store-and-forward services. The BOCs' provision of voice mail services is particularly significant. In the relatively brief time that the BOCs have been permitted to provide that service, voice mail has been provided to rapidly increasing numbers of customers in their regions at reasonable prices.

8. By contrast, our experience with structural separation shows that it inhibits BOC provision of enhanced services. Under structural separation, the BOCs provided few enhanced services, and structural separation apparently completely foreclosed BOC provision of voice mail service.[10] Essentially, structural separation prevents the BOCs from using their existing substantial resources to provide enhanced services, requiring instead separation and/or duplication of facilities and personnel to provide both enhanced and basic services. It imposes direct monetary costs, and results in loss of efficiencies and economies of scope. The BOCs have submitted significant evidence of the financial and operational efficiencies that would be lost under structural separation. Costs for voice mail services could be up to 68% percent higher under structural separation necessitating price increases of up to 30% and 80%.

---

[10] American Telephone and Telegraph Co. Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations, 88 FCC 2d 1 (1981) (Custom Calling Denial Order).

9. We also conclude that the use of our comprehensive set of strengthened nonstructural safeguards instead of structural separation will not result in significant public interest costs. Some commenters claim that a major cost of nonstructural safeguards is that they will be ineffective to protect against anticompetitive conduct by the BOCs in the enhanced services marketplace. As we explain fully below, we have adopted and implemented a comprehensive regulatory framework that provides an effective alternative to structural separation for protection against anticompetitive conduct. To the extent nonstructural safeguards may involve any small diminution in protection against anticompetitive conduct as compared with a structural separation requirement, we conclude that it is outweighed by the substantial benefits of nonstructural safeguards.

10. The _California_ Court did not find fault with our determination in _Computer III_ that there could be significant public interest benefits from use of nonstructural safeguards. It vacated _Computer III_ in its entirety because it concluded that the Commission had not presented sufficient justification for reliance on cost accounting safeguards so soon after the Commission's decision in the _BOC Separation Order_ to continue structural separation for BOC enhanced services operations. In response to the Court's concerns, we first address the proposals in the _Notice_, and adopt a strengthened set of cost accounting safeguards. We then determine that these modified cost accounting safeguards, given our experience with cost accounting safeguards since the _BOC Separation Order_ and _Computer III_, constitute an effective alternative to structural separation to protect against cross-subsidy. Further, we adopt various safeguards against discrimination, including: (1) network disclosure rules; (2) nondiscrimination reporting requirements; and (3) revised customer proprietary network information (CPNI) rules. We conclude that these requirements, along with ONA, are an effective alternative to structural separation to guard against anticompetitive conduct by the BOCs affecting the enhanced services marketplace.

11. Having identified a comprehensive set of nonstructural safeguards to protect against cross-subsidization and discrimination, we then assess, in Section D. below, the benefits of eliminating structural separation. We conclude, as indicated, that there are substantial benefits from use of nonstructural safeguards and no significant costs. We therefore permit the BOCs to provide enhanced services pursuant to those nonstructural safeguards instead of the _Computer II_ regime of structural separation. We also undertake to review, after three years of a fully effective ONA environment, the working of nonstructural safeguards in light of marketplace developments.

A. Safeguards Against Cross-Subsidization

12. In the _Notice_, the Commission evaluated regulatory developments since the _BOC Separation Order_ and tentatively concluded that they have reduced the ability of the BOCs to engage in improper cross-subsidization of their enhanced service operations, as well as their incentives to do so. These regulatory developments were the adoption and implementation of detailed cost allocation rules and related cost accounting safeguards that

separate nonregulated service costs from regulated service costs,[11] the implementation of cost accounting mechanisms to enforce the joint cost rules including the filing and approval of cost allocation manuals, the requirement that carriers submit to independent audits, and the establishment of the Automated Reporting and Management Information System (ARMIS).[12] The Commission also stated that the adoption of price cap regulation for the local exchange carriers (LECs) could, along with cost allocation, reporting, and enforcement safeguards, reduce BOC incentives to cross-subsidize.[13] The Commission observed that its enforcement mechanisms had resulted in vigorous enforcement actions in several instances to assure that improper cross-subsidization did not occur.[14] In addition to these regulatory developments, however, the Commission proposed to strengthen in five ways its existing cost accounting safeguards applicable to the BOCs and other Tier 1 LECs. The Commission stated that these measures would provide regulated ratepayers and the BOCs' (and other Tier 1 LECs') competitors with important additional protections against cross-subsidization. The Commission tentatively concluded that its existing and proposed cost accounting safeguards would effectively protect ratepayers and others from cross-subsidization and the effects thereof, and that structural separation is not necessary to protect against cross-subsidization.

13. In this Report and Order, we determine that our existing cost accounting safeguards and those proposed in the Notice constitute a realistic and reliable alternative to structural separation to protect against cross-subsidy. These cost accounting safeguards, along with our safeguards against discrimination, will permit realization of the public interest benefits of integrated provision by the BOCs of basic and enhanced services without creating substantial risks of cross-subsidization in comparison to structural separation. We also determine that the adoption of price cap regulation for the LECs constitutes an effective complement to cost allocation, reporting, and enforcement safeguards, to reduce BOC incentives to cross-subsidize.[15] We address first adoption of the strengthened cost accounting safeguards proposed in the Notice and then address the effectiveness of these cost accounting safeguards to protect against cross-subsidization.

---

[11] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities & Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies to Provide for Nonregulated Activities and to Provide for Transactions Between Telephone Companies and Their Affiliates, CC Docket No. 86-111, 2 FCC Rcd 1298, 1329-1331 (1987) (Joint Cost Order), recon. 2 FCC Rcd 6283 (1987) (Joint Cost Reconsideration Order), further recon., 3 FCC Rcd 6701 (1988) (Joint Cost Further Reconsideration Order), affirmed sub nom., Southwestern Bell Corporation v. FCC, 896 F.2d 1378 (D.C. Cir. 1990).

[12] Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules), 2 FCC Rcd 5770 (1987) (ARMIS Order), recon., 3 FCC Rcd 6375 (1988).

[13] Notice, 6 FCC Rcd at 178, para. 25.

[14] Id. at 177-178, paras. 18-23.

1. Adoption of Strengthened Cost Accounting Safeguards

14. The Notice proposed, in addition to the panoply of existing cost accounting, reporting, and enforcement safeguards, that: (1) LECs treat enhanced services as nonregulated activities for accounting and jurisdictional separations purposes; (2) independent auditors provide the same level of assurance in audits conducted pursuant to the joint cost rules as that undertaken in a financial statement audit engagement; (3) the Common Carrier Bureau study means of achieving greater uniformity in the carriers' cost allocation manuals and, if appropriate, take steps necessary to accomplish this goal; (4) carriers quantify the effects of cost allocation manual changes when such changes are submitted to the Commission; and (5) the Bureau study whether to establish a reasonable threshold for determining the materiality of errors and omissions discovered in the independent audits of carrier filings, and, if appropriate, take steps necessary to implement such a threshold.[16] We address these proposals in turn.

a. Nonregulated Treatment of Enhanced Services for Federal Accounting and Jurisdictional Separations Purposes

15. The first accounting proposal involves continued nonregulated treatment of enhanced services for accounting and cost allocation purposes. Under such treatment, the costs of nonregulated activities are removed from the carriers' prescribed Part 32 accounts prior to the jurisdictional separations process.

16. Comments. Our proposal to require carriers to treat enhanced services as nonregulated activities for accounting and jurisdictional separations purposes is supported by virtually all of the LECs commenting on this issue, as well as by a trade association of equipment manufacturers.[17] The LECs commend the proposal as an effective measure to ensure that interstate ratepayers do not bear costs associated with enhanced services.[18] They state that continued treatment of enhanced services as nonregulated activities will allow carriers to utilize their existing accounting systems and will enable the Commission to achieve its policy goals without adversely affecting the rights of the states.[19] The LECs contend that subjecting enhanced service costs to jurisdictional separations would be unnecessary, difficult to administer and audit, and require costly modifications to the Commission's cost allocation process and access charge rules, the carriers' internal accounting systems, and ARMIS, the Commission's Automated Reporting Management Information System.[20]

---

[15] Id. at 178, para. 25.

[16] Notice, 6 FCC Rcd at 178, para. 26.

[17] CBEMA Comments at 6.

[18] USTA Comments at 6; Ameritech Comments at 15-16; NYNEX Comments at 35; Pacific Comments at 39; U S West Comments at 102.

17. The majority of comments filed in this proceeding by states, state agencies and commissions, and their representatives do not address this question.[21] One state commission, the Michigan PSC, support continued nonregulated treatment of enhanced services.[22] On the other hand, the Southwest Regional Regulatory Group (SWRRG), representing five state commissions, objects to the proposal, arguing that its adoption would constitute unwarranted preemption of state regulation of a number of enhanced services that are "solely intrastate or local in their use of the network."[23] The California PUC further argues that Section 410(c) of the Communications Act compels the Commission to apportion enhanced service costs between the federal and state jurisdictions.[24] Finally, the District of Columbia PSC contends that the proposal shifts cost allocation problems for enhanced services from this Commission to the state commissions. In reply, NYNEX states that our proposal should not affect state regulation of enhanced services because states regulating rates for enhanced services could consider the total fully allocated enhanced service costs and thereby prevent cross-subsidization.[25]

---

[19] BellSouth Comments at 19; Bell Atlantic Comments at 19. See also USTA Comments at 6-7; Ameritech Comments at 17; Pacific Comments at 39-40; SNET Comments at 10.

[20] USTA Comments at 6-7; Ameritech Comments at 15-17; Pacific Comments at 39-40; BellSouth Comments at 19; Cincinnati Bell Comments at 3; SNET Comments at 10.

[21] Colorado Public Utilities Commission, Florida Public Service Commission, Hawaii, Illinois Commerce Commission, New York Public Service Commission, Oregon Public Utilities Commission, Pennsylvania Office of Consumer Advocate, Vermont Department of Public Service, Washington Utilities and Transportation Commission, National Association of Regulatory Utility Commissioners.

[22] Michigan PSC Comments at 6-7.

[23] SWRRG Comments at 9. The Southwest Regional Regulatory Group includes the Arkansas Public Service Commission, Kansas Commerce Commission, Missouri Public Service Commission, Oklahoma Commerce Commission, and the Public Utilities Commission of Texas.

[24] California PUC Comments at 11-12.

[25] NYNEX Reply at 30-31.

18. Discussion. We conclude that enhanced services should be treated as nonregulated services for accounting and jurisdictional separations purposes. Our accounting rules specify that activities never subject to regulation are to be classified as "nonregulated."[26] The Commission first defined "enhanced services" during the Computer II proceeding, and concluded that enhanced services are not common carrier services and should not be regulated under Title II of the Communications Act.[27] Exchange carrier enhanced services have never been treated as regulated activities for purposes of the accounting or jurisdictional separations rules. We see no reason to change that treatment now.

19. Significantly, as many commenters note, changes in our accounting treatment of enhanced services are entirely unnecessary to protect against improper cross-subsidy. Application of the joint cost rules already ensures that interstate ratepayers do not bear costs associated with enhanced services. By contrast, treating enhanced service costs as regulated for accounting and jurisdictional separations purposes would require large scale modifications in the Commission's existing regulatory processes as well as in the carriers' internal accounting systems. For instance, jurisdictional separations would need to be amended in order to address enhanced service costs. Expanding the separations process to deal with all LEC-provided enhanced services would be a massive undertaking. The carriers would also likely incur substantial costs to revise their accounting systems and to prepare studies necessary to adopt separations methodologies applicable to enhanced services. The difficulty, complexity, and expense for regulators and the carriers would be exacerbated by the lack of historical data or previous studies regarding the jurisdictional usage of enhanced services.

20. Our decision not to subject enhanced service costs to jurisdictional separations does not represent, as SWRRG and the California PUC suggest, preemption of state regulation. Absent jurisdictional separations, states that choose to regulate rates for intrastate enhanced services are generally free to do so.[28] There is little, if any, state regulation of enhanced service rates at this time.[29] Therefore, undertaking the burden of formulating and operating jurisdictional separations rules for enhanced services is neither necessary nor warranted. A state choosing to regulate enhanced service rates should bear the effort and expense associated with such regulation.

---

[26] 47 C.F.R. § 32.23(a).

[27] Final Decision, 77 FCC 2d at 428-32.

[28] Classification of Inside Wiring Services for Accounting Purposes, Memorandum Opinion and Order on Review, 5 FCC Rcd 3521 (1990), recon. dismissed, FCC 91-387 (adopted November 21, 1991).

[29] On May 16, 1991, the Federal-State Joint Conference on Open Network Architecture adopted a resolution that enhanced services should not be subject to tariffing or entry/exit regulation. NTIA notes that enhanced services "are not per se regulated by the Commission or, presently, by the states." NTIA Comments at 13. Contrary to the argument advanced by the California PUC, see California PUC Comments at 12, section 410(c) of the Communications Act does not require that we apply jurisidictional separations procedures to non-common carrier services, such as enhanced services. See

b. Independent Audits

21. The Notice proposed to strengthen the standard to be used by independent auditors in preparing their reports on carriers' cost allocation manual implementation and results. The joint cost rules required the independent audit reports to meet the professional standards for an attest audit.[30] Specifically, we proposed to require carriers' independent auditors: (a) to provide the same level of assurance in their audits as that undertaken in a financial statement audit engagement, (b) to render an opinion on whether the carrier's cost allocation methodologies are in conformity with its cost allocation manual and whether the results fairly present the results of the company's operations, and (c) to evaluate and report upon the carriers' internal controls when auditors rely upon those controls in determining the extent of auditing procedures.[31]

22. Comments. Some commenters contend that the benefits do not justify the additional costs associated with changes to the independent audit requirement.[32] USTA, the American Institute of Certified Public Accountants (AICPA), and several LECs support the proposal but recommend modifications. AICPA and several LECs suggest changing the wording of the "presents fairly" requirement.[33] Some parties suggest that the Commission explicitly require compliance with the professional audit standards contained in the Generally Accepted Auditing Standards (GAAS), noting that the Notice mentions only two of the ten standards contained in GAAS. Finally, some parties object to the proposed requirement for a separate report on the adequacy of carriers' internal controls, claiming that the proposal is unnecessary because GAAS already requires an evaluation of internal controls as part of a financial statement audit, and a separate report would increase the expense of the audit.

Detariffing the Installation and Maintenance of Inside Wiring, (Third Report and Order), CC Docket No. 79-105, FCC 91-386 (adopted November 21, 1991).

[30] See note 11, supra.

[31] In late 1990, the Common Carrier Bureau's Accounting and Audits Division imposed similar standards on a one-time basis for purposes of the independent audit reports for 1990 operations. Responsible Accounting Office (RAO) Letter 12, DA 90-1491, revised October 19, 1990, released October 23, 1990.

[32] Contel Comments at 10; GTE Comments at 9.

[33] AICPA Comments at 9; see also USTA Comments at 8; Ameritech Comments at 18; Bell Atlantic Comments at 18; U S West Comments at 102-103; SNET Comments at 11.

23. Discussion. We here adopt our proposal to strengthen the independent audit requirement, with some minor modifications. We conclude that the independent auditors should provide the same level of assurance as that provided in a financial statement audit engagement.[34] USTA, supported by several LECs, proposes language that makes clear that the independent auditors are to evaluate the results of applying carriers' cost allocation manuals in light of the requirements of the manuals as well as our joint cost rules and other pertinent regulations.[35] We agree that we should state specifically the regulatory requirements to be considered by the independent auditors, and therefore incorporate the suggested language in section 69.904 of our rules.

24. We also require that independent auditors follow GAAS. The Notice referred to the professional standards governing independent auditors. Independent auditors must follow all of the ten standards of GAAS in preparing the required reports. At the same time, however, we specifically do not disclaim our authority, for purposes of regulatory compliance, to prescribe the manner in which the independent audit reports are prepared and presented. For that reason, as is currently the case with respect to the application of generally accepted accounting principles (GAAP),[36] we shall state explicitly in our rules that GAAS shall control only insofar as it is not inconsistent with the rules or directives of the Commission (or its staff on delegated authority). Finally, we agree with the AICPA and several of the LECs that adoption of GAAS by reference obviates the

---

[34] Notice, 6 FCC Rcd at 178. The AICPA and several LECs suggest amending the wording of the proposed rule. The AICPA suggests language that would effectively lessen the standard, but did not explain its rationale for proposing such language. AICPA Comments at 9; see also Ameritech Comments at 18. We decline to adopt AICPA's proposed language because it would reduce the effectiveness of the independent audit as a safeguard against cross-subsidization.

[35] USTA's proposed language precisely tracks the wording of the sample opinion letter appended to RAO Letter 12, which imposed one-time strengthened requirements for the 1990 independent audits. That language requires an independent audit "that provides a positive opinion on whether the applicable data shown in the carrier's annual report required by Section 43.21(f)(2) of this Chapter presents fairly, in all material respects, the information of the carrier required to be set forth therein in accordance with the carrier's cost allocation manual, the Commission's Joint Cost Orders issued in conjunction with CC Docket No. 86-111, and the Commission's rules and regulations thereto including Sections 32.23, 32.27, 64.901 and 64.903 in force as [of] the date of the auditor's report." USTA Comments at 9.

[36] 47 C.F.R. §§ 32.12(a) and 32.16(a).

need for a duplicative report on the carriers' internal controls. Accordingly, we shall not require such a report.[37]

c. Uniformity in Cost Allocation Manuals

25. In the Notice we proposed to require the Common Carrier Bureau to study a means of achieving greater uniformity in the carriers' cost allocation manuals.

26. Comments. Several state and federal agencies and other commenters support that proposal.[38] ADAPSO argues that the Commission should mandate uniformity and not defer to the judgment of the Common Carrier Bureau.[39] The Alarm Industry and MCI both contend that we should specify detailed proposals and timetables for achievement of greater uniformity in carrier cost allocation manuals.[40]

27. The LECs support efforts to promote cost allocation manual uniformity, but generally oppose a requirement of absolute uniformity in cost allocation practices. They argue that complete cost allocation manual uniformity among carriers is inconsistent with the principle of cost causation set forth in the Joint Cost Order,[41] and that requiring a uniform set of cost pools would force a carrier to create cost pools that it would not utilize, contrary to Commission orders requiring carriers to remove hypothetical cost pools from their cost allocation manuals.[42] These parties state that complete uniformity in most accounts, cost pools, and apportionment and time reporting methods is not possible due to differences among the LECs' operations, organizations, records, systems, and nonregulated activities.[43] They argue that cost allocation manual revisions to implement a uniformity requirement would be administratively inconvenient and costly, disrupt quarterly cost allocation manual filings, interrupt year-to-year tracking of actual business specific expenditures, and potentially create an adverse effect upon annual access tariff filings through changing allocation methods.[44] Finally, they claim that a requirement of uniformity could delay the introduction of new enhanced services and carrier reaction to competitive opportunities due to the need to develop uniform industry procedures.[45]

---

[37] For the past four years, the independent audit requirement has proven to be extremely useful in reviewing implementation of the carriers' cost allocation manuals and the results of cost allocations under the manuals. Our proposal to strengthen the financial audit standard for independent audits represents not a failure of our accounting safeguards, but rather an effort to fine-tune a measure that has been highly effective since its adoption. As explained elsewhere in this Order, the independent audit, while valuable, is only one of several measures that comprise our set of cost accounting safeguards. As to the Alarm Industry's request that we adopt procedures to discourage opinion shopping in selecting independent auditors, we see no reason to change our disposition of that matter in this proceeding. See Joint Cost Order, 2 FCC Rcd at 1331-1333. We can revisit the issue later if opinion shopping ever becomes a significant obstacle to the independent audit process.

[38] NTIA Comments at 13; Hawaii PUC Comments at 13; Illinois CC Comments at 7; Michigan PSC Comments at 8; SWRRG Comments at 10; CBEMA Comments at 6; Ad Hoc Users Comments at 28.

[39] ADAPSO Comments at 35.

[40] Alarm Industry Comments at 10; MCI Comments at 61.

[41] USTA Comments at 10; BellSouth Comments at 21-22; NYNEX Comments at 38; Pacific Comments at 42; SWBT Comments at 34; U S West Comments at 103-04; Centel Comments at 5-6; Cincinnati Bell Comments at 4.

28. Discussion. Increased uniformity in LEC cost allocation practices would facilitate our review of those practices and help ensure that they are reasonable and accurate. Although staff efforts to date have resulted in more uniformity than in the originally filed cost allocation manuals, we conclude that even greater uniformity in cost allocation practices is highly desirable to the extent feasible. The benchmarking process facilitated by ARMIS should prove still more effective if greater uniformity in carriers' cost allocation processes can be accomplished. Moreover, this goal should be met expeditiously.

29. We therefore direct the Common Carrier Bureau to analyze the cost allocation practices of subject carriers to determine ways to obtain greater uniformity in carriers' cost allocation procedures and practices. The Bureau is further directed to prepare a request for comments addressing proposed uniformity requirements and to promulgate uniformity requirements upon delegated authority. This effort is a matter of significant priority. We direct the Bureau to proceed on an expedited basis in implementing cost allocation requirements that produce greater uniformity among carrier practices.[46]

---

[42] USTA Comments at 11; Bell Atlantic Comments at 20; BellSouth Comments at 22; SWBT Comments at 33-34; U S West Comments at 104. Under section 64.901 of the Commission's Rules, 47 C.F.R. § 64.901, costs which cannot be directly assigned to either regulated or nonregulated activities are considered common costs. Common costs are grouped into homogeneous cost categories, or cost pools, to facilitate the proper allocation of costs between a carriers' regulated and nonregulated activities in accordance with a hierarchy of preferred cost allocation techniques. See also Joint Cost Order, 2 FCC Rcd at 1343, Appendix B.

[43] USTA Comments at 10; Ameritech Comments at 19; Bell Atlantic Comments at 20; BellSouth Comments at 21-22; NYNEX Comments at 37-38; Pacific Comments at 42; SWBT Comments at 32-33; U S West Comments at 103-04; Centel Comments at 6; Cincinnati Bell Comments at 3-4; GTE Comments at 13-14; Rochester Comments at 9; SNET Comments at 12-13.

[44] Centel Comments at 7; Cincinnati Bell Comments at 4-6; Rochester Comments at 8-9; SWBT Comments at 33-34;

[45] USTA Comments at 11; Ameritech Comments at 20; BellSouth Comments at 22; U S West Comments at 104; SNET Comments at 13.

d. Quantification of the Effects of Cost Allocation Manual Changes

30. Our fourth accounting proposal involves quantification of the effects of revisions to the cost allocation manuals. The Notice indicated that such estimates could assist Commission staff as well as interested parties in focusing attention on the most significant manual revisions.

31. Comments. Federal and state agencies support this proposal,[47] although the DC PSC expresses general reservations regarding the cost allocation process.[48] The Ad Hoc Users also support the proposal.[49]

32. Some LECs claim that quantification is unnecessary, irrelevant, burdensome, and that its cost would outweigh any benefits.[50] Other LECs argue that quantification would be difficult because carriers do not have systems in place to quantify changes at the cost pool level.[51] Several carriers contend that the financial impact of new ventures (or of cost allocation manual changes generally) may not be known at the time that these changes are filed.[52] NYNEX claims that the filing of financial impact estimates would reveal proprietary information concerning new nonregulated service offerings.[53] A few LECs suggest that the quantification requirement proposed in the Notice be replaced with a requirement that carriers state whether the effect of a cost allocation manual revision exceeds a specified threshold amount.[54] The majority of LECs argue that carriers should be allowed to provide a range of the estimated dollar effects of any cost allocation manual changes.[55]

---

[46] The carriers have asserted, and no one has disputed, that absolute uniformity would be nearly impossible to achieve given the differences in the business operations, systems, and records of the subject carriers. In light of the undisputed disparities in carrier operations, it would not be prudent to impose an immediate requirement of absolute uniformity and we do not do so.

[47] NTIA Comments at 13; DC PSC Comments at 25-26; Hawaii PUC Comments at 13; Illinois CC Comments at 6; Michigan PSC Comments at 8-9; SWRRG at 10.

[48] DC PSC Comments at 25-26.

[49] Ad Hoc Users Comments at 29, Appendix 1 at p. 5.

[50] Centel Comments at 8; SNET Comments at 14; U S West Comments at 105.

[51] USTA Comments at 12; BellSouth Comments at 23.

[52] NYNEX Comments at 40; Pacific Comments at 43-44; U S West Comments at 104-05; Cincinnati Bell Comments at 6-7.

[53] NYNEX Comments at 40.

33. Discussion. The purpose of quantifying the effects of revisions to cost allocation manuals is to help interested parties and Commission staff to identify changes in cost allocations that potentially could have a significant impact on regulated and nonregulated activities. We conclude that requiring quantification of cost allocation manual changes to the nearest $100,000 strikes a reasonable balance between relieving the carriers of the burden of precise quantification and preserving the ultimate usefulness of quantification of cost allocation manual revisions. Quantification would not need to be provided for a change with a financial impact of less than $100,000.

34. The reporting ranges proposed by the LECs are so broad that the information provided would be meaningless. USTA, supported by numerous LECs, propose the following ranges: for balance sheet effect, $0-10 million, $10-50 million, and greater than $50 million; for income statement effect, $0-1 million, $1-10 million, $10-50 million, and greater than $50 million.[56] We do not believe that the relative significance of cost allocation manual changes could be ascertained if such large ranges were used.

35. Some commenters have requested that carriers be allowed to quantify changes at the account level rather than at the more detailed cost pool level.[57] We conclude that the level of quantification should not be the same for all types of manual changes. There are three types of manual changes that are susceptible to quantification: (1) changes in time reporting procedures; (2) changes related to affiliate transactions; and (3) changes in the cost apportionment tables. Cost allocation manual changes related to time reporting and affiliate transactions generally occur at or above the account level. In addition, such quantification at the more detailed cost pool level would be very difficult. We therefore require, at a minimum, that carriers quantify changes in time reporting and affiliate transaction at the account level.

---

[54] Bell Atlantic Comments at 21; NYNEX Comments at 41; SWBT Comments at 35; Cincinnati Bell Comments at 7; Rochester Comments at 11.

[55] USTA Comments at 12-13; Ameritech Comments at 20-21; BellSouth Comments at 24; Pacific Comments at 44; SWBT Comments at 35; Cincinnati Bell Comments at 6-7; GTE Comments at 14-15; Rochester Comments at 11; SNET Comments at 14.

[56] Ex Parte Letter from Martin McCue, Vice President and General Counsel, United States Telephone Association, to Donna R. Searcy, Secretary, FCC, June 26, 1991.

[57] E.g., Cincinnati Bell Comments at 6-7.

36. Changes in the cost apportionment tables, on the other hand, generally are made at the cost pool level and carriers reasonably can be required to quantify the effects of those changes at that level. Moreover, if quantification were to take place at the account level, simultaneous changes in several cost pools within a given account could offset one another in the quantification process and thereby mask significant changes in the results at the cost pool level. Thus, the reporting of changes only at the account level might not reveal significant changes at the cost pool level. Such a result would frustrate the purpose of adopting a requirement that carriers quantify the effects of cost allocation manual changes. We therefore require that changes to cost apportionment tables be quantified at the cost pool level.

e. Materiality Threshold of Errors and Omissions

37. We also proposed to direct the Common Carrier Bureau to study whether to establish a reasonable threshold for determining the materiality of errors and omissions discovered in the independent audits of carrier filings.

38. Comments. With the exception of the LECs and the AICPA, all parties commenting upon this issue support the proposal. A few of those commenters ask that the Commission mandate a materiality threshold rather than deferring to the judgment of the Bureau or that the Commission provide detailed proposals and timetables for establishment of specific standards for the materiality of errors and omissions.[58]

39. The AICPA and the LECs argue that a materiality threshold specified by the Commission may be inconsistent with GAAS.[59] Three carriers contend that if the Commission were to specify a materiality threshold for the planning process of the independent audits, a report based upon such procedures could not be made available for general distribution.[60] BellSouth argues that the cost of the independent audit could escalate dramatically if the Commission were to specify a materiality threshold lower than that already used by independent auditors.[61] Finally, the AICPA and several of the LECs argue that the Commission should refrain from prescribing a materiality threshold for planning the audit and, instead, limit our action to setting a materiality threshold for purposes of reporting audit results and correcting errors or omissions that exceed the threshold.[62]

---

[58] ADAPSO Comments at 35; Alarm Industry Comments at 10; MCI Comments at 61.

[59] AICPA Comments at 10; USTA Comments at 13; Ameritech Comments at 21; BellSouth Comments at 24-26; NYNEX Comments at 41-42; Pacific Comments at 45-46; SWBT Comments at 36-37; U S West at 105-106; GTE Comments at 11-13; SNET Comments at 15.

[60] BellSouth Comments at 25-26; SWBT Comments at 36-37; U S West Comments at 106.

[61] BellSouth Comments at 26-27.

40. Discussion. It is important that the independent audits serve their intended purpose and that the independent auditors use an appropriate materiality threshold in planning their audits. Materiality thresholds can aid audit planning. Moreover, as the Michigan PSC suggests in its comments, setting a materiality threshold could facilitate consistent review of carriers' cost allocations.[63] In addition, the independent audits of cost allocation manual implementation and results differ from typical audits in that they serve a regulatory purpose.[64] For that reason, it is essential that the materiality thresholds used by the independent auditors in planning their audits are appropriate in order to ensure accurate results of the cost allocations required under our rules.

41. We therefore direct the Common Carrier Bureau to monitor the materiality thresholds used by the various independent auditors to ensure that each threshold is suitable for the operations of the carrier(s) for which it is employed. In addition, we hereby authorize the Bureau to take such action regarding the materiality thresholds as it deems necessary to ensure consistent and appropriate independent audits. This authorization includes, but is not limited to, setting a uniform materiality threshold or multiple materiality thresholds for different types or sizes of carrier operations. We authorize the Bureau to prescribe materiality thresholds, as necessary, for purposes of planning the independent audits as well as for reporting and correcting errors and omissions to carriers' reports to the Commission. Such authority is essential because it is possible that many errors and omissions exceeding a prescribed materiality threshold would not be discovered unless a suitable threshold were also used in planning the audit. We disagree with commenting parties who argue that setting a materiality threshold would interfere impermissibly with the preparation of the independent audit reports.[65]

---

[62] AICPA Comments at 10; USTA Comments at 13-14; Ameritech Comments at 21; NYNEX Comments at 42-43; Pacific Comments at 46.

[63] Michigan PSC Comments at 9.

[64] McGraw-Hill Reply at 10-11.

[65] Parties present their arguments on this issue in relatively conclusory fashion, without reference to specific professional auditing standards to support their position and without explanation of how a prescribed materiality threshold would interfere with preparation of the required audit report.

2. Use of Strengthened Accounting Safeguards to Protect Against Cross-Subsidization

a. Comments

42. A number of commenters claim that there is no evidence that cost allocation rules can prevent cross-subsidization.[66] These commenters contend that the Commission cannot rely on any form of cost accounting safeguards because those safeguards rely on allocations, rather than isolation of costs through structural separation,[67] and because cost allocations inherently entail an unacceptable potential for intentional or inadvertent misallocation of costs.[68] Others argue that accounting safeguards give the BOCs too much discretion in devising allocation formulas,[69] service definitions, and service descriptions,[70] and that the BOCs control the underlying information used to allocate these costs, such as time reporting by repair technicians.[71] MCI also asserts that our cost allocation rules do not prevent cross-subsidization at the intrastate level.[72]

43. Some commenters contend that the Commission does not have the resources available to implement or enforce the cost allocation rules.[73] They claim that ARMIS is inadequate to detect cross-subsidies because the benchmarking process does not reveal subtle cross-subsidies or misallocations common to all of the BOCs.[74] They also argue that the data provided by individual carriers are not comparable, and the form and manner in which the data are collected keeps changing. Several parties claim that the enforcement actions cited in the Notice show not the ability of the Commission to enforce the cost accounting safeguards, but rather the ability of the BOCs to succeed in cross-subsidization.[75] Some parties express concern that cross-subsidies and other pricing improprieties could go undetected indefinitely or could be discovered only after damage to the competitive marketplace has occurred.[76] Ad Hoc claims that the Commission's affiliate transaction rules do not permit the Commission effectively to detect abuses because actual affiliate transactions are not separately reported.[77] Parties who claim that cost allocation rules cannot protect against cross-subsidy also generally disagree with the Notice's observation that adoption of incentive regulation for the LECs reduces BOC incentives to cross-subsidize.

---

[66] ANPA Comments at 13; CompuServe Comments at 18-19; CBEMA Comments 5-7; IDCMA Comments at 9-15; Iowa Network Services Comments at 15; MessagePhone Comments at 10; NAB Comments at 4; WUTC Comments at 8-9; Stroh Comments at 1-2.

[67] DC PSC Comments at 17; McGraw Reply at 9-10; Florida Comments at 6; CBEMA Comments at 5; ADAPSO Comments at 9-12; MCI Comments at 49-52; ANPA Comments at 16; CompuServe Comments at 19-20; IDCMA Comments at 10-11.

[68] SWRRG Comments at 9; WUTC Comments at 9-10.

[69] MCI Comments at 52-56.

[70] Ad Hoc Comments at 24-25; MCI Reply at 37.

[71] MCI Comments at 55-56.

[72] MCI Comments at 42-45.

[73] McGraw Comments at 11; Alarm Industry Comments at 6-8; IDCMA Comments at 11-12; CompuServe Comments at 26-27; Messagephone Comments at 10; MCI Comments at 61-63; DC PSC Comments at 19-20; WUTC Comments at 9 (true for state regulators as well).

[74] MCI Reply at 38-39.

44. Many parties, including DOJ and NTIA, strongly support use of accounting safeguards to protect against cross-subsidization.[78] These parties state that the BOCs have provided nonregulated services for many years and have not been able to establish market dominance in any of the unregulated markets in which they compete, or harm consumers by raising regulated rates.[79] In addition, these parties note that the Ninth Circuit did not have the benefit of the record established in the Joint Cost Proceeding, and thus there was little evidence showing that effective cost accounting rules could in fact be developed and implemented. NTIA, DOJ, and others, including the BOCs, state that since adoption of the Computer III decision, the Commission has devised and implemented a comprehensive and viable set of cost accounting safeguards to protect against cross-subsidization, including cost allocation rules, cost allocation manual filings, independent audit requirements, ARMIS submissions, and on-site field audits.[80]

---

[75] MCI Reply at 32-35; IDCMA Reply at 3-4.

[76] ANPA Comments at 19; CBEMA Comments at 5-6; IDCMA Comments at 13-14; Iowa Network Services Comments at 13-14; MCI Comments at 59-60; WUTC Comments at 9.

[77] Ad Hoc Comments at 23. Ad Hoc also contends that the affiliate transaction rules should encompass services. Id. at 23-24.

[78] NTIA Comments at 5, 8-10; DOJ Comments at 4-7; CSE Foundation Comments at 7-8; CBT Comments at 2-3; NYNEX Comments at 21-32; SNET Comments at 3-5; Pacific Comments at 32; Bell Atlantic Reply at 4; USTA Comments at 2-4; U S West Comments at 99; Vermont State DPSC Comments at 1; Illinois CC at 6-7.

[79] CSE Foundation Comments at 7. According to Bell Atlantic and SWBT, the BOCs have only a 10% market share in the CPE market, indicating that BOC entry into competitive markets has not discouraged competition. Bell Atlantic Reply at 4-7; SWBT Reply at 37-38.

45. Parties supporting use of cost accounting rules also contend that the manner in which the Commission devised the cost allocation and affiliate transaction rules actually benefits regulated ratepayers.[81] Moreover, these parties argue that nearly four years of Commission and industry experience with these rules demonstrate that cost accounting safeguards can and do control the ability of the BOCs to cross-subsidize such that the benefits of replacing structural separation with nonstructural safeguards outweighs the potential costs.[82] Furthermore, these commenters state that LEC price cap regulation substantially reduces BOC incentives to cross-subsidize because the BOCs cannot automatically pass on to ratepayers increases in costs.[83]

b. Discussion

46. We conclude that our comprehensive system of cost accounting safeguards has worked well and, as strengthened above, effectively protects ratepayers against cross-subsidization by the BOCs. This system consists of five principal parts: (1) the establishment of effective accounting rules and cost allocation standards; (2) the requirement for telecommunications carriers to file cost allocation manuals reflecting the established rules and standards; (3) the requirement for audits by independent auditors of carrier cost allocations, requiring a positive opinion on whether carriers' allocations comply with their cost allocation manuals; (4) the establishment of detailed reporting requirements and the development of an automated system to store and analyze the data; and (5) the performance of on-site audits by FCC staff.

47. The Uniform System of Accounts (USOA) prescribed by the Commission establishes the regulated accounts that carriers must use. After nearly fifty years without significant modification, the Commission substantially revised the USOA, effective January 1, 1988, to reflect significant changes in the industry and modern accounting practices.[84] In the Joint Cost Proceeding, the Commission adopted joint cost rules to ensure that carriers are not permitted to assign the costs of nonregulated activities to the provision of regulated services. Under the Commission's cost allocation rules, costs are directly assigned to regulated or nonregulated activities whenever possible. In the event that costs cannot be directly assigned, costs are assigned, if possible, to regulated or nonregulated activities based on cost causation principles. Remaining costs are then allocated according to general allocation factors.

---

[80] Pacific Comments at 32-33; U S West Comments at 99-100; Bell Atlantic Reply at 8.

[81] CSE Foundation Comments at 8; NYNEX Comments at 25-26; U S West Comments at 100-101; Rochester Comments at 7, n. 16; Pacific Reply at 16; SWBT Comments at 28.

[82] NTIA Comments at 10; NYNEX Comments at 21-23; Pacific Comments at 32; Bell Atlantic Reply at 4.

[83] CSE Foundation Comments at 8-9; NYNEX Comments at 32; Rochester Comments at 7; SNET Comments at 6-7; SWBT Comments at 21-22; Pacific Reply at 24-25.

48. Moreover, these specific standards and rules are geared to protecting ratepayer interests. The Commission could have decided to adopt an incremental costing approach for nonregulated activities, which is likely to have encouraged faster and more extensive development and deployment of enhanced services by telecommunications common carriers. Instead, the Commission employed a fully distributed cost (FDC) allocation methodology. Under this methodology, nonregulated services must contribute towards the general overhead costs of the regulated operations, which would otherwise be borne entirely by the ratepayers of regulated services. Thus, an FDC approach assures that ratepayers will receive additional protection and benefit from the efficiencies gained through joint use of the network. The Commission also adopted affiliate transaction rules that prevent the BOCs from charging ratepayers inflated prices for goods and services obtained from nonregulated affiliates, or from providing these affiliates with goods and services at unduly low prices.[85] Additionally, the requirement that enhanced services costs be excluded from separations will help assure that such costs are excluded from the interstate ratemaking process.[86]

---

[84] Revision of the Uniform System of Accounts and Financial Reporting Requirements for Class A and Class B Telephone Companies, 51 Fed. Reg. 43,498 (December 2, 1986).

[85] 47 C.F.R. § 32.27. Similarly, the affiliate transaction rules are geared to protecting ratepayers. According to those rules, asset transfers from regulated accounts are recorded by the BOCs at net book cost or fair market value, whichever is higher, while assets transferred from a nonregulated affiliate to a regulated carrier are recorded at the lower of net book cost or fair market value. These rules also cover the transfer of services to and from unregulated affiliates and regulated carriers in a manner that properly allocates costs to the appropriate activity. For services that are provided to or received from affiliates, the rules require that the affiliate pay the tariff rate or, if there is no tariff rate, the prevailing price (determined by transactions with nonaffiliates), or fully distributed cost. By structuring our affiliate transaction rules this way, the nonregulated activity bears not just its incremental costs for asset and service transfers but general overhead costs as well, which would otherwise be solely borne by regulated ratepayers.

[86] By excluding enhanced services from separations, the Commission can directly ensure that interstate basic service ratepayers do not bear the costs of unregulated services. Our cost allocation safeguards also provide

49. As the second part of our system, the Commission has reviewed and approved BOC cost allocation manuals showing the cost allocation factors used to allocate joint costs and the manner in which the BOCs will implement cost allocations. The manuals provide detail on the nature of nonregulated activities and the cost accounts they affect, as well as cost allocation formulas and procedures. All the original cost allocation manuals were subject to public comment and Commission review. Before their original approval, the Commission required extensive revisions to the BOCs' cost allocation manuals.[87] Under the strengthened cost accounting safeguards adopted today, the BOCs will be required to quantify the effects of cost allocation manual changes in $100,000 increments at the cost pool level for cost apportionment changes and at the account level for changes in time reporting and affiliate transactions. This level of detail will improve the ability of staff and the public to evaluate proposed cost allocation manual changes. Additionally, as indicated, the Common Carrier Bureau is undertaking an examination of ways to achieve even greater uniformity in cost allocation manuals than currently exists, which could further enhance comparisons of BOC manuals.

50. We have also required that the BOCs submit to annual audits conducted by independent auditors. The independent audit requirement has proven to be a very useful and cost effective tool in reviewing implementation of the carriers' cost allocation manuals and the results of cost allocations under the manuals. The requirement also assists Commission staff in evaluating carriers' compliance with the Commission's rules, as well as the effectiveness of the rules themselves. As strengthened by our action in this Order, independent auditors are required to provide the same level of assurance in their audits as that undertaken in a financial statement audit engagement. Under this level of assurance, the auditor will provide an opinion on the carrier's cost allocations in light of the requirements of the cost allocation manual approved by the Commission as well as of our joint cost rules and other pertinent regulations. Commission auditors continually review the audits submitted by the independent auditors.

51. The Commission also has imposed detailed reporting requirements for the BOCs' cost allocations and has developed and implemented ARMIS, an automated system to store and analyze the reported data. The ARMIS system contains detailed cost and revenue information that allows the Commission to make benchmark comparisons among the carriers and across time periods to identify discrepancies warranting Commission attention. In the

---

sufficient information for the states to protect against cross-subsidies at the intrastate level. The operation of the joint cost and separations rules results in a BOC intrastate assignment of basic services costs. To protect against cross-subsidy of enhanced services by intrastate ratepayers, a state need only use its normal regulatory mechanisms to ensure that intrastate rates are not too high in light of that assignment.

[87] _See_ NYNEX Comments at 27; SWBT Comments at 29-30; NYNEX Reply at 15.

ARMIS Order,[88] the Commission required carriers to file new computerized reports aimed at detecting improper cross-shifting. These reports are available to the states and to the public. The quarterly report contains certain financial data reflecting the results of the accounting and cost allocation requirements prescribed in Part 32 and Part 64 of the Commission's Rules.[89] Also, carriers are required to file an annual USOA Report displaying the results of their total activities for every account in the USOA, and an annual Joint Cost Report showing the allocation to regulated and nonregulated activities for all accounts involved in the ratemaking process. Over time, the Commission has refined the ARMIS reporting requirements in order to make benchmark comparisons more easily and readily available.

52. Commission staff also conducts targeted on-site audits. These audits determine whether specific carrier practices and procedures are in compliance with the joint cost rules and whether such practices and procedures are sufficient to prevent cross-subsidization. The Commission examines, among other things, carrier procedures and practices that may be found to be potentially vulnerable to cross-subsidization. In preparation for on-site audits, Commission staff scrutinizes the independent audit reports, the detailed ARMIS submissions, complaints against the carriers, cost allocation manual filings, and internal analytical studies. These efforts permit the Commission to target on-site audits effectively on those carriers and those issues that most warrant Commission attention. Commission auditors, among other things, interview witnesses, study thousands of pages of workpapers, and review the carriers' own internal control systems designed to prevent cross-subsidy.

53. We are not persuaded by commenters who claim that these requirements and procedures will be inadequate to detect improper cross-subsidization. While allocation factors and the detailed manner of implementation of allocations are chosen by the BOCs, we have established specific guidelines and reporting mechanisms for the BOCs to follow and, as has been done in the past, we will not hesitate to require changes in cost allocations when necessary. We conclude that our comprehensive system of accounting safeguards provide a reasonable and sufficient method of assuring that the cost allocation factors chosen by the BOCs and the manner of implementing the cost allocations set forth in the cost allocation manuals will not result in cross-subsidy. Similarly, MCI's claim that the BOCs

---

[88] See note 12, supra.

[89] Part 32 contains the USOA, which lists the more than 250 accounts used by the carriers to record the costs and revenues of their regulated and nonregulated activities. Part 64 contains the rules adopted in the Joint Cost Order that separate regulated costs from the costs of nonregulated activities.

routinely overproject regulated costs is completely unsupported.[90] Accordingly, we reject arguments of commenters that our cost allocation requirements are so vague as to permit carriers to engage in cross-subsidization.[91]

54. Based on nearly four years experience with cost accounting safeguards, we are convinced that we will be able to continue to enforce these safeguards. Underlying information, including the time reporting of employees, is subject to audit both by independent auditors and Commission staff. Furthermore, ARMIS contains detailed reporting of the cost allocations that can be used to evaluate an individual BOC's actual allocations of costs as well as to make benchmark comparisons between the BOCs. MCI's claims that these reports do not reveal subtle cross-subsidies is unsupported and unexplained. The Commission has refined the ARMIS requirements to facilitate meaningful benchmark comparisons. The Commission also has adequate resources to monitor the BOCs' activities.[92] Contrary to the view of some commenters, our enforcement action against the NYNEX telephone companies for apparently improper affiliate transactions between New York Telephone and New England Telephone, and NYNEX's nonregulated affiliate, the Material Enterprises Company (MECO) supports the efficacy of our affiliate transaction rules.[93]

---

[90] Moreover, under our joint cost rules, the BOCs are constrained from overallocating joint costs to the regulated side. If actual nonregulated usage does exceed projected peak usage, a reallocation of investment is required to the nonregulated side. The reallocation compensates the regulated operation for the time value of the costs it bore for the nonregulated operation. It also blunts any incentive for the BOCs to underestimate its future nonregulated demand with the goal of overallocating investment to the regulated operations.

[91] Nor are our rules defective because they fail to charge nonregulated operations for training when, for example, regulated service employees go to work for the nonregulated service operations. See MCI Comments at 10. Even under a structural separation requirement, a BOC employee could be trained by the regulated company and then subsequently transferred to the BOCs' nonregulated affiliate. In addition, the joint cost rules already address the question of "inter-temporal cross-subsidies" raised by Ad Hoc. See Ad Hoc Comments, Attachment at 12. In the Joint Cost Proceeding, we did not adopt a costing methodology that would have allocated the costs of regulated services (central office equipment and outside plant investment) between regulated and nonregulated services based on actual relative regulated and nonregulated use, but rather on the basis of intended relative use. The Commission adopted a projected use methodology to ensure that ratepayers do not bear the risks and costs of nonregulated business failures. For instance, if a cost were incurred largely to provide for future nonregulated services, and these services failed to grow as expected, we did not want regulated ratepayers to pay for the nonregulated share of the costs. Joint Cost Order, 2 FCC Rcd at 1320, paras. 169-172.

[92] We will also work with Congress to secure additional resources if they become necessary.

55. We also conclude that the implementation of LEC price cap regulation as of January 1, 1991, is a significant regulatory development since the BOC Separation Order that reduces BOC incentives to cross-subsidize enhanced services with basic services.[94] Under rate-of-return regulation, a regulated carrier is entitled to charge basic service rates that reflect regulated costs plus a reasonable rate of return on investment. As a practical matter, misallocation of nonregulated costs to regulated operations under rate-of-return regulation increases a carrier's regulated costs and therefore permits higher regulated rates to recover the improperly allocated nonregulated costs. By contrast, because price cap regulation severs the direct link between regulated costs and prices, a carrier is not able automatically to recoup misallocated nonregulated costs by raising basic services rates, thus reducing the incentive for the BOCs to shift nonregulated costs to regulated services.[95]

---

[93] Based on a Common Carrier Bureau audit, we tentatively concluded that MECO had overcharged its telephone company affiliates by a total of $118.5 million from 1984 through 1988. Accordingly, this Commission ordered New York Telephone and New England Telephone to show cause why they should not be required to remove $32.6 million in excessive capital costs from their rate base, and perform ratemaking adjustments to return $35.5 million in improper charges imposed on interstate ratepayers. This Commission also found the two telephone companies apparently liable for forfeitures totaling $1.419 million for violation of the Commission rules. See New York Telephone Co. and New England Telephone and Telegraph Co., Apparent Violations of the Commission's Rules and Policies Governing Transactions with Affiliates, Order to Show Cause and Notice of Apparent Liability for Forfeitures, 5 FCC Rcd 866, 870-871, paras. 31, 33 (1990). New York Telephone and New England telephone denied any allegations of wrongdoing. A consent decree was entered into on October 3, 1990, in which NYNEX agreed to reduce its interstate capital account balances by $32.6 million, to reduce interstate revenue requirements by $35.5 million, and to make contributions to the United States Treasury in the amount of $1.419 million. See New York Telephone Co. and New England Telephone and Telegraph Co., Apparent Violations of the Commission's Rules and Policies Governing Transactions with Affiliates, 5 FCC Rcd 5892 (1990), recon. denied, 6 FCC Rcd 3303 (1991), appeals pending sub. nom., New York v. FCC, No. 91-1362 (D.C. Cir. filed August 5, 1991). Having obtained for interstate ratepayers and the Treasury all of the relief sought in the Order to Show Cause, we agreed to terminate the proceeding without a finding of wrongdoing on the part of NYNEX.

[94] See CSE Foundation Comments at 9; NYNEX Comments at 32; Rochester Comments at 7; SNET Comments at 6-7; SWBT Comments at 21; Pacific Reply at 24-25.

[95] See NYNEX Comments at 32; Rochester Comments at 7; SNET Comments at 6-7; SWBT Comments at 21; Pacific Reply at 24-25. Several parties claim that the BOCs have an incentive, pending the price cap review of the productivity

56. The Court in California v. FCC vacated Computer III in its entirety because the Court concluded that the Commission had not presented a sufficient justification for reliance on cost accounting safeguards so soon after its decision in the BOC Separation Order to continue structural separation for BOC enhanced services operations. Based on our experience of nearly four years, and based on the record developed on remand, we conclude that our cost accounting safeguards constitute a realistic and reliable alternative to structural separation to protect against cross-subsidy. We find as well that the adoption and implementation of incentive regulation for the BOCs serves as an effective complement to these cost accounting safeguards by reducing BOC incentives to cross-subsidize their enhanced services. We further conclude that the effectiveness of those nonstructural safeguards renders any costs of eliminating structural separation marginal.

B. Safeguards Against Discrimination

57. The Notice proposed the following nonstructural safeguards to protect independent ESPs from possible BOC discrimination in the provision of access to underlying basic services: (1) ONA, as adopted by the Commission in December 1990; (2) the Computer III nondiscrimination reporting requirements; (3) Computer III network information disclosure rules; and (4) CPNI disclosure rules. The Notice proposed to rely on ONA, which the Commission readopted at the time of the Notice. The Notice also proposed to adopt the Computer III nondiscrimination reporting requirements and network information disclosure rules, and requested comment on whether we should modify the CPNI rules. Finally, the Commission proposed, irrespective of its broader decisions regarding structural and nonstructural safeguards, to eliminate both the capitalization plan requirement and the prohibition against a regulated BOC and a BOC affiliate from performing software development for one another.

58. In this Report and Order, we conclude that a set of nonstructural safeguards will effectively protect against potential discrimination by the BOCs in provision of basic services to competing ESPs. Contrary to the requests of some commenters, fundamental changes in our ONA requirements are not necessary in order to rely on them for protection against discrimination. We readopt the Computer III nondiscrimination

---

offset in 1994, to load up their regulated operations with additional costs in order to avoid an increase in their productivity offset. See, e.g., MCI Comments at 24; DC PSC Comments at 23-24. Furthermore, as recognized in the Notice, there may be some incentive remaining under price cap regulation for LECs whose earnings are approaching the sharing mark to try to shift costs to the regulated side of its operations. See Ad Hoc Comments at 22. We do not find here that LEC price cap regulation eliminates all possible incentive to shift costs. We find, rather, that these incentives under price caps are much less significant than under rate-of-return regulation, for the BOCs are no longer automatically entitled to increase rates to recoup cost increases. LEC price cap regulation serves as an effective complement to cost accounting, reporting, auditing, and enforcement safeguards.

reporting requirements as effective protections against discrimination in quality, and in installation and maintenance of basic services. We also readopt the Computer III network disclosure rules to assure that competing ESPs obtain critical network information in a timely fashion. We adopt modified CPNI requirements that require BOC enhanced services marketing personnel to obtain prior authorization before accessing the CPNI of customers with more than twenty lines. These safeguards, along with nonstructural safeguards against cross-subsidization, should effectively protect against anticompetitive conduct by the BOCs toward competing ESPs. We also eliminate the capitalization plan requirement and the prohibition against a BOC and unregulated affiliates performing software development for one another.

1. Open Network Architecture

59. Background. The Phase I Order in Computer III adopted CEI requirements so that unaffiliated ESPs could obtain nondiscriminatory access to the underlying basic network services used by the BOCs in their provision of enhanced services. Under CEI, the BOCs were required to provide their ESP competitors with "equal access" interconnections to basic network services at the same tariffed rates that the BOCs themselves paid.[96] The Commission also required that the BOCs implement ONA, which extended CEI principles beyond the underlying services used to provide their own enhanced services to the BOCs' overall basic networks and which was designed to increase opportunities for ESPs to use the regulated networks of the BOCs in a nondiscriminatory manner. Under ONA, the BOCs were required to develop plans describing how they would provide unbundled basic service "building blocks," so that competing ESPs could use network services in a flexible and economical manner. Specifically, we required the BOCs to make available basic services, features, and functions requested by ESPs, based on the expected market demand for such elements, their utility as perceived by enhanced service competitors, and the technical and costing feasibility of such unbundling.[97]

60. Following the Ninth Circuit's vacation and remand of Computer III, we proposed to reinstate ONA, which had not been challenged before the

---

[96] Basic services used in the provision of BOC enhanced services had to "be available to others on an unbundled basis, with technical specifications, functional capabilities, and other quality and operational characteristics, such as installation and maintenance times, equal to those provided to the carrier's enhanced services." Phase I Order, at 1036-1037, paras. 147, 150, n. 210.

[97] Phase I Order, 104 FCC 2d at 1065-1066, paras. 214, 217.

Ninth Circuit.[98] At the time we adopted the Notice in this proceeding, we also adopted an Order requiring the BOCs to implement ONA.[99]

61. Comments. A few parties argue that ONA will not be an effective safeguard against BOC access discrimination.[100] These parties argue that competing ESPs will never achieve access to the network comparable to that of the BOCs' enhanced services because ONA does not require the BOCs to allow independent ESPs to collocate their equipment at BOC central offices or require the BOCs to unbundle transport and switching.[101] Also, some parties assert that ONA is just a repackaging of limited network services that were in existence and being offered prior to the development of ONA, and that the BOCs are reluctant to unbundle network offerings any further.[102] MCI claims that the BOCs' ONA plans do not contain proposals to deploy any new or improved unbundled types of ONA services.

62. Discussion. We conclude that ONA constitutes an effective safeguard, helping to ensure that independent ESPs obtain nondiscriminatory access to BOC basic services. The *California* Court did not criticize ONA, but stated that the record supported the Commission's findings that ONA "will be effective in reducing the risk of BOC access discrimination[.]"[103] Our experience with ONA since that time serves to reaffirm this conclusion. ONA has been developed in a meticulous fashion over the past five years. In particular, the BOCs were required to file detailed ONA plans in 1988, specifying the basic services they would provide to competing ESPs and the time of deployment, as well as the methods employed to comply with our other nondiscrimination safeguards. These ONA plans were subject to intense scrutiny by both the public and the Commission. In December 1988, the Commission released an order that approved the BOC ONA plans in substantial part but identified a number of areas that needed revision before ONA could be effectively implemented. In May, 1989, the BOCs filed amended ONA plans, which were again subject to public comment and careful review. In May 1990, we approved the amended plans, and authorized implementation of ONA. To ensure the continued evolution of ONA, the Commission required further amendments to the ONA plans, which were filed in April 1991, and are addressed in a companion order. On November 1, 1991, the BOCs filed federal tariffs for their initial ONA services.

---

[98] Computer III Remand Proceedings, CC Docket No. 90-368, *Notice of Proposed Rulemaking*, 5 FCC Rcd 5242 (1990).

[99] Computer III Remand Proceedings, CC Docket No. 90-368, *Report and Order*, 5 FCC Rcd 7719 (1990).

[100] MessagePhone Comments at 11; ANPA Comments at 25; MCI Comments at 77; Ad Hoc Comments at 25.

[101] Ad Hoc Comments at 25-26; ANPA Comments at 25.

[102] ANPA Comments at 25; MCI Comments at 71-72.

[103] *California*, 905 F.2d at 1238.

63. We conclude that, given current network architecture and technical capabilities, the BOCs are generally meeting the basic service needs of the enhanced services industry. Since the filing of the original ONA plans, the BOCs have filed tariffs for initial ONA services. NYNEX alone has filed tariffs for twenty-one ONA services in response to requests by independent ESPs.[104] The BOCs' ONA plans describe in considerable detail their deployment plans for new ONA services, and the BOCs are continually introducing new ONA services that will be offered to ESPs.[105]

64. We are not persuaded by the conclusory arguments of some commenters that we need make fundamental changes in ONA in order to rely on it as a check against discrimination. Mandatory physical collocation of ESP equipment is not necessary to ensure comparable access. The Phase I Order sets forth nine parameters designed to ensure comparable technical access,[106] and the Commission has approved BOC parity pricing as satisfactorily providing comparable pricing.[107] In the BOC ONA Order, the Commission declined to require a radical reconfiguration or fundamental unbundling of the BOC networks, stating that providing ONA based on a more disaggregated, and at that time unspecified, architecture would be extremely costly and unnecessary for effective implementation of ONA.[108]

---

[104] According to NYNEX, only two of these services are utilized in conjunction with NYNEX's enhanced service offerings. NYNEX Reply at 44-45.

[105] In a companion order, we today generally approve the BOCs' most recent ONA plan amendments detailing their provision of ONA services. See Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, FCC 91-382 (released December 19, 1991). To the extent that parties argue that the CEI rules do not allow independent ESPs to purchase different or more advanced basic network services than those used in the provision of BOC enhanced services, see, e.g., Accessplus Comments at 9, these parties confuse our CEI and ONA requirements. As discussed above, the CEI regime was a transitional phase that provided ESPs with "equal access" to the underlying basic services used to provide BOC enhanced services. Reasonable access to different or new basic services desired by ESPs, however, is a requirement of ONA.

[106] The CEI parameters include: (1) interface functionality; (2) basic service unbundling; (3) resale; (4) technical characteristics; (5) installation, maintenance, and repair; (6) end user access; (7) CEI availability; (8) minimization of transport costs; and (9) CEI recipients. See Phase I Order, at 1021-1043, paras. 117-166. The ONA plans filed by the BOCs contain considerable detail on how the BOCs are to satisfy these parameters.

[107] Phase II Order, 104 FCC 2d at 1048-1049, paras. 174-175; Phase I Second Further Reconsideration Order, 4 FCC Rcd at 5927-5929, paras. 3-19.

2. Nondiscrimination Reporting Requirements

65. Background. In the Phase II Order, the Commission required the BOCs to file quarterly nondiscrimination reports.[109] Subsequently, the Commission required the BOCs to use a uniform format for their reports on the installation and maintenance of basic services and specified 48 basic service categories for reporting.[110] The Commission also modified the quality reporting requirement and required the BOCs to file annual affidavits attesting that they have not discriminated in the quality of services provided to enhanced service competitors.[111]

---

[108] BOC ONA Order, 4 FCC Rcd at 41-43, paras. 69-72. We note that we are actively considering the public interest benefits of unbundling switching and transport in our Expanded Interconnection proceeding. Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Notice of Proposed Rulemaking and Notice of Inquiry, 6 FCC Rcd 4818 (1990).

The Notice also requested comment on the relationship between the nondiscrimination safeguards and LEC price cap regulation. Notice, 6 FCC Rcd at 180, para. 37. Only two parties discussed this issue. MCI stated that application of price cap regulation to ONA pricing would allow rate churn, making it difficult for ESPs to plan ahead in developing their own enhanced services. MCI Comments at 84. Furthermore, the DC PSC contends that price cap regulation may give the BOCs flexibility to price basic service elements (BSEs) that they use for their own enhanced services at lower rates than BSEs that they do not use. DC PSC Comments at 28-29. The Commission addressed these concerns in the Part 69/ONA Order, where we adopted a cost-based approach to the initial pricing of new ONA services, such as BSEs and basic services arrangements (BSAs). Under this approach, a LEC introducing new services must satisfy the net revenue test as well as submit, for example, engineering studies, time and wage studies, and other cost accounting studies to identify the direct costs of providing the new service. In addition, the BOCs were required to "flag" or identify the BSEs that they intend to use in their enhanced service operations. This requirement was adopted in order to prevent the BOCs from discriminating against independent ESPs by raising the rates of BSEs that their competitors use and decreasing the rates of BSEs that their own enhanced service operations use. See Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture and Policy and Rules Concerning Rates for Dominant Carriers, CC Docket Nos. 89-79 and 87-313, Report and Order & Order on Further Reconsideration & Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524, 4528, 4531-4533, paras. 23, 38-50.

[109] See Phase II Order, 2 FCC Rcd at 3082, 3084, paras. 73, 89.

[110] BOC ONA Reconsideration Order, 5 FCC Rcd at 3103, paras. 76-80.

66. Comments. MCI argues that the nondiscrimination reporting requirements are no stronger than they were under structural separation, and that, absent a change in regulatory or market conditions, these requirements must be strengthened under nonstructural safeguards.[112] MCI and ADAPSO argue that the effectiveness of this safeguard relies on compliance by BOC employees and after-the-fact reporting, which is too arbitrary.[113]

67. Discussion. We conclude that our nondiscrimination reporting requirements adequately protect ESP competitors from discrimination in the installation, maintenance, and quality of basic services. The nondiscrimination reporting requirements were adopted to protect against possible discrimination against ESPs by the BOCs in the quality, and installation and maintenance, of basic services. These requirements are designed so that the Commission can compare the level of service of basic services used in providing the BOCs' enhanced services with that of services used by their enhanced service competitors. During the past three years, we have reviewed the installation and maintenance reports filed by the BOCs. These reports indicate that the BOCs are installing and maintaining the basic services used in providing their own enhanced services in the same fashion and at the same rate as the basic services used by their competitors. We note that we have not received any complaints alleging that the BOCs are discriminating in the installation, maintenance, or quality of basic services. MCI does not point to any specific reasons as to why our nondiscrimination reporting requirements are ineffective. Based on our experience, we find that, within the ONA framework that the Commission has developed, they adequately protect against discrimination in the installation, maintenance, repair, and quality of basic services. We therefore readopt the nondiscrimination reporting requirements in effect before the California decision.[114]

3. Network Disclosure Rules

68. Background. In Computer III the Commission adopted network information disclosure rules to ensure that independent ESPs receive timely access to technical information related to new or modified network services affecting the interconnection of enhanced services to the BOC networks.[115] These rules require that disclosure of network information to ESPs occur at the make/buy point, i.e., when the carrier decides to make itself, or to procure from an affiliated entity, any product the design of which relies on the network interface. The BOCs were also required to release this information publicly at least twelve months prior to the introduction of the new service or network change. If a carrier was able to introduce the service between six and twelve months after the make/buy point, however, public disclosure was required at the make/buy point, but not less than six months before the introduction of the service.[116]

---

[111] Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 4 FCC Rcd 1, 248-249, para. 481 (BOC ONA Order); 5 FCC Rcd 3084 (1990) (BOC ONA Reconsideration Order); 5 FCC Rcd 3103, 3120, para. 145 (BOC ONA Amended Plans Order). See also Phase II Reconsideration Order, 3 FCC Rcd at 1160, paras. 76-77.

[112] MCI Comments at 82-83.

[113] ADAPSO Comments at 12-15; MCI Comments at 86-88.

[114] This includes the requirement that the BOCs file annual affidavits attesting that they have not discriminated in the quality of services provided to their enhanced service competitors.

69. Comments. MCI argues that the network information disclosure requirement is no stronger than that under structural separation.[117] IDCMA further argues that these rules actually advantage the BOCs in their provision of enhanced services operations because public disclosure of network information is not required at the time the information is actually given to the BOCs' unregulated services personnel but, rather, at the make/buy point, which may be substantially later.[118] Several parties, including DOJ, NTIA, the Michigan PSC, and the Illinois Commerce Commission, support readoption of the network information disclosure rules.[119]

70. Discussion. We conclude that the Computer III network disclosure rules provide the enhanced services industry with critical network information in a timely fashion, and thus serve as an effective safeguard against discrimination in the provision of basic services to competing ESPs. These rules generally require disclosure to independent ESPs at the make/buy point, which includes the time when the BOCs begin joint planning, research, or development of enhanced services that require new network services or changes to existing network services that affect the interconnection of enhanced services with the network.[120] Furthermore, any decision by the BOCs to manufacture or procure hardware or software for any service relying on the new or modified network interface would also trigger our disclosure requirements. We did not require disclosure to ESPs as soon as BOC personnel with any involvement with enhanced services are provided with network information. Such a disclosure rule would impair the carriers' development efforts, inhibit network improvements, and eliminate the benefits of removing structural separation by reinstituting the same types of artificial and inefficient restraints on internal information flows that are imposed by a structural separation requirement.[121] Such early disclosure of possible changes in the network could also cause significant difficulties if a BOC subsequently chose to follow a different course, giving rise to possible allegations of misconduct by ESPs who have relied on such preliminary information.[122] Again, MCI does not provide any specific reasons as to why the network disclosure rules are inadequate. Accordingly, we readopt the network disclosure rules in effect prior to the California decision.

---

[115] Phase I Order, 104 FCC 2d at 1080-1086, paras. 246-255.

[116] See Phase II Order, 2 FCC Rcd at 3087-3088, paras. 107-112.

[117] MCI Comments at 82-83.

[118] IDCMA Comments at 19, n. 25.

[119] NYNEX Comments at 83-84; Ameritech Comments at 22-23; Pacific Comments at 70; Michigan PSC Comments at 9-10, Illinois CC Comments at 5-6; NTIA Comments at 5-6; DOJ Comments at 7.

[120] Phase I Order, 104 FCC 2d at 1081, para. 252.

4. Capitalization Plan Requirement and Software Development

71. Background. In Computer II, the Commission required the BOCs to file capitalization plans regarding the capital structure of the nonregulated affiliate.[123] The Commission eliminated the capitalization plan requirement in Computer III.[124] The Commission also in Computer II prohibited the regulated BOC company and its nonregulated affiliate from performing software development for one another.

72. Comments. No parties opposed the proposal in the Notice to eliminate the capitalization plan requirement or the prohibition against joint software development. On the other hand, several commenters express support for the removal of the capitalization plan requirement and the

---

[121] Phase I Order, 104 FCC 2d at 1081, 1083-1084, paras. 248, 251-252. The same rules have also worked well when applied to the provision by the BOCs of basic services and unregulated customer premises equipment. See Furnishing of Customer Premises Equipment by Bell Operating Telephone Companies and the Independent Telephone Companies, Report and Order, 2 FCC Rcd 143 (1987) (BOC CPE Relief Order), mod'd on recon., 3 FCC Rcd 22 (1987) (Reconsideration Order).

[122] The State of Hawaii argues that GTE should be subject to the same nondiscrimination safeguards as are the BOCs because GTE is comparable to the BOCs and because Hawaii is served only by one carrier, GTE. Hawaii Comments at 3-8. GTE contends that it is not comparable to the BOCs in that it is comprised of a number of geographically dispersed LECs and that it is voluntarily complying in some respects with ONA and nondiscrimination safeguards. GTE Reply at 1-9; Ex Parte Letter, from Whitney Hatch, Assistant Vice President, Regulatory Affairs, GTE, to Donna R. Searcy, Secretary, FCC, November 12, 1991. Although this is an issue worthy of Commission consideration, it is beyond the scope of this proceeding to determine whether GTE should be subject to the same nondiscrimination requirements as the BOCs for GTE's provision of enhanced services.

[123] Final Decision, 77 FCC 2d at 485, para. 258.

[124] See Phase I Order, 104 FCC 2d at 1076-1077, paras. 238-240; Phase II Order, 2 FCC Rcd at 3098-3099, paras. 177-186.

prohibition against the regulated company and the nonregulated affiliate from performing software development for one another.[125]

73. Discussion. We conclude that, in light of the implementation of our affiliate transaction rules and the burdens associated with the capitalization plan requirement, the filing of capitalization plans is no longer justified. We have no indication that the BOCs have improperly transferred assets from the regulated company to the separate subsidiary. Moreover, since Computer II, the Commission has implemented affiliate transaction rules that include asset valuation requirements to govern the transfer of assets to and from regulated and nonregulated affiliates. These rules specifically address the concerns mentioned in Computer II that resulted in the capitalization plan requirement. Under the affiliate transaction rules, asset transfers from the regulated company are recorded by the BOCs at net book cost or fair market value, whichever is higher. Thus, improper subsidies in the form of asset transfers will not flow from regulated ratepayer pockets to any separate nonregulated affiliate.

74. Similarly, we eliminate the prohibition against the BOCs' regulated company and any nonregulated affiliates performing software development for one another. The Commission's affiliate transaction rules specifically govern joint software development, and will adequately protect ratepayers from any disproportionate spreading of the costs of software development onto regulated activities. Transfer of services from the regulated company to the nonregulated company require that the affiliate pay the tariff rate, the prevailing price (determined by transactions with nonaffiliates) if there is no tariff rate, or fully distributed cost. These rules ensure that the unregulated affiliate does not obtain special discounts or other improper price reductions to the detriment of regulated ratepayers.

C. Customer Proprietary Network Information

1. Background

75. Under the current CPNI rules for enhanced services, the BOCs' enhanced services marketing personnel are allowed to make use of CPNI without customer authorization, although a customer can request that its CPNI be withheld from such personnel. Independent ESPs, by contrast, must obtain advance authorization from the customer in order to obtain access to CPNI. The rules also require that the BOCs provide an annual written notice of CPNI rights to multiline business customers, and that any aggregated CPNI that a BOC makes available to persons involved in the marketing of enhanced services must also be made available to independent ESPs on the same terms.

76. The current CPNI rules for enhanced services were adopted in the Phase II Order,[126] and reaffirmed in the Phase II Reconsideration

---

[125] See e.g., Pacific Comments at 70-71.

[126] Phase II Order, 2 FCC Rcd at 3093-3098, paras. 141-176.

Order.[127] In the BOC ONA Reconsideration Order,[128] however, the Commission noted the continued concerns of ESPs about the competitive effects of the rules, and recognized that the manner in which the rules are implemented may affect whether a customer purchases BOC enhanced services before becoming aware either that independent providers exist or that those providers may have access to the customer's CPNI to structure a service offering to meet the customer's needs. Although we concluded that the CPNI rules were not properly before us at that time, we directed the BOCs to address any legitimate concerns of the independent ESPs in the April 1991 amended ONA plans.

77. In the Notice, we decided to expand and accelerate our review of the CPNI safeguards applicable to BOC provision of enhanced services. We requested comment both on proposals for improving the implementation of the CPNI rules, and on modifications to the rules, including specifically a prior authorization requirement to be applied to the BOCs in some or all circumstances.[129] The Notice specified that any proposals should balance considerations of efficiency, competitive equity, and customer privacy.

2. Comments

78. Parties seeking modification of the current CPNI rules focus largely on the issue of competitive equity. Independent ESPs and others argue that the current CPNI rules give the BOCs a significant competitive advantage.[130] For instance, parties assert that the BOCs can use their access to CPNI: (1) to identify new customers before anyone else and to contact those customers before they realize that there are competitive alternatives; (2) to target the customers of competing ESPs; (3) to tailor their marketing presentations based on information about customers' network usage; and (4) to identify the appropriate customer contact.[131] Some parties argue in particular that the current rules give the BOCs the opportunity to try to sell enhanced services to customers who contact them to purchase basic services for use in conjunction with a competing ESP's services.[132] Moreover, some parties contend that many customers do not understand, or simply ignore, the CPNI notices currently provided to multiline business customers, suggesting that these notices are an ineffective response to competitive concerns.[133]

---

[127] Phase II Reconsideration Order, 3 FCC Rcd at 1161-1164, paras. 85-114.

[128] BOC ONA Reconsideration Order, 5 FCC Rcd at 3094, paras. 81-83.

[129] Notice, 5 FCC Rcd at 180, paras. 38-40.

[130] ADAPSO Comments at 35-36; ANPA Comments at 40-45; ATSI Comments at 10-16; ONA Users Group Comments at 6-9; CompuServe Comments at 32-33; Iowa Network Services Comments at 32-35; California Comments at 9-10; Colorado Comments at para 7; DC Public Service Commission Comments at 29; Florida Comments at 12-13; NARUC Comments at 15; New York Comments at 11-12; Pennsylvania Comments at 11-14; Sprint Comments at 3-4; IDCMA Comments at 18; MessagePhone Comments at 15; IIA Comments at 6-15.

[131] See e.g., ANPA Comments at 40-42; ATSI Comments at 10-11; Iowa Network Services Comments at 32-35; IIA Comments at 6-15; Florida Comments at 12-13.

79. Some ESPs argue specifically that the current rules do not provide sufficient protection for their own CPNI or that of their customers. For instance, ATSI asserts that although an ESP is permitted to restrict BOC access to its CPNI, the BOCs discourage restrictions by telling ESPs who do so that they can no longer do business with the account executives familiar with their business needs.[134] With regard to the CPNI of the ESPs' customers, Iowa Network Services proposes that the Commission prohibit the BOCs from releasing such CPNI to the BOC enhanced services operations without the consent of the ESP, in order to prevent the BOCs from identifying and marketing enhanced services to the ESPs' customers.[135] A number of large customers express concern over unrestricted BOC access to CPNI, arguing that CPNI can be competitively sensitive from the customer's point of view.[136]

80. The BOCs respond to competitive equity arguments in a number of ways. The BOCs argue that CPNI does not provide them with a significant advantage in identifying customers.[137] Some of the BOCs also contend that CPNI cannot easily be used to generate lists of potential customers,[138] or that independent ESPs have access to much better marketing data from other sources, such as their own customer records or publicly sold marketing lists.[139] The BOCs also argue that CPNI has little value because ESPs make very few requests for CPNI.[140] Some of the BOCs assert that they have addressed certain ESP competitive equity concerns internally. For instance, some BOCs permit ESPs to order network services for their ESPs' customers, thereby minimizing the BOC's contact with those customers.[141] In addition, BellSouth and Pacific state that they have instructed their service representatives not to market enhanced services to customers when they call to order network services for use with another ESP's service.[142]

---

[132] ATSI Comments at 12-15.

[133] TCA Comments at 6-7. See also U S West Comments at 72-75; Ameritech Comments at 27-28.

[134] ATSI Comments at 16-18. Pacific responds that under a prior authorization requirement, all customers that do not authorize access to CPNI will suffer the same inconvenience of which ATSI complains because these customers would need to be transferred from their current account executives to network-services-only account executives. Pacific Reply at 38-39. TCA argues that the BOCs should not only be subject to a prior authorization rule, but should also be prohibited from assigning enhanced service marketing functions to their network service account teams. TCA Comments at 7-8.

[135] Iowa Network Services Comments at 34.

[136] AAR Comments at 2; ICA Comments at 15; TCA Comments at 4; UTC Comments at 4-6; ONA Users Group Reply at 2-4.

[137] Ameritech Reply at 20-21; Bell Atlantic Comments at 15-18; BellSouth Comments at 33-34; NYNEX Comments at 60-62; Pacific Comments at 58-59; SWBT Comments at 49-50.

[138] SWBT Reply at 49-51.

81. Finally, the BOCs argue that their access to CPNI is no different from an unregulated company's access to its customer records and should therefore be permitted. Ameritech asserts that the antitrust laws prove that the BOCs' use of CPNI does not give them an unfair competitive advantage, citing *Catlin v. Washington Energy Co.*[143] as holding that a natural gas utility was free to use its customer list to market gas-related products in competition with others.[144]

82. On the issue of privacy, differing views were expressed on whether the BOCs' use of CPNI is in accord with customers' expectations. The BOCs assert that people generally expect the companies with which they have an ongoing business relationship to have information about their past transactions, and to use that information occasionally to market new services to them.[145] Some of the BOCs argue as well that customers will actually be upset if all BOC personnel do not have access to their records.[146] Other parties, however, challenge the BOCs' assertion that the current rules are in accord with customers' privacy expectations.[147]

---

[139] *See* Bell Atlantic Comments at 16-17; *see also* Pacific Comments at 58-63, SWBT Comments at 49.

[140] *See* Bell Atlantic Reply at 13; BellSouth Reply at 33; Pacific Comments at 60. *But see* Sprint Reply at 6 (low number of requests for CPNI may reflect difficulty of obtaining customer authorizations, not the low value of the information).

[141] BellSouth Comments at 33-34.

[142] BellSouth Comments at 33-34; Pacific Comments at 52.

[143] 791 F.2d 1343 (9th Cir. 1986).

[144] Ameritech Reply at 20.

[145] Ameritech Comments at 26; BellSouth Reply at 41; NYNEX Comments at 57-60, Appendices A & B; Pacific Comments at 54-55; SWBT Comments at 51; U S West Comments at 70-71.

[146] BellSouth Reply at 49 (Florida customers subject to prior authorization have complained about BOC personnel inability to access account information); *see also* NYNEX Comments at Appendix A, pp. 28-29; Pacific Comments at 54-55.

83. With regard to efficiency, the BOCs and USTA argue that any prior authorization requirement will effectively impose structural separation on their enhanced services marketing activities, asserting that a prior authorization rule would require the use of separate sales forces for basic and enhanced services.[148] BellSouth states that as a result of a Florida rule requiring prior authorization for BOC-initiated contacts, the cost of reaching the mass market is higher, and fewer customers are being contacted and offered services from which they might benefit.[149] Other commenters argue that the BOCs have exaggerated the difficulty of structuring their workforces to comply with a prior authorization rule[150] and of obtaining customer consent to access CPNI, particularly in view of the BOCs' assertions that customers do not object to BOC use of their CPNI.[151] Sprint suggests that to the extent prior authorization does result in some loss of efficiency, prior authorization should not necessarily be rejected, as efficiency is only one of the policy objectives cited by the Commission.[152]

3. Discussion

84. The CPNI rules for enhanced services were intended to balance considerations of efficiency, competitive equity, and privacy. Having had the opportunity to monitor the operation of the CPNI rules since their adoption, we now conclude that a change in those rules is appropriate to better balance these three important interests. Accordingly, we will require that, for customers with more than twenty lines, BOC personnel involved in marketing enhanced services obtain written authorization from the customer before gaining access to its CPNI.

85. The current rule enables the BOCs to engage in integrated marketing and sales of basic and enhanced services, thereby providing a number of benefits, especially in developing a mass market for enhanced services. Permitting the BOCs greater freedom in marketing enhanced services to residential and smaller business customers can help to increase the customers' knowledge about such services. BOC marketing efforts that make consumers more aware of the benefits of enhanced services should expand the market for such services, benefitting both consumers and ESPs.[153] The integrated marketing to consumers and smaller businesses made possible by the current CPNI rule not only allows the BOCs to provide basic and enhanced services more efficiently, but also provides direct benefits to customers in the form of "one stop shopping." For instance, without the integrated marketing and sales made possible by our CPNI rules, if a customer called the telephone company to discuss basic network services, such as additional lines or call waiting, and then wanted merely to get information about an enhanced service, such as voice mail, he would have to be transferred to a separate enhanced services representative who would likely ask him to repeat much of the information that he had already provided.[154] With integrated marketing and sales, the BOC service representative receiving a call can also offer consumers additional choices that may better suit their needs, including combinations of basic and enhanced services. For instance, a customer service representative might suggest a voice mail service to record messages when the customer's line is busy as a more economical alternative to ordering additional lines. If a prior authorization rule were applied to all customers, only the largest business customers would be able to enjoy the one-stop-shopping benefits of the integrated marketing of basic and enhanced services.[155]

---

[147] See e.g., ATSI Reply at 12; ONA Users Group Comments at 4-6, Reply at 2-4; ANPA Comments at 43; Pennsylvania Comments at 13; Alarm Industry Comments at 10-11.

[148] Ameritech Comments at 25-26; Bell Atlantic Comments at 15; BellSouth Comments at 30-32; NYNEX Comments at 51-52; Pacific Comments at 49-54; USTA Reply at 18-21.

[149] BellSouth Reply at 47-50.

[150] See ONA Users Group Reply at 4; DC Public Service Commission Reply at 10-11; TCA Reply at 10.

[151] McGraw-Hill Reply at 14-15; DC Public Service Commission Reply at 10-11; TCA Reply at 10.

[152] Sprint Reply at 4-5.

---

[153] See Phase II Reconsideration Order, 3 FCC Rcd at 1162, para. 97.

[154] That this is the likely result of a prior authorization requirement is confirmed by the ONA Users Group, who, in arguing that the BOCs could easily comply with a prior authorization requirement, asserts that the BOCs could have regulated service personnel respond to all general inquiries, and refer to enhanced services personnel any inquiries about enhanced services. ONA Users Group Reply at 4. See also TCA Comments at 10.

[155] Applying a prior authorization rule for other than the largest customers likely would require a BOC to establish separate enhanced and basic service marketing forces for those customers. Unlike the largest business customers, which are likely to have relatively frequent contacts with their local BOCs through telephone company representatives specifically assigned to them, mass market customers commonly have only sporadic contacts with BOC telephone personnel, calling blind into the BOC's business office whenever they have questions or desire services from the telephone company. Thus, the BOCs can be expected to staff their business offices with personnel able to respond to most customer's basic services inquiries. If a customer has restricted CPNI, whether through action or inaction, then for basic services that customer must deal with "network-services-only" personnel, i.e., those with no involvement with enhanced services marketing or sales, because only those personnel are permitted under the Commission's CPNI rules to have access to restricted CPNI. Under a prior authorization rule, a large majority of mass market customers are likely to have their CPNI restricted through inaction, and in order to serve them the BOCs would have to staff

86. The current rules do raise some competitive issues, however. In this proceeding, most commenters argue for greater restrictions on BOC access to CPNI, and the record indicates that their unrestricted access to CPNI does give the BOCs an advantage over competing ESPs in marketing enhanced services to BOC customers. This advantage is of particular importance with respect to large business customers, as their CPNI is most likely to be of competitive value, due to the volume and nature of business involved.[156] The CPNI of large business customers raises competitive issues not only for ESPs competing with the BOCs, but also for the customers themselves. Some large business customers have expressed concern about the competitive implications for them of unrestricted BOC access to their CPNI,[157] suggesting that CPNI records can reveal sensitive marketing strategies, expansion plans, innovative uses of telecommunications, customer lists, costs, and other confidential business information and therefore should not be revealed to anyone, including the BOCs' enhanced services operations, without the customer's consent.[158] At the same time, the BOCs are most likely to be able to obtain prior authorization from those customers because the BOCs in many cases already have established special sales relationships with them. Accordingly, a prior authorization rule for large business customers will achieve complete competitive equity for a valuable market segment while leaving intact the public interest benefits of joint marketing for smaller customers and not severely disrupting those for large business customers either. We will therefore change the CPNI rules to require prior authorization for customers with more than twenty lines.[159]

---

their business offices with network-services-only representatives, and establish separate marketing and sales forces for enhanced services. Thus, a prior authorization rule would vitiate a BOC's ability to achieve efficiencies through integrated marketing to smaller customers -- one of the benefits sought through adoption of nonstructural safeguards rather than structural separation.

[156] See Phase II Order, 2 FCC Rcd at 3096, para. 164.

[157] ICA Comments at 14-15; TCA Comments at 3-5. The Utilities Telecommunications Council indicated that utilities are very concerned about the security of their communications services, and limit the information that they reveal even to the telephone companies on a strict "need to know" basis. UTC Comments at 5.

[158] For instance, AAR indicates that some customers may want to restrict CPNI access to lessen the danger that their network design and usage patterns might be disclosed to competitors. AAR Comments at 2. TCA argues that as the BOCs enter unregulated businesses, they will find themselves increasingly in competition with their customers. TCA Comments at 4.

[159] We note that although customer privacy has always been one of the Commission's concerns in addressing CPNI, our focus in this order is on competitive equity and efficiency. To the extent that CPNI is available to BOC personnel involved in marketing enhanced services, information is

87. In order to provide additional safeguards in those areas where competitive concerns are greatest while at the same time minimizing the extent to which the benefits to be derived from the current rules are diminished, we must identify that group of large business customers whose CPNI should be subject to prior authorization. The record does not reflect a consensus as to what would be the best method, and there may be varying administrative burdens on the BOCs to implement any approach to defining large business customers because the BOCs have established different internal definitions of large business customers and marketing organizations to serve them. Parties have suggested different methods by which such customers could be identified, such as a number of lines test,[160] or an external source such as the Fortune magazine rankings of companies by size.[161] External sources do not take account of a customer's use of telecommunications services in the way that a number of lines approach does, and it is the use of communications services that is significant for our purposes. We therefore conclude that a number of lines test is more effective. While the BOCs all oppose any prior authorization rule, three have suggested in the alternative that we impose a prior authorization requirement for customers of 50 or more lines, while one has suggested a prior authorization requirement for customers of more than 20 lines.[162] We conclude that BOC personnel involved in enhanced services marketing should obtain prior authorization before accessing the CPNI of customers with more than twenty lines. This rule preserves the benefits of our current rules for the further development of enhanced services for the mass market, while providing additional safeguards with respect to those customers whose CPNI might provide the greatest competitive advantage to the BOCs and raises competitive issues for the customers themselves.[163]

---

available only within a single integrated company, and we do not believe that such internal BOC access to CPNI generally raises significant privacy concerns. Although privacy concerns are implicated by disclosure of CPNI to third parties outside the BOC, the CPNI rules have always protected against such disclosure. A more extensive prior authorization rule is not necessary to protect customers' privacy interests.

[160] Ex Parte Letter from Gary L. Dennis, Director, Federal Regulatory, BellSouth, to Donna R. Searcy, Secretary, FCC, November 1, 1991.

[161] Ex Parte Letter from Shelley E. Harms, Attorney, NYNEX, to Donna R. Searcy, Secretary, FCC, October 10, 1991.

[162] See e.g., Ex Parte Letters from Elridge A. Stafford, Director, Federal Relations, U S West, to Patrick Donovan, Attorney, FCC, November 4, 1991; Gary J. Dennis, Director, Federal Regulatory, BellSouth, to Donna R. Searcy, Secretary, FCC, November 1, 1991; and Shelley E. Harms, Attorney, NYNEX, to Donna R. Searcy, Secretary, FCC, October 10, 1991.

[163] To the extent that customers may have more than twenty lines distributed among multiple locations, each of which has fewer than twenty, the BOCs should treat these customers as subject to the prior authorization rule if it is practically feasible to identify them as having more than

88. Some of the BOCs question whether the Commission may change the CPNI rules, asserting that there are no changed circumstances to justify such a decision.[164] The Commission, however, does have the authority and, indeed, the obligation to reexamine its regulatory policies to ensure that they continue to serve the public interest. "An agency is not prohibited from changing its mind. '[F]aced with new developments or in light of reconsideration of the relevant facts and its mandate, [the agency] may alter its past interpretation and overturn past administrative rulings and practice.'"[165] Having concluded that the public interest would be better served by the rules adopted in this Order, we are not only authorized but obligated to change our rules.

89. Accordingly, we are amending our CPNI requirements to provide that BOC personnel engaged in the marketing of enhanced services may not access the CPNI of customers with more than twenty lines unless they have obtained the permission of the customer. We require the BOCs to implement this requirement six months from the date of release of this *Report and Order*.[166] We will require that the BOCs implement our revised prior authorization rule in a nondiscriminatory manner. The CPNI rules for enhanced services as they apply to other customers remain unchanged.[167] By continuing to permit the BOCs' enhanced services operations to have access to the CPNI of most customers, we are not authorizing the practice of "unhooking," the targeting of enhanced service sales pitches at customers who

---

twenty lines in total. Where the BOC treats several locations as belonging to the same customer for other purposes, it should do so for CPNI as well, unless good cause is shown for doing otherwise. In any event, we require that, in implementing the CPNI rule, the BOCs must treat a customer as having more than twenty lines whenever the customer has more than twenty lines at one location.

[164] *See* Bell Atlantic Comments at 15; SWBT Comments at 57; U S West Comments at 30.

[165] *Spartan Radiocasting Co. v. FCC*, 619 F.2d 314, 322 (1980), citing *American Trucking Ass'n v. Atchison, Topeka and Santa Fe Railway Co.*, 387 U.S. 397, 416 (1967).

[166] In our companion order, we require each BOC to file an amendment to its ONA plans describing, *inter alia*, changes to its CPNI procedures necessary to implement our revised CPNI rule. *See* Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, FCC 91-382, at para. 54 (released December 19, 1991).

[167] For instance, the notification requirement remains in place for those multiline business customers whose CPNI is not subject to prior authorization. In addition, the rules regarding the use of aggregated CPNI and disclosure of CPNI to independent ESPs remain unchanged. Similarly, the rules applicable to the use of CPNI in marketing CPE are not affected by this Order.

contact the BOC to order network services to use with a competitor's enhanced service.[168] We find that practice to constitute an abuse of the BOCs' positions as providers of basic services, and will investigate claims that any BOC is engaging in such a practice.

D. Public Interest Analysis

1. Background

90. Using a cost/benefit analysis, the Commission concluded in Computer III that, when compared to nonstructural safeguards, a structural separation requirement for BOC provision of enhanced services imposed significant costs on both the BOCs and the public. Those costs included decreased efficiency, innovation, and service availability caused in part by the requirement for BOC duplication of facilities and personnel as well as by limitations on joint marketing. The Commission found that, relative to nonstructural safeguards, the costs of structural separation outweighed the benefits.[169]

91. The California Court, however, vacated the Computer III decision because it concluded that the Commission had not presented sufficient justification for reliance on cost accounting safeguards to guard against cross-subsidization so soon after the Commission's decision in the BOC Separation Order to continue structural separation for BOC enhanced services. Despite the remand, the Court upheld the fundamental Computer III determination that BOC structural separation requirements impose significant public interest costs. The Court observed that the record in that proceeding supported the conclusion that lifting the structural separation requirements would benefit consumers of enhanced services by permitting the BOCs to operate more efficiently in the enhanced services market. The Court said the record supported the Commission's finding that "the BOCs have had to raise the price of certain services, withhold others from the market, and perhaps never develop still others because of the inefficiencies of structural separation."[170] Moreover, the Court stated that the Commission showed that "the integration of regulated and unregulated telecommunications services by the BOCs would yield some economies of scale."[171]

2. Comments

92. Most commenters in this proceeding either support, or do not oppose, institution of nonstructural safeguards for BOC provision of enhanced services. NTIA, DOJ, and IBM, for example, strongly support reinstatement of nonstructural safeguards rather than a structural separation requirement.[172] GSA also opposes any rule that would preclude or inhibit the physical integration of enhanced services into the facilities and equipment that provide basic services.[173]

---

[168] In the Matter of the Commission's Investigation into Southern Bell Telephone and Telegraph Company's Provision of Memory Call Service, Order of the Commission, Georgia Docket No. 4000-U (June 4, 1991).

[169] Phase I Order, 104 FCC 2d at 1011-1092.

[170] California, 905 F.2d at 1231.

[171] Id.

93. The BOCs generally contend that the American public will benefit as a result of the efficiencies of integrated offerings of basic and enhanced services.[174] They argue that experience with structural separation demonstrates that it hinders the introduction and development of enhanced services, which would otherwise benefit the public by being widely available through the BOCs' local exchanges. They contend that a structural separation requirement imposes direct costs because it mandates the duplication of facilities and personnel and limits joint marketing. The BOCs assert that the biggest cost of structural separation is that, without integration, most enhanced services would not be offered to the mass market in the foreseeable future.[175]

94. The BOCs claim that the removal of BOC structural separation already is producing the benefits anticipated by the Commission, as shown by BOC experience with voice mail in the mass market.[176] According to NYNEX, the LECs are the one industry segment with the resources, experience, and established relationships to educate the average consumer about the availability and advantages of enhanced services, and to develop and offer integrated packages tailored for small business and residential customers' needs.[177] They further assert that integration benefits business competitiveness and productivity generally, as well as increases availability of other enhanced services.[178]

95. Commenters urging adoption of a structural separation requirement claim that the risk of successful anticompetitive conduct by the BOCs under nonstructural safeguards outweighs any possible benefits of integrated provision of interstate basic and enhanced services.[179] Some commenters argue that the Notice's cost/benefit analysis places too much weight on the perceived efficiencies resulting from removal of structural separation, and too little on the protection it offers to consumers and competition.[180] They also argue that a structural separation requirement would be much easier to enforce.[181]

---

[172] NTIA Comments at 6-7; DOJ Comments at 4-7; IBM Comments at 2-5.

[173] GSA Reply at 20; see also Illinois CC Comments at 7.

[174] Bell Atlantic Comments at 7; BellSouth Comments at 5-14; NYNEX Comments at 9-11; Pacific Comments at 5-7; SWBT Comments at 6; U S West Comments at 18-25; Bell Atlantic Reply at 5; BellSouth Reply at 10-14; Pacific Reply at 3-13.

[175] See e.g., Pacific Reply at 9, SWBT Reply at 30; NYNEX Reply at 5.

[176] See e.g., Pacific Comments at 5-13; Bell Atlantic Comments at 3-9; NYNEX Comments at 11-12; Bell Atlantic Reply at 5.

[177] NYNEX Comments at 11.

[178] U S West Comments at 18-25; Ameritech Comments at 7-8.

96. Commenters favoring a structural separation requirement claim that its elimination is not required to bring enhanced services to the public, and will not result in the BOCs providing more, or innovative, enhanced services.[182] These parties claim that there is no record support that there are any efficiencies available from integration, that the price of enhanced services will rise without integration, or that structural separation imposes significant costs.[183] Several parties contend that Ameritech's provision of enhanced services through separate subsidiaries and that the provision by other BOCs, such as Pacific Bell, of certain enhanced services through separate subsidiaries proves that structural separation imposes no costs and that nonstructural safeguards have no real benefits for BOC provision of enhanced services.[184] ADAPSO suggests that structural separation could be flexibly implemented to allow integration whenever BOCs can demonstrate real benefits through a waiver process.[185]

97. In reply, the BOCs dispute contentions that enhanced services are widely available to the mass market. They assert instead that the availability and quality of enhanced services for residential and small business consumers are still far behind several industrial nations in Europe and Asia.[186] They also disagree that a return to the Computer II waiver process would be a viable alternative to nonstructural safeguards since this would introduce unwarranted delay and other costs into the delivery of new services.[187]

---

[179] See e.g., Ad Hoc Comments at 19-27; MCI Comments at 29-30; ANPA Reply at 2; CompuServe Reply at 3-6.

[180] CompuServe Comments at 12.

[181] See e.g., ADAPSO Comments at 9-12; MCI Comments at 94-95; IDCMA Reply at 3.

[182] CompuServe Comments at 13; MCI Comments at 10, 12-13.

[183] Ad Hoc Comments at 19-27; ANPA Comments at 24; CompuServe Comments at 10; DC PSC Comments at 3-9, MCI Comments at 10-14; Pennsylvania PUC Comments at 4; ANPA Reply at 7; CompuServe Reply at 8; IDCMA Reply at 2.

[184] MCI Comments at 8-16, 35-38.

[185] ADAPSO Comments at 31.

[186] See e.g. Pacific Reply at 4.

3. Discussion

98. As set forth above in detail, we have developed a set of strengthened nonstructural safeguards that will protect against cross-subsidization and discrimination. We conclude that permitting the BOCs to participate in the enhanced services industry pursuant to this set of safeguards will not result in significant public interest costs. The benefits, in contrast, are substantial and lead us to conclude that on balance, the public interest is better served by eliminating the structural separation requirement. We find that this approach will permit the BOCs to use their resources more efficiently to provide enhanced services, resulting in the wider availability of enhanced services to the public, while effectively ensuring that BOC participation in enhanced services does not adversely affect basic service rates or harm ESPs due to BOC anticompetitive conduct.

99. Contrary to the assertions of some commenters, we conclude that the BOCs hold great potential for providing a wide variety of enhanced services throughout the country, especially on a mass market basis. The BOCs own, manage, and control an important portion of our nation's telecommunications assets and resources, including not only communications facilities, but also the associated management and operational resources essential for providing all kinds of communications services feasible with existing and emerging technologies. These resources provide the BOCs with a substantial foundation for providing such communications-based services as enhanced services. For example, the geographic dispersion of facilities throughout the BOC regions makes it possible for the BOCs to serve many communities not economic for others. The BOCs' existing marketing contacts with customers provide a ready, inexpensive opportunity for the marketing of enhanced services.[188] In addition, because the BOCs already serve large numbers of households in their respective regions, they have a substantial ability to use their existing assets and resources to provide enhanced services to the consumer market.

100. We conclude as well that the BOCs cannot fully realize their potential in the enhanced services marketplace unless they are permitted to capture the legitimate efficiencies available to them. Provision of enhanced services on an integrated basis with basic services can result in operational efficiencies, economies of scope, and cost savings by avoidance of separation and/or duplication of assets and personnel required by a regulatory requirement for structural separation. For example, the BOCs can be more efficient by: (1) using existing sales contacts to market enhanced services rather than establishing new, separate sales forces;[189] (2) using the same personnel to repair and install equipment used to provide basic and enhanced services rather than using different personnel;[190] and (3) using existing expertise in research and development that may have application to enhanced and basic services rather than seeking to do so separately for enhanced services.[191] The existence of such potential efficiencies is confirmed both by the history of the enhanced services market and by the record in this proceeding.

---

[187] NYNEX Reply at 9; U S West Reply at 34-35.

[188] BellSouth states that it has millions of marketing contacts annually with customers. BellSouth Comments at 42.

101. Since Computer II and the BOC Separation Order, the Commission has gained substantial experience with application of both structural separation and nonstructural safeguards as regulatory frameworks governing BOC provision of enhanced services. That experience demonstrates that, relative to nonstructural safeguards, mandatory structural separation has significantly dampened BOC provision of enhanced services.[192] During the Computer II regime and prior to our CEI requirements, most BOCs provided few enhanced services, and only then subject to waivers of Computer II granted after lengthy proceedings.[193] Computer III pointed to the Custom Calling Denial Order as evidence of the impact of structural separation on the likelihood of the BOCs providing enhanced services to the public.[194] In that decision, the Commission denied the request of AT&T (which then included the BOCs) for waiver of the Computer II requirement for structural separation to provide network-based voice mail services based on the view that, even if AT&T were not permitted to integrate the voice storage and retrieval feature into its basic service offerings, competitors would offer comparable services. However, no fully comparable services were offered.[195]

---

[189] See e.g., NYNEX Comments at 11-14, 18; Pacific Comments at 4, 24; SWBT Comments at 16; U S West Comments at 16.

[190] See e.g., NYNEX Comments at 17-20; SWBT Comments at 13-14.

[191] See e.g., NYNEX Comments at 14-17; U S West Comments at 16; SWBT Comments at 10-12, 16.

[192] In the first triennial review of the MFJ, the District Court modified the information services restriction to permit the BOCs, inter alia, to provide voice storage and retrieval services. United States v. Western Electric Co., 673 F.Supp. 525 (D.D.C. 1987); United States v. Western Electric Co., 714 F.Supp. 1 (D.D.C. 1988); 767 F.Supp. 308 (D.D.C. 1991).

[193] Petitions for Waiver of Section 64.702 of the Commission's Rules (Computer II), Memorandum Opinion and Order, 100 FCC 2d 1057 (1985).

[194] American Telephone and Telegraph Co. Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations, 88 FCC 2d 1 (1981).

[195] Telephone answering machines and telephone answering service bureaus provide very valuable types of voice storage and retrieval services. In Computer III we stated that the distinguishing characteristic of network based voice mail services is their ubiquity and their easy availability to

Thus, structural separation appears, as a practical matter, to have completely foreclosed the offering of this service to the public. The BOCs also provide specific examples of new services that have been affected by the imposition of a structural separation requirement after the California decision.[196]

102. By contrast, our experience with nonstructural safeguards shows that removal of structural separation requirements has resulted and will result in greater BOC participation in the provision of enhanced services. Under CEI plans, the BOCs have participated to a much greater degree in providing enhanced services than under structural separation. For instance, under CEI plans or market trials, the BOCs have provided, or sought to provide, voice mail service, E-mail, gateways, electronic data interchange, data processing, voice store-and-forward, and fax store-and-forward services. Some of these services have been of an experimental nature, such as gateways, confirming our view in Computer III that the BOCs can bring innovative enhanced services to the public.

103. BOC experience with voice mail has been particularly telling. Since the BOCs have been permitted to provide voice storage and retrieval services under nonstructural safeguards, they have vigorously competed in the provision of voice mail service at a reasonable price to consumers. As of the time of filing comments in this proceeding, Bell Atlantic provided its voice mail service to nearly 120,000 subscribers after one year of general availability.[197] It expected this number to grow to 350,000 subscribers in 1991. NYNEX's voice mail service was available to over 850,000 access lines.[198] U S West provided voice mail service to approximately 200,000 subscribers.[199] Pacific, which makes use of an integrated sales force in the marketing of its voice mail service, provided service to 2000 new residential customers each week during the first three months that it offered the service.[200] Contrary to assertions of some commenters, this participation is

---

casual users. Phase I Order, 104 FCC 2d at 1112, para. 313.

[196] U S West, for example, states that it has foregone development of its proposed fax store and forward service since the reimposition of the Computer II regime following the Ninth Circuit decision. U S West Comments at 26. NYNEX states that the future of certain enhanced services that were in the planning and development stage when the Court vacated Computer III is now uncertain since it is unclear when, if ever, they may be pursued on an integrated basis. NYNEX Comments at 20, n. 32.

[197] Bell Atlantic Comments at 4.

[198] NYNEX Comments at 13.

[199] U S West Comments at 21-22.

[200] Pacific Comments at 8.

substantial within the timeframe during which the BOCs have been allowed to provide voice mail service pursuant to nonstructural safeguards.[201]

104. Generally confirming our conclusions of the significant efficiencies and economies of scope that could be gained from integrated provision of basic and enhanced services are BOC estimates of the costs of a structural separation requirement.[202] Operational efficiencies in some of these areas may be essential to serving the consumer market. Pacific Bell and U S West have estimated that the one time costs for transferring and/or duplicating facilities and personnel could be as high as $10-$15 million for structurally separate provision of voice mail services.[203] Various BOCs estimate that the costs of providing some enhanced services under structural separation could be up to 68%[204] higher than under integration and necessitate price increases of as much as 30%[205] and 80%.[206] U S West estimates that increased marketing expenses alone under structural separation would increase the price of its voice mail service by 30%.[207] The BOCs state that marketing studies reveal that at this level of price increase there would be a significant decline in demand for some enhanced services rendering them uneconomical to provide.[208]

---

[201] BOC participation in the enhanced services marketplace has not injured competition. The BOCs report that voice mail services show solid trends of increasing output and decreasing price. The BOCs estimate that overall, the market for voice mail services grew between 1988 and 1989, with total revenues rising from $452 million to $635 million. See BOC Reply Memorandum filed in United States of America v. Western Electric Company, Inc., and AT&T (Civ. No. 82-0192), Appendix, Exhibit A citing "European, U.S. Voice Messaging Grow at Very Different Rates." FinTech Telecom Markets (September 20, 1990). Moreover, the BOCs further state that in the two years they have participated in the provision of voice mail services, the voice mail equipment market has grown threefold; prices have declined; the number of voice mailboxes has grown from 5.3 million to 11.6 million; and the market for voice mail services has increased by 40 percent from $452 million to $635 million. BOC Reply Memorandum, Table A-5. Similarly, in the two years that the BOCs have provided videotext gateways, total subscribers to all videotext gateways have increased from 715,000 to 1.8 million and are continuing to multiply at a rate of 15-20 percent each year. BOC Reply Memorandum, Table A-11.

[202] See e.g., U S West Comments at 17-28; Ameritech Comments at 3-4; Bell Atlantic Comments at 3; BellSouth Comments at 5-13; NYNEX Comments at 9-10; SWBT Comments at 6-12. See also Unisys Comments at 3; NTIA Comments at 6-7. We reject the view of some commenters that we may not, or should not, consider the BOCs' estimates of cost savings and efficiencies of integration because the underlying data have not been submitted and cannot be verified, and because the estimates of efficiencies vary among the BOCs. Ex Parte Letter from Frank W. Krogh, Appellate Counsel, Regulatory Law, MCI, to Donna R. Searcy, Secretary, FCC, November 12, 1991; Ex Parte Letter from Warner Sinback, Chairman, Domestic Communications Committee, Information Technology Association of America, to Donna R. Searcy, Secretary, FCC, November 13, 1991. While the BOCs have not submitted complete substantiation of their estimates of cost savings and efficiencies, the information submitted is sufficient to confirm and support our finding that allowing the BOCs to participate in the enhanced services market pursuant to nonstructural safeguards will achieve efficiencies and economies of scope. For instance, some of the BOCs have provided information as to how they arrived at these estimates and, in some cases, have provided a categorization and quantification of the types of costs and revenues that were used in estimating the cost savings of integration. See e.g., Ex Parte Letter from Trudi W. Blair, FCC Relations, Bell Atlantic, to Donna R. Searcy, Secretary, FCC, November 7, 1991. Commenters have not shown that the manner in which these BOCs arrived at their estimates has precluded their use as evidence confirming the other record information that nonstructural safeguards would

105. We therefore find that the BOCs hold great potential for providing enhanced services, and that the use of nonstructural safeguards in lieu of structural safeguards permits a fuller realization of that potential. We conclude that a major benefit of adopting nonstructural safeguards is that this course would permit the BOCs to take advantage of operational efficiencies of integration, facilitate BOC provision of enhanced services, engage in joint marketing of basic and enhanced services, and will result in a greater provision of enhanced services, especially in the mass market.[209]

---

permit the BOCs to operate more efficiently in the enhanced service marketplace than would structural separation. We also find that the range of specific BOC estimates does not undermine their confirmation of our broad public interest finding of the efficiency benefits of nonstructural safeguards.

[203] _Ex Parte_ Letter from Celia Nogales, Federal Regulatory Relations, Pacific, to Donna R. Searcy, Secretary, FCC, September 20, 1991; _Ex Parte_ Letter from Elridge A. Stafford, Director, Federal Relations, U S West, to Donna R. Searcy, Secretary, FCC, September 26, 1991.

[204] _Ex Parte_ Letter from William A. Blase, Director, Federal Relations, Southwestern Bell, to Donna R. Searcy, Secretary, October 11, 1991.

[205] _Ex Parte_ Letter from Elridge A. Stafford, Director, Federal Relations, U S West, to Donna R. Searcy, Secretary, FCC, September 26, 1991.

[206] Bell Atlantic Comments at 5.

[207] _Ex Parte_ Letter from Elridge A. Stafford, Director, Federal Relations, U S West, to Donna R. Searcy, Secretary, September 26, 1991.

[208] NYNEX Comments at 10; Bell Atlantic Comments at 5.

[209] Our nonstructural safeguards benefit basic service ratepayers as well, relative to mandatory structural separation. As indicated, para. 48, _supra_, under our cost accounting rules, the BOCs must use a fully distributed costing methodology to allocate costs between enhanced and basic services. This means that some of the savings resulting from integrated

By mandating the physical separation of assets and personnel used to provide enhanced services from those used to provide basic services, a structural separation requirement would eliminate all opportunity to realize the efficiencies and cost savings of integration. We do not agree with commenters who argue that other considerations would outweigh the benefits of integration. These commenters urge that any possible benefit of integration is outweighed by the relative ineffectiveness of nonstructural safeguards in protecting against cross-subsidization and discrimination. As detailed above, we find that the comprehensive set of nonstructural safeguards identified in this proceeding constitutes an effective regulatory alternative to structural separation for protecting against such abuses. Moreover, to the extent that nonstructural safeguards may involve any small diminution in protection against cost-subsidization and discrimination, we find that the danger of this is outweighed by the benefits of integration.

106. Similarly, we disagree with commenters who contend that heavier administrative burdens imposed by nonstructural safeguards require that we adopt a Computer II regime of structural separation. We have had several years' experience implementing cost accounting rules and other safeguards under Computer III's CEI regime for BOC provision of enhanced services. The resulting administrative burden does not lead us to conclude that use of nonstructural safeguards in the future will be an unacceptable administrative burden. Moveover, the future administrative burden of nonstructural safeguards may somewhat be reduced because it will not be necessary under ONA to approve use of nonstructural safeguards on an individual service basis, as under CEI. Further, structural separation imposes administrative burdens. Enforcement of structural separation, including review of affiliate transactions, requires significant administrative resources, as does evaluation of reasonably expected waiver requests. Thus, we do not find significant administrative advantages to structural separation.

107. We also conclude that we should not permit use of nonstructural safeguards only for particular enhanced services and/or permit only partial integration of some or all enhanced services. For example, some parties suggest that we should require the BOCs to offer enhanced services through a separate subsidiary generally, but permit joint activities whenever a BOC is able to demonstrate that it is more efficient or will result in benefits to the public. While it appears that some enhanced services may feasibly be provided using some form of a separate corporate subsidiary,[210]

---

provision of basic and enhanced services must contribute towards general overhead costs of the basic service operations. This would not be the case under structural separation.

[210] Ameritech has chosen to provide enhanced services primarily through purchase of separate entities already providing enhanced services. Ameritech has elected not to integrate into the corporate parent. Ameritech Comments at 5-7. A decision not to integrate purchased, already freestanding, operational entities into existing carrier operations does not show that there are no efficiencies from integration.

that does not persuade us to attempt to implement some modified structural separation requirement. Such an approach would involve case-by-case evaluation of enhanced service offerings, which would be cumbersome and time consuming and delay introduction of service offerings. Moreover, it would require us simultaneously to apply some form of separate subsidiary requirement for some services or carrier activities and nonstructural safeguards for other services or activities. This would not eliminate the administrative burden of either approach. Finally, we see little benefit to this approach since we do not find, contrary to this approach's advocates, that there are substantial risks to nonstructural safeguards that make it desirable to remove structural separation only in narrow cases.[211]

108. In view of the foregoing, we conclude, contrary to our decision in Computer II and the BOC Separation Order, that based on a cost/benefit analysis, the record developed in this proceeding favors adoption of the nonstructural safeguards detailed above, rather than a structural separation requirement, to govern BOC participation in the enhanced services industry. We find that our strengthened nonstructural safeguards will permit the BOCs more fully to realize their potential in providing enhanced services to American consumers. We additionally find, in light of our determination that nonstructural safeguards will effectively protect against BOC cross-subsidization and discrimination, that a structural separation requirement is an unnecessary government intrusion into business judgments by the BOCs regarding the most effective corporate organization for the provision of enhanced services. A structural separation requirement for BOC provision of enhanced services would instead erect unnecessary barriers impeding the responsiveness of industry to marketplace incentives that foster increasing use and advancement of the nation's telecommunications assets. We therefore conclude to permit the BOCs to provide enhanced services pursuant to the nonstructural safeguards described in this Report and Order once all conditions for lifting structural separation have been met. In the interim, the BOCs are allowed to file CEI plans and CEI waivers under the requirements set forth in Computer III.[212]

---

[211] Cox Cable and CompuServe contend that the proceedings at the Georgia Public Service Commission (Georgia PSC) regarding provision by BellSouth of voice mail service in the state, pursuant to an approved federal CEI plan, show that nonstructural safeguards are ineffective in preventing anticompetitve conduct. In the Matter of the Commission's Investigation into Southern Bell Telephone and Telegraph Company's Provision of Memory Call Service, Order of the Commission, Georgia Docket No. 4000-U (June 4, 1991). The Georgia PSC proceedings do not show that our safeguards are ineffective. The findings at the state level regarding unfair marketing and discrimination are based on "unhooking," as well as the failure of BellSouth to make available to competing voice mail providers physical collocation and certain basic features and functions desired by them until BellSouth decided to provide its own voice mail service. As is made clear in this Report and Order, unhooking is unacceptable under our nonstructural safeguards. See paragraph 89, supra. Our CEI/ONA requirements ensure that ESPs obtain "equal access" interconnection, absent mandatory collocation. Moreover, our CEI/ONA requirements reasonably preclude discriminatory provision of basic services required by ESPs. Under our interim CEI requirements, BellSouth must make available to independent ESPs the underlying basic network functions that BellSouth uses in providing its own enhanced services. Our permanent ONA requirements are more far reaching, and require an unbundling and availability of basic network functions irrespective of whether they are used in providing BOC enhanced services. Thus, in an ONA environment, BellSouth would violate our requirements if it unreasonably refused to make available, prior to offering its voice mail service, basic services desired by its voice mail competitors. Such an unreasonable refusal to offer a basic service is not justified because the service is not included in the BOC's approved ONA plan. Concerning the possibility of cross-subsidization, we have implemented cost accounting safeguards, including cost allocation standards, that define improper cross-subsidization. The Georgia PSC's finding of possible cross-subsidization at the state level is not sufficiently particularized at this time to permit evaluation of whether it may have any bearing on BellSouth's compliance with federal requirements.

---

[212] In the BOC ONA Amended Plans Order, we stated that structural separation requirements will be removed for each BOC when it files a notice informing us that: (1) it is technically prepared to offer each of its initial ONA services; (2) federal tariffs for each of its initial interstate ONA services are in effect; and (3) it has filed state tariffs for each of its initial intrastate ONA services (although such state tariffs do not have to be effective for the removal of structural separation). BOC ONA Amended Plans Order, 5 FCC Rcd at 3105, para. 13. The BOCs have filed their federal ONA tariffs. All of the BOCs, however, have requested waivers of the Part 69/ONA requirement that they tariff all basic service elements listed in their approved ONA plans. See Pleading Cycle Established For Comments on Bell Operating Company Petitions for Waiver of ONA Tariffing Orders, Public Notice, CC Docket Nos. 89-79, 88-2, DA 91-1424 (released November 15, 1991). We conclude that, in order to meet the requirements stated above for removal of structural separation, federal tariffs for all initial services listed in the BOCs' approved ONA plans must be effective, unless the Common Carrier Bureau grants waivers. The Common Carrier Bureau will place all BOC petitions for structural relief on public notice, and may seek additional information from the BOC, if necessary. Once thirty days have passed from the release of the public notice, and the Bureau is satisfied that the BOC has met the Commission's conditions for granting structural relief, the Bureau will issue an order or letter stating that structural separation requirements have been removed for the BOC. We also delegate to the Common Carrier Bureau the authority to oversee the process of removing structural separation requirements. In the interim period between the effective date of this Order and removal of structural separation, the BOCs may file CEI plans and CEI waivers. The BOCs are also permitted to provide enhanced services on an integrated basis pursuant to the Computer II waivers granted by the Commission following the California decision. The determinations in this Report and Order concerning removal of structural separation and adoption of nonstructural safeguards will become effective on February 1, 1992. On January 1, 1992, the BOCs may engage in integrated planning and development of enhanced services, once they have made any necessary amendments to their cost allocation manuals. See e.g., Pacific and Nevada Bell Cost Allocation

109. We are confident that, for the reasons cited, the benefits of nonstructural safeguards substantially outweigh any marginal costs. As technology and its applications evolve, the enhanced services marketplace will continue to develop. ONA, too, is an evolving process. We deem it prudent, therefore, for the Commission to review the nonstructural safeguards after the seven BOCs have operated under a full ONA environment for three years.[213] Such a review will enable the Commission to evaluate whether nonstructural safeguards have been effective in promoting a competitive enhanced services marketplace while permitting the BOCs to provide enhanced services more efficiently on an integrated basis, and whether any changes are necessary given our obligation to reevaluate regulations in light of changing conditions.

IV. Preemption

A. Background

110. In Computer III, the Commission preempted: (1) all state structural separation requirements applicable to the provision of enhanced services by AT&T, the BOCs, and the independents; (2) all state nonstructural safeguards applicable to AT&T and the BOCs inconsistent with federal safeguards; and (3) all state nonstructural safeguards applicable to the independents more stringent than those applied to AT&T and the BOCs.

111. In California, the Court vacated these preemption actions.[214] The Court was not persuaded that the Commission had adequately justified preemption of state structural separation requirements and of inconsistent nonstructural safeguards. The Court found that the Commission had failed to demonstrate that all state-imposed structural separation requirements would negate the federal interest in permitting AT&T and the BOCs to offer integrated enhanced services. The Court stated that the Commission had made a plausible argument that some forms of state structural separation requirements -- for instance, those that could require physical separation of intrastate basic and enhanced service facilities -- could negate federal policies permitting structural integration. The Court found, however, that the Commission had failed to explain how the possibility that some forms of state structural separation requirements could negate federal policy had

---

Plan for Enhanced Services Planning and Development, CC Docket No. 85-229, 2 FCC Rcd 1725 (1987).

[213] For purposes of this review, a fully effective ONA environment will exist when all seven BOCs are no longer subject to the Computer II structural separation requirement.

[214] The California Court additionally found fault with the Commission's preemption in Computer III of state tariff regulation of intrastate enhanced services. In the Notice, note 96, we stated that we would not address in this proceeding preemption of state tariff regulation of intrastate enhanced services. Accordingly, we do not address that issue in this Report and Order.

justified the Commission's preemption of all state structural separation requirements. The Court also stated that Computer III had failed to address the possibility that some enhanced services might be offered on a purely intrastate basis. The Court found as well that the Commission had failed to justify the breadth of the preemption of inconsistent state nonstructural safeguards applicable to AT&T and the BOCs. Finally, the Court found inadequate the Commission's explanation for preemption of state imposition on the independents of nonstructural safeguards more stringent than those imposed by the Commission on AT&T and the BOCs.[215]

112. In the Notice the Commission sought to examine preemption of state requirements for structural separation of various specific facilities and personnel functions,[216] and only a limited number of specific state nonstructural safeguards, including state network disclosure requirements that require initial disclosure at a time different from federal rules and different state CPNI and nondiscrimination reporting requirements. The Commission sought comment on whether any preemption in these areas should apply to state requirements applicable to AT&T and the independents as well as to the BOCs.

B. Comments

1. In General

113. Of those parties commenting on preemption issues, most contend as a general matter that the Commission can and should preempt state safeguards that will thwart or impede federal objectives.[217] U S West, Pacific Bell, and SNET, by contrast, contend that the Commission should wait to assess the need to preempt until a state adopts or proposes conflicting requirements.[218] U S West argues that the Commission should not try to establish the nature of inseverability as a hypothetical matter, particularly when the nature of the service and the state regulation are unknown.[219] Pacific Bell urges that in this proceeding the Commission set forth guidelines for preemption of state safeguards. It contends that the Commission can and should preempt in the areas proposed in the Notice at the time a state establishes safeguards in those areas.[220]

---

[215] California, 905 F.2d at 1244.

[216] The Commission specifically sought comment on the impact on federal policies of state requirements that AT&T, the BOCs, and independents provide enhanced services using structurally separate: (1) communications facilities and equipment, (2) computer facilities and software, (3) other facilities, such as real estate and vehicles, (4) general management, (5) operations, (6) marketing, (7) installation and maintenance, and (8) research and development.

[217] NYNEX Comments at 63; SWBT Comments at 59; Ameritech Comments at 31; AT&T Comments at 3; IBM Comments at 13; API Comments at 5-6; GSA Comments at 3; NTIA Comments at 18; NTCA Comments at 2-3; SNET Comments at 16; USTA Comments at 20-21.

[218] U S West Comments at 110-111; Pacific Comments at 73; SNET Reply at 8-9.

114. A number of state public utility commissions oppose in general any preemption of possible state safeguard requirements without commenting on the specific areas of preemption addressed in the Notice. The Washington UTC claims that our preemption proposals are flawed because they ignore the intrastate nature of some enhanced services, citing voice mail service. The Washington UTC and NARUC argue that, because of the interexchange restriction of the MFJ, the BOCs do not provide any interstate enhanced services, and thus there is no federal interest at stake warranting preemption.[221] The New York DPS and NARUC assert that the Commission has not shown that the proposed preemption is necessary to prevent states from thwarting achievement of federal objectives.[222] The California PUC, Florida PSC, and NARUC contend that there should not be uniform nationwide safeguards, but safeguards that take account of different intrastate market conditions.[223] The California PUC, Illinois Commerce Commission, and NARUC suggest that the Joint Conference should resolve the preemption issues in this proceeding.[224]

2. Structural Separation

115. Five of the BOCs, AT&T, and the independents support preemption of state structural separation requirements. Ameritech, Bell Atlantic, BellSouth, NYNEX, and SWBT contend that it is not economically or practically possible for carriers to integrate provision of interstate enhanced services while simultaneously providing intrastate enhanced services pursuant to structural separation.[225] They claim that all of the facilities and personnel used to provide enhanced services are jointly used to provide interstate and intrastate enhanced services, and that there is no practical or economical way to permit simultaneously the integration of interstate enhanced services and the structurally separate provision of intrastate enhanced services.[226] Ameritech argues that the BOCs would necessarily have to comply with the most restrictive requirements because the complexities and loss of economies of scale resulting from overlapping organizations designed to provide identical offerings in different jurisdictions would more than exceed the cost of complying with the most restrictive rule.[227] AT&T, in comments limited to the preemption issue, also supports preemption of state structural separation requirements. It states that it has a single national unified network that provides both interstate and intrastate services that cannot as a practical matter be separated along jurisdictional lines.[228]

---

[219] U S West Comments at 108-111; U S West Reply at 36-41.

[220] Pacific Bell Comments at 73-78.

[221] WUTC Comments at 16; NARUC Comments at 5. See also MCI Comments at 96-101.

[222] New York DPS Comments at 9-11; NARUC Comments at 5-8.

[223] California PUC Comments at 7; Florida PSC Comments at 5; NARUC Comments at 14-15.

[224] California Comments at 9; California Reply at 4-6; NARUC Comments at 12-14. The Federal-State Joint Conference on Open Network Architecture was established by the Commission in the BOC ONA Order in response to industry and state comments in the ONA Proceeding urging the Commission to establish a forum for continuing dialogue and cooperation between the Commission and the states. The Joint Conference serves as a forum to facilitate federal/state cooperation and the successful development and implementation of ONA.

116. NTIA states that insofar as state and federal regulations require separation and integration of the same thing at the same time, the federal rule preempts the state one. It asserts that the FCC need not, and as a practical matter could not, analyze every possible safeguard a state may ever wish to impose.[229] Unisys, Integrated Communications Systems, Inc., and API support preemption of state structural separation requirements on the ground that it would make practically impossible the integrated offering of basic and interstate enhanced services. USTA, NTCA, GTE, SNET, Centel, and Cincinnati Bell support preemption of state structural separation requirements applied to independents for the same reasons advanced by the BOCs.[230]

117. Those states specifically commenting on this issue oppose preemption. The DC PSC, for example, states that the Notice failed to present any data demonstrating that any or all state structural separation requirements should be preempted. It states that the Commission has a very high burden under California to justify preemption. It claims that reorganization of personnel functions among corporate entities may not result in loss of efficiencies and, therefore, would not justify preemption.[231] The Florida PSC contends that, contrary to the Notice's assumption that there should be one nationwide solution for all services, states are in a better position to assess the need for structural separation.[232] Other states raise similar concerns.[233]

---

[225] Ameritech Comments at 30-31; Bell Atlantic Comments at 13; BellSouth Comments at 41-44; NYNEX Comments at 72; SWBT Comments at 63.

[226] Bell Atlantic Comments at 10-13; NYNEX Comments at 71; SWBT Comments at 63.

[227] Ameritech Comments at 30. See also Bell Atlantic Comments at 12; NYNEX Comments at 72; SWBT Comments at 62; Ameritech Comments at 30-31.

[228] AT&T Comments at 4-7; AT&T Reply at 6-9.

[229] NTIA Comments at 19-20, 22.

[230] USTA Comments at 21; NTCA Comments at 3; GTE Comments at 3-4; SNET Comments at 16-17; Centel Comments at 12-14; Cincinnati Bell Comments at 8-9.

3. Customer Proprietary Network Information

118. Ameritech, Bell Atlantic, BellSouth, NYNEX, Pacific Bell, SWBT, and AT&T urge the Commission to preempt state CPNI rules that would require prior authorization.[234] They basically argue that any state prior authorization rule would effectively bar access for both interstate and intrastate services because it would be impossible to have a prior authorization rule for intrastate enhanced services while at the same time allowing access under the federal rule.[235] NYNEX and SWBT urge that the Commission review other state CPNI requirements on a case-by-case basis.[236] Integrated Communications Systems, API, and USTA also argue that CPNI cannot be separated by jurisdiction, and that the we should preempt different state rules.[237] NTCA states that the Commission should preempt state regulation of independents to the same extent that we preempt state regulation of the BOCs.[238] The DC PSC states that since the FCC agrees that the customer, if he elects to do so, may restrict access to his CPNI, it is not necessary for attainment of Commission goals to preempt states from determining that written customer authorization is to be required.[239]

4. Network Disclosure Rules

119. A number of parties urge the Commission to preempt various state network disclosure rules. AT&T urges the Commission to preempt any state network disclosure rule that requires earlier or broader dissemination of information than is required by the federal rule. Information is inseverable by jurisdiction, AT&T argues, and broader dissemination would frustrate the federal goal of safeguarding carriers' legitimate proprietary interests and promoting innovation by, and competition among, basic service providers.[240] Ameritech, Pacific Bell, NYNEX, Integrated Communications Systems, and Cincinnati Bell agree with the reasoning in the Notice that state requirements for initial disclosure at times different from times specified in the federal rule would negate the federal rule.[241] SWBT states that theoretically a state could impose an advance notice period that differed slightly but would not negate either the purpose or the effect of the FCC rule.[242] Centel and NTCA urge the Commission to preempt state network disclosure requirements applicable to the independents to the same extent as the BOCs.[243]

---

[231] DC PSC Reply at 16.

[232] Florida PSC Comments at 3.

[233] Vermont DPS Comments at 1; Pennsylvania Comments at 11; Hawaii Comments at 15-16.

[234] Ameritech Comments at 31; Bell Atlantic Comments at 18; BellSouth Comments at 46-47; Pacific Bell Comments at 79; NYNEX Comments at 78-79; SWBT Comments at 66.

[235] NYNEX Comments at 78; Pacific Bell Comments at 80.

[236] NYNEX Comments at 79; SWBT Comments at 66.

[237] ICS Comments at 13; API Comments at 9; USTA Comments at 23.

[238] NTCA Reply at 2.

[239] DC PSC Comments at 40; DC PSC Reply at 16-17.

120. The DC PSC contends that state network disclosure rules might not necessarily frustrate the ability of AT&T and the BOCs to provide integrated services. It asserts, however, that the Commission could preempt state requirements for initial disclosure after the make/buy point.[244]

C. Discussion

121. In this Report and Order, we have determined that the public interest will be best served if the BOCs are permitted to use their substantial resources to serve customers and provide interstate enhanced services pursuant to a comprehensive set of nonstructural safeguards instead of a Computer II regime of structural separation. AT&T and the independents are already permitted to provide interstate enhanced services pursuant to nonstructural safeguards.[245] As stated in the Notice, it is inevitable that state commissions will have different experiences and perspectives that may lead them to adopt safeguards that are at variance with each other, and with federal safeguards. These differences should be accommodated whenever possible. Preemption of state regulation in this area should be as narrow as possible to accommodate differing state views while preserving federal goals. In this proceeding, we preempt state requirements for structural separation of facilities and personnel used to provide the intrastate portion of jurisdictionally mixed enhanced services, state CPNI rules requiring prior authorization that is not required by our rules, and state network disclosure rules that require initial disclosure at a time different than the federal rule. These state requirements would thwart or impede the nonstructural safeguards pursuant to which AT&T, the BOCs, and the independents may provide interstate enhanced services and the federal goals that they are intended to achieve.[246] We do not preempt any other state safeguards, which we will review, if necessary, on a case-by-case basis.[247]

---

[240] AT&T Comments at 11-13. See also USTA Comments at 22.

[241] Ameritech Comments at 31; Pacific Bell Comments at 80; NYNEX Comments at 80; ICS Comments at 13; Cincinnati Bell Comments at 9-10. See also Bell Atlantic Comments at 13.

[242] SWBT Comments at 67-68.

[243] Centel Comments at 16; NTCA Comments at 5-6.

[244] DC PSC Comments at 39-40; DC PSC Reply at 16-17.

[245] Nonstructural safeguards were reinstituted for AT&T's provision of enhanced services in Computer III Remand Proceeding, CC Docket No. 90-368, Report and Order, 5 FCC Rcd 7719 (1990). Independents have never been subject to structural separation for provision of enhanced services. All LECs other than average schedule companies are required to allocate costs between regulated and nonregulated activities in accordance with our cost allocation rules and policies. Joint Cost Reconsideration Order, 2 FCC Rcd at 6300, paras 154-159. Tier 1 LECs are subject to additional requirements, such as the requirement that they file cost allocation manuals. Joint Cost Order, 2 FCC Rcd at 1304, para. 47.

---

[246] Contrary to the arguments of U S West and Pacific that we should wait for states to impose requirements that would thwart federal objectives before considering whether to preempt them, we are preempting the specific state safeguards discussed below, for which a sufficient record now exists. This approach will ensure that federal objectives are not thwarted while avoiding the procedural and practical difficulties that would be occasioned by carriers' obligations to comply with state requirements such as structural separation, pending review by this Commission of petitions to preempt. Further, our decision to preempt certain state safeguards is not based on "hypothetical" factors. States are taking steps to impose safeguards that would thwart federal objectives. For example, the DC PSC has recently proposed to require that the C&P Telephone Co. provide enhanced services pursuant to structural separation. Formal Case No. 904, In the Matter of the Investigation of Enhanced Services, Notice of Proposed Rulemaking (September 13, 1991). The Georgia PSC has indicated that it may require separate organizations for Southern Bell's provision of enhanced services in the state. Docket No. 3987-U, In Re Southern Bell T&T Co. Cross Subsidy, Order (October 1, 1991). The Texas PUC has proposed a prior authorization requirement. Project No. 9547, Telecommunications Privacy Issues, § 23.57, Notice of Proposed Rulemaking (October 18, 1991). Sufficient factual information has been submitted with respect to these and the other specific state safeguards identified below to warrant a finding of the practical impossibility of complying with these state safeguards while simultaneously integrating interstate basic and enhanced services. Extensive review with states and others has led the Commission to narrow significantly its approach to preemption here. In view of the demonstrated impact on federal objectives of the state actions we are preempting, a further reference to the Joint Conference is not necessary to establish a complete record to decide the issue.

[247] For instance, although the Notice sought comment on whether we need to preempt any state nondiscrimination reporting requirements, no commenter urged that we do so. We do not here consider the possible preemption of state regulatory requirements on grounds that they thwart or impede ONA safeguards other than the specific safeguards discussed here. The

1. State Structural Separation Requirements

122. Under our comprehensive set of nonstructural safeguards, the BOCs will be able to offer interstate enhanced services on an integrated basis with interstate basic services, instead of a Computer II regime of structural separation. States may decide to require that intrastate enhanced services be provided on a structurally separate basis from intrastate basic services. The Notice proposed not to preempt a simple state requirement that a carrier establish a separate corporate entity for provision of intrastate enhanced services, but to preempt state requirements for separation of facilities and personnel that it tentatively concluded made it impossible as a practical matter for the BOCs to provide integrated interstate basic and enhanced services. We determine here that state structural separation requirements that apply to purely intrastate enhanced services, or that merely require a separate corporate entity with separate books of account for the intrastate portion of jurisdictionally mixed enhanced services, would not thwart federal objectives. However, we find that state requirements for separation of facilities and personnel used to provide the intrastate portion of jurisdictionally mixed enhanced services would thwart our objectives, and therefore preempt such requirements.

123. The Court in California found that the Commission had failed to justify the breadth of its preemption in Computer III because the Computer III opinion had failed to address the possibility that some enhanced services might be offered on a purely intrastate basis. Based on the record in this proceeding, we do not now think that applying state structural separation requirements to purely intrastate enhanced services would necessarily thwart our objectives for interstate enhanced services. Accordingly, we do not at this time preempt state structural separation requirements applicable to such services.

124. On the other hand, we believe that many, if not most, enhanced services provided by the BOCs, AT&T, and the independents are likely to be jurisdictionally mixed in nature. For such services, carriers could theoretically take two approaches to accommodating a state requirement for structural separation of facilities and personnel used to provide intrastate enhanced services while at the same time integrating interstate basic and enhanced services. First, in theory, carriers could establish a corporate entity with its own facilities and personnel that would be used to provide all enhanced services and interstate basic services on an integrated basis, and a separate corporate entity with its own facilities and personnel that would be used to provide intrastate basic services. This approach would involve separate facilities and personnel to provide interstate and intrastate basic services. As such, it would be wholly impractical and uneconomical. Many cases have recognized the impracticality of separate

---

interrelationship of federal ONA policies and state regulation has been extensively considered in other proceedings. See Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 4 FCC Rcd 1 (1988).

provision of interstate and intrastate basic communications.[248] This approach thus would not enable carriers to provide interstate enhanced services on an integrated basis while complying with state requirements to provide intrastate basic and enhanced services through structurally separate facilities and personnel.

125. Alternatively, the BOCs could seek to establish a corporate entity with its own facilities and personnel that would be used to provide intrastate enhanced services and essentially retain the facilities and personnel used to provide interstate enhanced services integrated with basic services, interstate and intrastate, within its existing corporate structure. This approach would require that carrier facilities and personnel used to provide the intrastate and interstate portions of an enhanced service be physically separate and duplicated -- one set for intrastate enhanced services and one set for interstate enhanced services that would be integrated with interstate basic services.[249]

126. The record demonstrates, however, that this approach is no more operationally feasible than the first approach. As the BOCs assert, for example, it is not possible to market intrastate and interstate enhanced services separately, because customers do not want such services and because it would create great customer confusion to attempt to do so.[250] In addition, as is the case in trying to separate interstate and intrastate basic services, duplication of facilities used to provide interstate and intrastate enhanced services is not practically possible because of the many different facilities involved.[251] Separate general management and operations for the interstate and intrastate portions of a jurisdictionally mixed enhanced service also are not feasible because they would require extremely complex operating procedures for billing and collection, order taking, and service provisioning.[252] Separate installation and maintenance also are not practically possible because there would be great confusion, inefficiency, and difficulty involved in trying to have two corporations locate problems, which are likely to affect both the interstate and intrastate portions of the service.[253] Finally, it is not economically or technically feasible to perform separate research and development. Economically, the potential payback from such activity will be drastically reduced since each corporation will be able to apply the results only to its portion of the enhanced service, rather than the entire service.[254] Technically, implementing the results of separate interstate and intrastate research and development would require the same technical splintering of enhanced services that the courts have repeatedly affirmed as infeasible for basic services.[255] In sum, it is not feasible to perform these functions separately for intrastate and interstate portions of an enhanced service. The _Notice_ specifically sought comment on whether we could more narrowly tailor our preemption to state structural separation requirements affecting only specific types of facilities and personnel, but no party has suggested any feasible subset of facilities and personnel for preemption.

---

[248] California v. FCC, 905 F.2d at 1243, quoting NARUC v. FCC, 880 F.2d 422, 430 (D.C. Cir. 1989). See also Louisiana Public Service Commission v. FCC, 476 U.S. 355, 375 n. 4 (1986); North Carolina Utilities Commission v. FCC, 537 F.2d 787, 791 (4th Cir. 1976), cert. denied, 429 U.S. 1027; North Carolina Utilities Commission v. FCC, 552 F.2d 1036 (4th Cir. 1977), cert. denied, 434 U.S. 874 (197); Atlantic Richfield Co. v. FCC, 3 FCC Rcd 3089 (1988), affirmed sub. nom. Public Utility Commission of Texas v. FCC, 886 F.2d 1325 (D.C. Cir. 1989); Illinois Bell Telephone Co. v. FCC, 883 F.2d 104 (D.C.Cir. 1989).

[249] We reject arguments of MCI and others that BOCs do not provide interstate enhanced services because of the interexchange restriction of the MFJ. IntraLATA services may be interstate either because the intraLATA service is transmitted by the BOC across state lines or because the service is part of a communication or service transmitted across state lines. It is well established that this Commission has jurisdiction over physically intrastate facilities and services used to provide interstate services. 47 C.F.R. § 153(a). New York Telephone Co. v. FCC, 631 F.2d 1059 (2nd Cir. 1980); Southern Pacific Communications, 61 FCC 2d 144 (1974).

[250] NYNEX Comments at 77, 74; BellSouth Comments at 42; SWBT Comments at 64. SWBT states that it has learned from market trials that there is very little market for enhanced services that would be limited to intrastate applications. Id. at 64. See also Illinois Bell Telephone Co. v. FCC, 883 F.2d 104 (D.C.Cir. 1989).

127. In addition, this second alternative is not feasible because the BOCs may not be able to identify the jurisdictional nature of the use of an enhanced service as it is being provided to the customer, which would be necessary for the BOC to ensure that it is being provided through the appropriate wholly separate corporation.[256] For example, the BOCs do not currently know the origin of any interLATA calls to the voice mail services they provide their customers.[257] Thus, it would be impossible to route an incoming call to different voice mail equipment based on jurisdiction. There is, in addition, no record support for the view that it is economically or practically possible to do so.[258] Accordingly, we conclude that it is not practically possible for carriers to integrate the interstate enhanced service if the facilities and personnel of the intrastate enhanced service are subject to state structural separation requirements. As a practical matter state structural separation requirements will compel carriers to use structural separation for interstate services, and, therefore, will negate the federal policy for interstate enhanced services.

---

[251] NYNEX Comments at 72-73; BellSouth Comments at 43.

[252] NYNEX Comments at 74. For instance, a customer wishing to order both interstate and intrastate components of an enhanced service would have to order from two separate companies, and the provisioning of the service would require cumbersome technical and operational coordination by the two corporate entities. Training employees to perform this technical and operational coordination could be very complex.

[253] NYNEX Comments at 76; SWBT Comments at 63.

[254] SWBT Comments at 64.

[255] _See_ note 248, _supra_.

[256] Bell Atlantic Comments at 10-11; BellSouth Comments at 39-40; NYNEX Comments at 64-65; SWBT Comments at 63-64.

128. On the other hand, we are not now persuaded that a state requirement for merely a separate corporate entity with separate books of account for provision of the intrastate component of a jurisdictionally mixed enhanced service would thwart federal objectives. For example, we do not see that carrier personnel maintaining separate accounts for intrastate enhanced services would thwart the opportunity to integrate interstate enhanced services with basic service provision.

129. Because AT&T and the independents are permitted to provide interstate enhanced services on an integrated basis and our public interest objectives would be equally thwarted by state structural separation requirements applied to them, we equally preempt state structural separation requirements that require separate facilities and personnel for the intrastate portion of a jurisdictionally mixed enhanced service provided by AT&T and the independents. Similarly, we do not preempt requirements applicable to those carriers for a separate corporate entity with separate books of account for provision of the intrastate component of jurisdictionally mixed enhanced services.

---

[257] No indication of the origin of a call is currently transmitted on interLATA calls except where Automatic Number Identification (ANI) is transmitted. ANI, which is the billing number of the caller, is transmitted from the originating LEC to the interexchange carrier for billing purposes. ANI is not, however, transmitted by the interexchange carrier to the terminating LEC. In any event, ANI provides a billing number, not the caller's telephone number, and therefore does not disclose the caller's location. The only circumstance under which the caller's telephone number is currently available to the terminating LEC is where a call is handled entirely by a single LEC that transmits the Calling Party Number via Signalling System 7 (SS7). Of course, depending on the technical configuration of any enhanced service, even that information might not be sufficient to determine the jurisdiction of an individual call.

[258] If a state imposed structural separation requirements, it would be necessary to know the jurisdiction of each call in order to assure that all intrastate calls were carried over separate facilities. In other contexts, for example, determining whether interstate or intrastate access charge rates apply, it is not necessary to know the jurisdiction of each call, but only to develop a reasonable surrogate for the jurisdictional split of the customer's traffic in aggregate. See e.g., Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Policy and Rules Concerning Rates for Dominant Carriers, CC Docket Nos. 89-79, 87-313, Report and Order and Order on Further Reconsideration and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991), paras. 66-68.

2. State CPNI Rules

130. Under the CPNI rules we are adopting in this Report and Order, BOC personnel with involvement in marketing enhanced service will be able to access a customer's CPNI without prior written authorization, except for customers with more than twenty lines. AT&T and the independents' personnel involved in marketing enhanced services are not subject to any federal prior authorization requirements. Access to CPNI permits effective integrated marketing of enhanced services and permits the efficient use of carrier resources to provide enhanced services to a broad spectrum of customers. Personnel subject to a state prior authorization rule would not be able to access CPNI when it is permitted under the federal rule. Carrier implementation of a state prior authorization rule where it is not required under the federal rule would effectively require the separation of marketing and sales personnel dealing with interstate enhanced services from personnel dealing with interstate basic services. In these circumstances, the state rule effectively would negate federal policies in favor of achieving the efficiencies and associated public interest benefits of integrated marketing, such as the ability to serve the mass market. Contrary to the assertions of the DC PSC, the fact that a customer may restrict access to its CPNI does not prevent the thwarting of federal policy by state requirements that the carrier obtain prior authorization. Accordingly, we preempt state CPNI rules applicable to the BOCs, AT&T, and independents that require prior authorization whenever such authorization is not required by our rules. Because we are not persuaded at the same time that other aspects of state CPNI rules would thwart or impede federal objectives, we are not preempting such state rules in this proceeding.

3. State Network Disclosure Rules

131. Under our network disclosure rules, initial disclosure of network information affecting the interconnection of enhanced service providers is generally required at the make/buy point, i.e., when the carrier decides to make itself, or to procure from an affiliated entity, any product the design of which relies on the network interface. The timing of this disclosure seeks to strike a balance between assuring that independent ESPs receive network information on a timely basis and preventing premature disclosure that could impair carriers' service development efforts and inhibit network innovation. A state rule that required timing of initial disclosure at a time that differs from the federal rule would substitute a state balancing for the federal balancing of these concerns, and could injure company development and network innovation efforts. While, as suggested by SWBT, states could adopt timing requirements that differed only slightly from the federal rule, carriers cannot simultaneously comply with differing state and federal requirements for initial disclosure of network information given that initial disclosure can occur only once. As stated in the Notice, a state rule that required initial disclosure at a time that differs from the time specified in the federal rule would negate the federal timing because by definition, initial disclosure can occur only once. Accordingly, we preempt state network disclosure rules that require initial disclosure at a time different than the federal rule. We are not persuaded at this time that any state rule that required disclosure of different or broader information would necessarily thwart federal network disclosure rules, and therefore will consider any problems that may arise on a case-by-case basis with other aspects of state network disclosure rules. We additionally do not preempt state network disclosure rules applicable to carriers that are not subject to the federal network disclosure rule.

V. Ordering Clauses

132. Accordingly, IT IS ORDERED, that pursuant to authority contained in Sections 1, 4, 201-205, 218, and 220 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154, 201-205, 218, and 220, Part 64 is AMENDED as set forth in Appendix B.

133. IT IS FURTHER ORDERED, that the policies, rules, and requirements set forth herein ARE ADOPTED.

134. IT IS FURTHER ORDERED, that the Chief, Common Carrier Bureau is delegated authority to act upon matters pertaining to implementation of the policies, rules, and requirements as set forth herein.

135. IT IS FURTHER ORDERED that the decisions in this Report and Order concerning removal of structural separation and adoption of nonstructural safeguards including the amendments to Part 64 SHALL BE EFFECTIVE February 1, 1992.[259]

136. IT IS FURTHER ORDERED, that the elimination of the capitalization plan requirement, the prohibition against the regulated BOC company and its affiliates from performing software development for one another, and the prohibition against integrated planning and development IS EFFECTIVE January 1, 1992.[260]

---

[259] We order an effective date of February 1, 1992, in order to permit the timely filing of petitions for structural relief by the BOCs on or about February 1, 1992, when federal ONA tariffs are scheduled to become effective. Petitions for structural relief could not be filed on that date unless our establishment herein, see footnote 212, supra, of the procedures and preconditions for filing such petitions were effective prior to that date. Accordingly, we find good cause that the effective date should be less than 30 days from publication in the Federal Register. See Section 553 (d)(3) of the Administrative Procedure Act, 5 U.S.C. § 553 (d)(3).

[260] The publication of a substantive rule which relieves a restriction may be made less than thirty days before its effective date. See Section 553 (d)(1) of the Administrative Procedure Act, 5 U.S.C. § 553 (d)(1). Our decision to remove the capitalization plan requirement, the prohibition

137. IT IS FURTHER ORDERED, that the preemption decisions adopted herein SHALL BE EFFECTIVE thirty days after publication of this Report and Order in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

---

against the regulated BOC company and its affiliates performing software development for one another, and the prohibition against integrated planning and development falls within that provision.

APPENDIX A

BOC SAFEGUARDS COMMENTS
CC Docket No. 90-623

AccessPlus Communications, Inc. (AccessPlus)
ADAPSO, The Computer Software and Services Industry Association, Inc. (ADAPSO)
Ad Hoc Telecommunications Users Committee (Ad Hoc)
Alarm Industry Communications Committee (AICC)
American Institute of Certified Public Accountants (AICPA)
American Newspaper Publishers Association (ANPA)
American Petroleum Institute (API)
American Public Communications Council (APCC)
American Telephone & Telegraph Company (AT&T)
Ameritech Operating Companies (Ameritech)
Arkansas Public Service Commission; Kansas Corporation Commission; Missouri Public Service Commission; Oklahoma Corporation Commission; Public Utility Commission of Texas on behalf of the Southwest Regional Regulatory Group (SW Group)
Association of American Railroads (AAR)
Association of Telemessaging Services International, Inc. (ATSI)
Bell Atlantic Telephone Companies (Bell Atlantic)
BellSouth Corporation, South Central Bell Telephone Company, and Southern Bell Telephone and Telegraph Company (BellSouth)
California Public Utilities Commission and People of the State of California (California)
California Bankers Clearinghouse Association, New York Clearing House Association, Mastercard International Incorporated, and VISA U.S.A., Inc. (ONA Users Group)
Central Telephone Company (Central)
Cincinnati Bell Telephone (CBT)
Citizens for a Sound Economy Foundation (CSEF)
Colorado Public Utilities Commission (Colorado PUC)
CompuServe Incorporated (CompuServe)
Computer and Business Equipment Manufacturers Association (CBEMA)
Department of Justice (DOJ)
District of Columbia Public Service Commission (DC PSC)
Dun & Bradstreet Corporation (Dun & Bradstreet)
Florida Public Service Commission (Florida PSC)
General Services Administration (GSA)
GTE Service Corporation and affiliated companies (GTE)
State of Hawaii
Illinois Commerce Commission (Illinois Commission)
Independent Data Communications Manufacturers Association (IDCMA)
Independent Telecommunications Network, Inc. (ITN)
Information Industry Association (IIA)
Integrated Communication Systems, Inc. (ICS)
International Business Machines Corporation (IBM)
International Communications Association (ICA)
Iowa Network Services, Inc. (INS)

MCI Telecommunications Corporation (MCI)
MessagePhone, Inc. (MessagePhone)
Michigan Public Service Commission (Michigan PSC)
National Association of Broadcasters (NAB)
National Association of Regulatory Utility Commissioners (NARUC)
National Telecommunications and Information Administration (NTIA)
National Telephone Cooperative Association (NTCA)
New York Department of Public Service (NY DPS)
NYNEX Telephone Companies (NYNEX)
Oregon Public Utility Commission (Oregon PUC)
Pacific Bell and Nevada Bell (PacTel)
Pennsylvania Office of Consumer Advocate (Pennsylvania)
Rochester Telephone Corporation (Rochester)
Southern New England Telephone Company (SNET)
Southwestern Bell Telephone Company (SWBT)
Stroh Ranch Communications Limited Partnership (Stroh Ranch)
Tele-communications Association (TCA)
Unisys Corporation (Unisys)
United States Telephone Association (USTA)
US Sprint Communications Company Limited Partnership (US Sprint)
US West Communications, Inc. (US West)
Utilities Telecommunications Council (UTC)
Vermont Department of Public Service (Vermont DPS)
Washington Utilities and Transportation Commission (Washington UTC)

BOC SAFEGUARDS REPLY COMMENTS
CC Docket No. 90-623

ADAPSO, The Computer Software and Services Industry Association, Inc. (ADAPSO)
Ad Hoc Telecommunications Users Committee (Ad Hoc)
American Newspaper Publishers Association (ANPA)
American Telephone & Telegraph Company (AT&T)
Ameritech Operating Companies (Ameritech)
Association of Telemessaging Services International, Inc. (ATSI)
Bell Atlantic Telephone Companies (Bell Atlantic)
BellSouth Corporation, South Central Bell Telephone Company, and Southern Bell Telephone and Telegraph Company (BellSouth)
California Public Utilities Commission and People of the State of California (California)
California Bankers Clearinghouse Association, New York Clearing House Association, Mastercard International Incorporated, and VISA U.S.A., Inc. (ONA Users Group)
CompuServe Incorporated (CompuServe)
District of Columbia Public Service Commission (DC PSC)
General Services Administration (GSA)
GTE Service Corporation and affiliated companies (GTE)
State of Hawaii
Independent Data Communications Manufacturers Association (IDCMA)
Information Industry Association (IIA)
Integrated Communication Systems, Inc. (ICS)
McGraw-Hill, Inc. (McGraw-Hill)
National Cable Television Association, Inc. (NCTA)
National Telephone Cooperative Association (NTCA)
NYNEX Telephone Companies (NYNEX)
Oregon Public Utility Commission (Oregon PUC)
Pacific Bell and Nevada Bell (Pacific)
Southern New England Telephone Company (SNET)
Southwestern Bell Telephone Company (SWBT)
Tele-communications Association (TCA)
Texas Public Utilities Commission (Texas PUC)
United States Telephone Association (USTA)
US Sprint Communications Company Limited Partnership (US Sprint)
US West Communications, Inc. (U S West)

APPENDIX B

Amendments to the Code of Federal Regulations

Title 47 of the C.F.R., Part 64, is amended as follows:

Part 64 — Miscellaneous Rules Relating to Common Carriers

1. The authority citation for Part 64 continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply secs. 201, 218, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218.

2. New section 64.903 is added to read as follows:

64.903 Cost Allocation Manuals

(a) Each local exchange carrier with annual operating revenues of $100 million or more shall file with the Commission a manual containing the following information regarding its allocation of costs between regulated and nonregulated activities:

(i) A description of each of the carrier's nonregulated activities;

(ii) A list of all the activities to which the carrier now accords incidental accounting treatment and the justification therefor;

(iii) A chart showing all of the carrier's corporate affiliates;

(iv) A statement identifying each affiliate that engages in or will engage in transactions with the carrier and describing the nature, terms and frequency of each transaction;

(v) A cost apportionment table showing, for each account containing costs incurred in providing regulated services, the cost pools within that account, the procedures used to place costs into each cost pool, and the method used to apportion the costs within each cost pool between regulated and nonregulated activities; and

(vi) A description of the time reporting procedures that the carrier uses, including the methods or studies designed to measure and allocate non-productive time.

(b) Each carrier shall ensure that the information contained in its cost allocation manual is accurate. Carriers must update their manuals at least quarterly, except that changes to the cost apportionment table and to the description of time reporting procedures must be filed at least 60 days before the carrier plans to implement the changes. Proposed changes in the description of time reporting procedures, the statement concerning affiliate transactions, and the cost apportionment table must be accompanied by a statement quantifying the impact of each change on regulated operations. Changes in the description of time reporting procedures and the statement concerning affiliate transactions must be quantified in $100,000 increments at the account level. Changes in cost apportionment tables must be quantified in $100,000 increments at the cost pool level. The Chief, Common Carrier Bureau may suspend any such changes for a period not to exceed 180 days, and may thereafter allow the change to become effective or to prescribe a different procedure.

(c) The Commission may by order require any other communications common carrier to file and maintain a cost allocation manual as provided in this section.

(3) New section 64.904 is added to read as follows:

64.904 Independent Audits

(a) Each local exchange carrier required by this Part or by Commission order to file a cost allocation manual shall have performed annually, by an independent auditor, an audit that provides a positive opinion on whether the applicable data shown in the carrier's annual report required by Section 43.21(f)(2) of this Chapter presents fairly, in all material respects, the information of the carrier required to be set forth therein in accordance with the carrier's cost allocation manual, the Commission's Joint Cost Orders issued in conjunction with CC Docket No. 86-111 and the Commission's rules and regulations including Sections 32.23, 32.27, 64.901 and 64.903 in force as of the date of the auditor's report. The audit shall be conducted in accordance with generally accepted auditing standards, except as otherwise directed by the Chief, Common Carrier Bureau.

(b) The report of the independent auditor shall be filed at the time that the local exchange carrier files the annual report required by Section 43.21(f)(2) of this Chapter.

November 21, 1991

SEPARATE STATEMENT OF
COMMISSIONER ERVIN S. DUGGAN

In Re: Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards

I have decided, after carefully weighing the arguments favoring nonstructural safeguards--- and despite lingering concerns about the adequacy of such safeguards--- to join my fellow Commissioners in voting to rely on nonstructural safeguards for Bell Operating Company provision of enhanced services.

I am persuaded that allowing the Bell Operating Companies to provide enhanced services on an integrated basis does promise significant public interest benefits. Those benefits are sufficient, in my mind, to outweigh the costs of forgoing the protections of structural separation. Integrated operations generate cost savings that if passed on to the consumer could provide real public benefits. In particular, it appears that the cost savings derived from joint marketing of enhanced and basic services may mean that the BOCs can provide affordable enhanced services to the mass market that others may not be able to provide profitably. Voice messaging is an obvious example.

We are heading, nevertheless, into uncharted territory. The MFJ restriction has only recently been lifted. As technology and its applications evolve, the enhanced services marketplace will develop in ways that are not easy to predict. Open Network Architecture, too, is an evolving process; we do not yet have experience with federally tariffed ONA services.

So in the end, my decision to support this item rests upon one important feature: a pledge by the Commission, included in the order we adopt today, to review the effectiveness of nonstructural safeguards after three years. We will determine in that three-year review proceeding whether our nonstructural safeguards have in fact been effective in protecting against discrimination and cross-subsidies. If we find after three years' experience that nonstructural safeguards have not succeeded, then I presume we will not hesitate to reimpose whatever structural separation requirements appear necessary.

It seems to me essential for travelers heading off into uncharted territory to take along safety equipment and to devise ways to retrace their steps if they take a wrong turn. The three-year review proceeding offers both. It will give us a chance to test empirically the Commission's predictions about the efficacy of our safeguards and the public interest benefits of integration. And it gives us at least some chance to correct any mistakes we might find that the Commission has made in its enthusiasm for nonstructural safeguards.

# # # #

FCC 91-382
38309

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 88-2
Filing and Review of Open	)	Phase I
Network Architecture Plans	)	

MEMORANDUM OPINION AND ORDER

Adopted: November 21, 1991 **Released: December 19, 1991**

By the Commission: Chairman Sikes and Commissioner Barrett issuing separate statements.

TABLE OF CONTENTS

Paragraph

I. INTRODUCTION.. 1

II. BACKGROUND.. 2

III. SUMMARY OF REQUIREMENTS.. 4

IV. DEPLOYMENT OF ONA SERVICES

A. Annual ONA Services Deployment Schedule Update.. 5
B. Disposition of New ONA Service Requests and Treatment of ONA Service Requests Previously Deemed Infeasible..14
C. Deployment of New Technologies: SS7, ISDN, and IN..20

V. UNIFORMITY OF ONA SERVICES

A. Technical and Long-term Uniformity 31
B. Cross Reference Guide 34

VI. STATE TARIFFING AND RATEMAKING PRINCIPLES.............36

VII. ONA SUPPORT SERVICES

A. Provision of Billing Information and CNI............39
B. Provision of OSS Services............................45
C. Uniformity in OSS Services Provision................48

VIII. OTHER NONSTRUCTURAL SAFEGUARDS

A. Procedures for Restricting BOC Access to CPNI........50
B. Confidentiality of ESP Proprietary Information.......55

IX. ONA MODEL

A. Authorization for ESP Purchases of CNSs for End Users.. 56
B. Reclassification of ONA Services................... 58
C. BSEs Used by BOCs.................................. 60

X. CONCLUSION..62

XI. ORDERING CLAUSES....................................65

Appendix A - List of Commenters
Appendix B - Future BOC Filing Requirements
Appendix C - ESP Service Requests Previously Deemed Infeasible
Appendix D - ISDN Deployment
Appendix E - National ISDN-1 Services--Basic Rate Interface
Appendix F - AIN Deployment
Appendix G - Possible AIN Services
Appendix H - IILC Issues
Appendix I - State Ratemaking Methods
Appendix J - Sample Matrix of ONA Services and State/Federal Tariffs
Appendix K - OSS Services
Appendix L - BOC Databases Containing Comprehensive CPNI
Appendix M - BSEs Used by the BOCs

I. INTRODUCTION

1. On April 12, 1990, this Commission adopted the BOC ONA Amendment Order, approving the Open Network Architecture (ONA) amended plan of each of the Bell Operating Companies (BOCs), subject to certain further modifications and amendments.[1] We directed the BOCs to file minor modifications by July 15, 1990, and to submit another amended ONA plan by

---

[1] Filing and Review of Open Network Architecture Plans, CC Docket 88-2, Phase I, 5 FCC Rcd 3103 (1990) (BOC ONA Amendment Order), Erratum, 5 FCC Rcd at 4045, pets. for recon. pending, pets. for rev. pending, California v. FCC, (9th Cir. No. 90-70336, filed July 5, 1990).

April 15, 1991. In the BOC ONA Amendment Order, we stated that ONA is an evolutionary process, and that the approval of the ONA plans is a first step in that process. We stated that we would continue to oversee ONA development, and that we would, therefore, continue to monitor the evolution of ONA with periodic reports, further amendments, or other Commission actions.[2] In this Order, in addition to requiring further amendments to the BOC ONA plans, we establish new annual reporting requirements in a number of areas. These annual reports will permit the Commission to ensure continued BOC progress in the provision of new ONA services and new technical capabilities to enhanced service providers (ESPs).

II. BACKGROUND

2. In the Computer III proceeding, the Commission established a regulatory framework of nonstructural safeguards to govern the BOCs' participation in the enhanced services marketplace. In order to provide network-based opportunities for competing ESPs, the Commission imposed Comparably Efficient Interconnection (CEI) and ONA requirements as conditions for the provision of enhanced services on an integrated basis by the BOCs.[3] In the Phase I Order, the Commission articulated the principles underlying ONA, instructed the BOCs to work with ESPs and file ONA plans consistent with these principles by February 1, 1988, and conditioned removal of existing structural separation requirements on approval and implementation of these plans.

3. In the BOC ONA Order, the Commission approved in part the ONA plans of each of the BOCs and addressed in detail the initial ONA plans filed by the BOCs.[4] In that order, the Commission directed each BOC to file

---

[2] BOC ONA Amendment Order, 5 FCC Rcd at 3105.

[3] Amendment of Sections 64.702 of the Commission's Rules and Regulations, (Computer III), CC Docket No. 85-229, Phase I, Report and Order, 104 FCC 2d 958 (1986) (Phase I Order), reconsideration, 2 FCC Rcd 3035 (1987) (Phase I Reconsideration), further reconsideration, 3 FCC Rcd 1135 (1988) (Phase I Further Reconsideration), second further reconsideration, 4 FCC Rcd 5927 (1989) (Phase I Second Further Reconsideration), Phase I Order and Phase I Reconsideration Order vacated, California v. FCC, 905 F. 2d 1217 (9th Cir. 1990) (California); Phase II, CC Docket No. 85-229, 2 FCC Rcd 3072 (1987) (Phase II Order), reconsideration, 3 FCC Rcd 1150 (1988) (Phase II Reconsideration Order), Phase II Order vacated California v. FCC, 905 F.2d 1217 (9th Cir. 1990) pet. for rev. pending of Phase II Order and Phase II Reconsideration Order, BellSouth Corp. v. FCC, (9th Cir. No. 88-7290, filed April 20, 1988).

[4] Filing and Review of Open Network Architecture Plans, CC Docket 88-2, Phase I, 4 FCC Rcd 1 (1988) (BOC ONA Order), recon., 5 FCC Rcd 3084 (1990) (BOC ONA Reconsideration). In the BOC ONA Order, the Commission approved the common ONA model developed by the BOCs and Bell Communications Research, Inc. (Bellcore). Under this model, ESPs obtain access to various optional,

amended ONA Plans on May 19, 1989.[5] In the BOC ONA Amendment Order, this Commission approved the BOCs' amended plans,[6] subject to the further modifications and amendments under review here.[7]

III. SUMMARY OF REQUIREMENTS

4. In this Order we require the BOCs to provide the following annual reports on an ongoing basis beginning April 15, 1992: (1) three-year deployment projections of ONA services;[8] (2) new ONA service requests and

---

unbundled ONA services, termed Basic Service Elements (BSEs), through access links described as Basic Serving Arrangements (BSAs). Other elements of the model include Complementary Network Services (CNSs), which are optional, unbundled basic service features that an end user may obtain from a carrier in order to receive or use an enhanced service, and Ancillary Network Services (ANSs), which are non-Title II services, such as billing and collection, which may be useful to ESPs. BOC ONA Amendment Order, 5 FCC Rcd at 3104, para. 4.

[5] BOC ONA Order, 4 FCC Rcd at 255-260, para. 496.

[6] BOC ONA Amendment Order, 5 FCC Rcd at 3104, para. 1. After the BOC ONA Amendment Order, the United States Court of Appeals for the Ninth Circuit vacated and remanded three of the Computer III decisions in the California decision. See supra n. 2. Subsequently, we issued the ONA Remand Order, addressing certain Computer III decisions that were not challenged by the Court. We there reinstated the ONA obligations on the BOCs and AT&T. Computer III Remand Proceeding, CC Docket No. 90-368, 5 FCC Rcd 7719 (1990), (ONA Remand Order), pet. for recon. pending, pets. for rev. pending, California v. FCC (9th Dir. No. 90-70336, filed July 5, 1990). In a companion to this Order, the Commission today adopts nonstructural safeguards for the BOC provision of enhanced services. See Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, CC Docket No. 90-623, FCC 91-381, adopted November 21, 1991 (BOC Safeguards Order).

[7] To avoid confusion in this Order, we refer to the July 15, 1990 filings as "modifications" and the April 15, 1991 filings as "further amendments." BOC ONA Amendment Order, 5 FCC Rcd at 3120, para. 149. Eight parties filed comments, and nine parties filed reply comments regarding the BOCs' April 15, 1991 filings. Parties filing comments and replies are listed at Appendix A.

[8] Each BOC must file, by April 15, 1992, annual deployment schedules for its ONA services by type of ONA service (BSA, BSE, CNS, or ANS) by percentage of access lines served on a system-wide (entire BOC region) and market-area basis for the years beginning July 1, 1993, 1994, and 1995, and on a rolling basis, for three subsequent years thereafter. BellSouth has sought reconsideration of the July 1 reporting date, requesting that the projections be as of December 31. That issue will be addressed in the reconsideration of the BOC ONA Amendment Order.

their disposition, and disposition of new service requests that have previously been designated for further evaluation; (3) treatment of ONA services previously deemed infeasible; (4) BSEs used in the provision of the BOCs' own enhanced services;[9] (5) deployment of Signaling System 7 (SS7), Integrated Services Digital Network (ISDN), and Intelligent Network (IN) in terms of percentage of access lines served system-wide and on a market-area basis; (6) new ONA services available through SS7, ISDN, and IN, and plans to provide these services; (7) progress on technical and long-term uniformity; (8) progress on the provision of BOC operations support systems (OSS) services, and access to those services by ESPs; (9) progress on uniform provision of OSS services; and (10) the provision of billing information to ESPs. We also require the BOCs to file by April 15, 1992, further amendments on: (1) changes in the BOC databases containing comprehensive customer proprietary network information (CPNI) that are password/ID or otherwise restricted from access by BOC enhanced services personnel, in response to the Commission's modified CPNI requirement;[10] and (2) additional CNSs that will be offered as BSEs. In addition, we require each BOC to file further amendments by February 14, 1992, regarding: (1) the manner in which it intends to unbundle SS7, ISDN, and IN; and (2) changes to its CPNI plan that it makes to reflect the Commission's modified CPNI requirement, including changes to the multiline CPNI notification form, procedures for customer's CPNI authorization to the BOCs' own enhanced services and to other ESPs, and procedures for restricting customer's CPNI. Information on state and federal tariffing of BOC ONA services must be filed no later than March 31, 1992, and every six months thereafter. The BOCs are also required to file a copy of the ONA Services User Guide, along with the Appendices A, B, and C that were initially in the Cross Reference Guide, when the information is updated semi-annually. In addition, each BOC is required to file an amendment to its ONA plan prior to offering an enhanced service that uses a BSA, BSE, or CNS, other than those listed in its approved ONA plan. We delegate to the Common Carrier Bureau the authority to decide the details and format regarding the collection of all the information we require in this Order.[11]

IV. DEPLOYMENT OF ONA SERVICES

A. Annual ONA Services Deployment Schedule Update

5. BOC Further Amendments. Each BOC has filed deployment schedules for its ONA services on a system-wide and market-area basis for the years, beginning July 1, 1992, 1993, and 1994, as required by the BOC

---

[9] By the term "BOCs' own enhanced services," we include those services provided by a BOC itself or by any of the BOC's affiliates.

[10] See BOC Safeguards Order, FCC 91-381 (adopted November 21, 1991).

[11] These requirements are further detailed in Appendix B.

ONA Amendment Order.[12] The deployment data indicate a trend in increased deployment. The system-wide deployment results for the seven regions, for the year beginning July 1, 1994, are summarized below:[13]

ONA Services Deployment Projections

	Number of ONA Services Offered	% of Offered ONA Services Deployed: To 80% of Lines or Greater	% of Offered ONA Services Deployed: To 90% of Lines or Greater
Ameritech	67	55%	39%
Bell Atlantic	79	73	70
BellSouth	94	60	57
NYNEX	115	51	50
Pactel	61	66	46
SWBT	93	73	49
US West	107	50	46
	AVERAGE	61% of ONA Services	51% of ONA Services

6. Positions of the Parties. AICC, ANPA, and MCI claim that the BOC deployments are generally inadequate and that the BOCs tend to offer only services that the BOCs intend to use in their own enhanced service operations.[14] AICC identifies six specific services that it claims are important to the alarm monitoring industry, and argues that the projected

---

[12] BOC ONA Order, 4 FCC Rcd at 188-190, paras. 357-363. BOC ONA Amendment Order, 5 FCC Rcd at 3114, para. 99, 3117, para. 122, 3120, para. 149 (A 2, A 3); Erratum, 5 FCC Rcd at 4045. We also required Pactel and Bell Atlantic to provide additional specific information describing their carriers' plans to provide ONA services. We find that the modifications filed by Pactel and Bell Atlantic now bring those carriers into compliance with our requirements. Pactel Modification at 3-4 and Appendix BBB; Bell Atlantic Modification at 1-2.

[13] Ameritech Further Amendments at App. 8; Bell Atlantic Further Amendments at App. A; BellSouth Further Amendments at Att. C; NYNEX Further Amendments at App. 1; Pactel Further Amendments at Ex. F; SWBT Further Amendments at Ex. J; and US West Further Amendments at Attachment on Deployment Information. It should be noted that the BOCs do not use a uniform system of nomenclature or service definition in their deployment plans. For example, US West uses one general entry for the service, "bridging," whereas NYNEX lists four different bridging applications as separate services. This lack of uniformity in reporting significantly limits the usefulness of comparing the deployment performance, in terms of ONA services offered, of the seven BOCs.

[14] AICC Comments at 20-30; MCI Comments at 7-13; ANPA Reply at 2.

deployment rates of these services are unsatisfactory.[15] AICC further states that Ameritech, in particular, has withdrawn its existing Derived Local Channel (DLC) service, SCAN Alert, and reclassified as technically infeasible three services that it previously proposed to offer as BSEs.[16]

7. In reply, Ameritech, Bell Atlantic, and NYNEX state that they offer most of the services that AICC claims are not being offered.[17] Ameritech further states that AICC's claims that Ameritech withdrew SCAN Alert without substantiation are not true. Ameritech states that it met with alarm customers to explain its reasons in detail. Moreover, Ameritech states that it will continue to offer SCAN Alert to the extent that the underlying platform has sufficient capability.[18] Ameritech states that it provides the other services requested by AICC, e.g. broadband links for video transmission, the ability to reconfigure networks, and route diversity capability.[19]

8. Several BOCs deny the claim that BOCs tend to offer only services that they will use in their own enhanced service operations.[20] NYNEX states that it will use only two of its twenty-one initially offered BSEs in providing its own enhanced services. Pactel states that it uses only four of the fifty-six ONA services that it has deployed. BellSouth claims that AICC has repeated its arguments about the lack of uniformity of development among the regions, and that these arguments were previously rejected by the Commission on the basis that AICC did not cite relevant

---

[15] The services are: Derived Local Channels (DLC); Ability to Detect Breaks in Telephone Line within 60 seconds; One-way Alarm Transmission; Broadband Links for Video Transmission; Ability to Reconfigure Networks; and Route Diversity. AICC Comments at 21.

[16] The withdrawn BSEs are: DLC (Monitoring); Derived Channels that Comply with Underwriter's Laboratory (UL) and National Fire Protection Association (NFPA); and Ability to Detect Breaks in Telco Lines within 60 Seconds. These BSEs depend on the availability of the SCAN Alert service. Ameritech Further Amendments, Addendum 4 at 30-32.

[17] Ameritech Reply at 7; Bell Atlantic Reply at 9-11; and NYNEX Reply at 4-5. See also Pactel Reply at 11-2.

[18] Ameritech Reply at 3-7. Ameritech states that it has suspended investment in SCAN Alert technology because of excessive trouble reports by ESPs and their end users, and incompatibilities with Ameritech's operating environment. Ameritech Further Amendments, Addendum 4 at 30-2, 65. Moreover, Ameritech states that alarm companies that have invested in equipment compatible with SCAN Alert and are currently using that service will not be significantly inconvenienced. Id.

[19] Ameritech Reply at 7-8.

[20] NYNEX Reply at 3-5; Pactel Reply at 10-11; BellSouth Reply at 19.

market-area or technical data. NYNEX argues that MCI cannot identify a request of its own that has not been met.

9. Discussion. The BOCs' deployment schedules indicate a steady growth in deployment through 1994. We find that the individual deployment rates of each BOC are generally reasonable and result in an industry-wide average deployment of sixty-one percent of the offered ONA services to eighty percent of an area's access lines by 1994, which also appears to be reasonable. We require that each BOC continue to report, on a rolling basis, three-year annual deployment schedules of its ONA services by type of ONA service by percentage of access lines served system-wide and by market-area.[21] We have found it difficult to compare the BOC deployment schedules because of the differences in service names and service aggregation. We therefore require the BOCs to use the ONA Services User Guide's generic names as well as the individual BOC service name in reporting deployment. For future services or other services without a generic name, we require the BOCs to develop generic names that can be used as a basis for comparison between BOCs.[22]

10. At this time, we are not prepared to conclude that it is reasonable for any of the BOCs to withdraw services listed in the ONA plans that were approved in the BOC ONA Amendment Order. In particular, we are not prepared to conclude that Ameritech's withdrawal of services of use to the alarm industry is reasonable. We do not look favorably upon the BOCs' withdrawal of services that were approved in their ONA plans. In the Part 69/ONA Order, we directed the BOCs to file federal tariffs for each BSE listed in its approved ONA plan.[23] All of the BOCs have filed requests for waiver of the Part 69/ONA Order requirement for BSEs they are not filing in their federal tariffs. Therefore, in this order, we do not approve the BOC amendments to the extent that they would withdraw BSEs that the BOCs previously committed to offer. The issue of the reasonableness of each request to withdraw will be evaluated in the waiver process. In the future, once a BSE has been federally tariffed, the BOCs must request and receive advance approval in writing before filing tariff revisions to discontinue offering the service.

---

[21] System-wide refers to the entire BOC region. The BOC ONA Order required the BOCs to define the boundaries for the market-areas for which they provide projections. Id. 4 FCC Rcd at 300-301, BOC ONA Amendment Order, 5 FCC Rcd at 3129, n. 163 & 165. We require the BOCs to notify the Commission when there are changes in market-areas.

[22] We require that the BOCs generally report on ONA services by generic name as well as by their own service name, for all relevant reports, including the following service reports discussed in this Order: three-year ONA deployment projections; new technologies deployment; and state and federal tariffing. We delegate to the Common Carrier Bureau the authority to decide the details and format regarding the collection of the information.

[23] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 6 FCC Rcd 4524 (1991) (Part 69/ONA Order).

11. In addition, the 120-day process provides a mechanism to address services that AICC (or other ESPs) find desirable that are not described in an approved ONA plan.[24] Under the 120-day process, a BOC is required to provide an evaluation of whether it will provide the service or specific reasons for not offering a given service. The BOC evaluation is to be based on the selection criteria set forth in the Phase I Order: market-area demand, utility as perceived by ESPs, and costing and technical feasibility. If an ESP should find a BOC's response to be unsatisfactory, it may then seek redress from this Commission by filing a petition for declaratory ruling.

12. We find no merit to AICC and MCI's contention that the BOCs are limiting their deployment of ONA services to those services used by their ESP affiliate. The BOCs have responded to AICC and MCI's comments by demonstrating that the BOCs use only a small proportion of the BSEs they offer. In the BOC ONA Amendment Order we required the BOCs to provide a list of BSEs used in providing their own enhanced services. As discussed in Section IX (C) of this Order, we conclude upon review of those lists that the BOCs have not limited their provision of BSEs to those used in providing their own enhanced services.[25]

13. Finally, once the structural separation requirement has been removed for a BOC, we require that if a BOC plans to offer an enhanced service that uses a BSA, BSE, or CNS, other than those listed in its approved ONA plan, it must file an amendment to its ONA plan with the Common Carrier Bureau at least ninety days prior to offering the enhanced service. The BOC shall not offer the enhanced service until the Common Carrier Bureau approves the amendment.[26]

B. Disposition of New ONA Service Requests and Treatment of ONA Service Requests Previously Deemed Infeasible

14. BOC ONA Amendment Order. The BOC ONA Amendment Order required the BOCs to list all new ONA service requests that were received from ESPs in the previous year, and to indicate the disposition of these services under the 120-day process.[27] The number of new service requests received by the BOCs under the 120-day process and their disposition is tabulated and discussed below:[28]

---

[24] The 120-day process requires that within 120 days after receiving a request for a new ONA capability, the BOC will provide a response that indicates whether it will provide that capability and, if so, when it will make the requested capability available; approximately how much it will charge for the service if demand meets estimates provided by the ESP; and what technical problems the BOC anticipates. BOC ONA Order, 4 FCC Rcd at 207-8, para. 397. BOC ONA Amendment Order, 5 FCC Rcd at 3117, para. 124.

[25] See infra para. 61.

[26] See Phase I Order, 104 FCC 2d at 1068, paras. 221-2. See also BOC Safeguards Order, FCC 91-381 (adopted November 21, 1991).

	No. of New Requests
Ameritech	0
Bell Atlantic	0
BellSouth	0
NYNEX	0
Pactel	12
SWBT	2
US West	4
TOTAL	18

15. Of the eighteen new requests the BOCs received, two were found technically infeasible, two are being offered, one has been developed, and the remainder are being evaluated or developed.[29]

16. In addition, the BOC ONA Amendment Order required the BOCs to report their progress in developing ONA services in response to ESP requests that had been previously deemed technically infeasible.[30] In response to this requirement, the BOCs report a number of services previously deemed infeasible that are now technically feasible.[31] The BOCs state that these services can either be met with existing technology, or are dependent on the future deployment of SS7, ISDN, or Advanced Intelligent Network (AIN).[32]

---

[27] BOC ONA Amendment Order, 5 FCC Rcd at 3120-1, para. 149 (B 9).

[28] Ameritech Further Amendments Sec. IX, E at 2; Bell Atlantic Further Amendments at 17; BellSouth Further Amendments at 37-8; NYNEX Further Amendments at 32; Pactel Further Amendments at Ex. D; SWBT Further Amendments at 36; and US West Further Amendments at 31-3. BellSouth and NYNEX state that they received one service request, Access to Ringing Tone Intervals. That request, however, was transferred to the Information Industry Liaison Committee (IILC), which initiated the currently active issue ESP Access to LEC Audible Ringing. BellSouth Further Amendments at 37-8; NYNEX Further Amendments at 32.

[29] Pactel offers LATA Wide Prefix for ESPs. Pactel Further Amendments at 26 & Exhibit D. SWBT offers unbundled Simplified Message Desk Interface (SMDI). SWBT Further Amendments at 36. US West has developed Directed Call Pickup. See Ex Parte Letter in CC Docket No. 88-2, Phase I, from Elridge A. Stafford, Director-Federal Relations, to Peggy Reitzel, FCC, October 25, 1991.

[30] BOC ONA Amendment Order, 5 FCC Rcd at 3120-1, para. 149 (B 9).

[31] Appendix C lists those ONA services the BOCs previously deemed infeasible that they now deem technically feasible. Ameritech Further Amendments Sec. IX, E, at 30; Bell Atlantic Further Amendments at 17 and App. I; BellSouth Further Amendments at 38-40; NYNEX Further Amendments at 33 and App. 4; Pactel Further Amendments at 26 and Ex. E; SWBT Further Amendments at

17. Positions of the Parties. MCI is generally dissatisfied with the BOCs' treatment of ONA service requests. MCI observes that only two of the twenty new requests received under the 120-day process have been developed and tariffed. MCI claims that the efforts to reclassify services that have been previously deemed technically infeasible have been unsatisfactory.[33]

18. Discussion. The BOCs have satisfactorily complied with our request for information on the processing of requests for new ONA services and ONA services previously deemed infeasible. Of the eighteen new requests the BOCs received, two were found technically infeasible, two are being offered, one has been developed, and the remainder are being evaluated or developed. Expeditious treatment of new service requests is essential to the continued development of ONA. Accordingly, we order the BOCs to continue to file reports of new service requests, and the BOCs' responses to these requests, on an annual basis. We also require the BOCs to report annually on the final disposition of new service requests that the BOCs have previously identified as being further evaluated.[34]

19. The BOCs have reclassified as feasible a number of requests previously deemed infeasible. In order for the Commission to continue to monitor BOC progress in developing and offering services previously deemed infeasible, we require the BOCs to continue to report annually on the status of those ONA service requests. We believe that through the annual reports, and the continuing requirement that the BOCs respond to individual service requests pursuant to the 120-day process, we can monitor BOC progress, and assure reasonable treatment of both new service requests and ongoing analysis of requests previously deemed infeasible.

C. Deployment of New Technologies: SS7, ISDN, and IN

20. BOC Further Amendments. Each BOC was required to amend its plan to describe any change to its plans for developing and implementing SS7, ISDN, and IN technologies, including a description of: (1) how it will unbundle the services provided through the use of such technologies and generally how those services will fit into the ONA framework; (2) ONA

36-7 and Exhibit K; and US West Further Amendments at 34.

[32] See infra n. 40 for a description of AIN.

[33] MCI Comments at 8-12.

[34] As discussed supra, at para. 11, ESPs that find unsatisfactory the BOC response to a new ONA service request from the 120-day process may seek redress from this Commission by filing a petition for declaratory ruling.

services that these technologies could support; and (3) its plans for offering such services.[35]

21. All of the BOCs except NYNEX provide SS7 deployment schedules. However, neither the time periods encompassed by the plans nor the deployment levels are uniform. The following projections (in terms of percent of access lines served by an SS7 office) are offered.[36]

SS7 Deployment

	Percent of Access Lines Served
1992	
Ameritech	49
Bell Atlantic	92
BellSouth	81
Pactel	50
SWBT	85
1994	
Bell Atlantic	99
BellSouth	84
Pactel	85
US West	70

NYNEX states that it contemplates system-wide deployment of SS7, and that it will concentrate upon the New York Metropolitan LATA. NYNEX gives no indication of target years or the extent of deployment.

22. The BOCs generally list between six to eight Custom Local Area Signaling Services (CLASS) that are supported by SS7, such as automatic call-back, caller ID, call trace, and selective call-forwarding. Several of the BOCs state that they will also offer Common Channel Signaling Access Service (CCSAS) in conjunction with SS7 deployment. CCSAS permits other SS7 networks to interconnect with a BOC's SS7 facilities.

---

[35] *BOC ONA Amendment Order*, 5 FCC Rcd at 3120-1, para. 149, (B 10). *See also id*. at 3116, para. 111.

[36] Ameritech Further Amendments Sec. IX,B, at 4; Bell Atlantic Further Amendments at 18-20; BellSouth Further Amendments at 41-43 and Att. D at 5; NYNEX Further Amendments at 22-26; Pactel Further Amendments at 28-29; SWBT Further Amendments at 48-49; and US West Further Amendments at 38.

23. All of the BOCs report plans to deploy ISDN.[37] Ameritech states that it will deploy ISDN in six metropolitan areas by year end (YE) 1992. Bell Atlantic states that ISDN will generally be available on a system-wide basis by 1995; initially as ISDN islands on an intraswitch basis, then interswitch intra-LATA by YE 1991, and interLATA in 1992. Bell Atlantic projects ISDN on 215,000 access lines by YE 1991. BellSouth projects ISDN deployment on 3100 lines by YE 1991 and on 10,500 lines by YE 1994. NYNEX projects deployment on five percent of its access lines by YE 1991 and on fourteen percent of its access lines by YE 1993. Pactel states that by YE 1991 it will have deployed ISDN in eighty-five central offices on a provisional basis. SWBT projects deployment, in twelve market-area with 476 end offices, in eleven percent of end offices by YE 1991, and in twenty-eight percent of end offices by YE 1992. The BOC deployment plans are discussed further in Appendix D. With regard to the ONA services supported by ISDN, the BOCs generally cite all or a portion of the National ISDN 1 applications described in the Bellcore Special Report.[38] These services are summarized in Appendix E.[39]

24. All of the BOCs state that they are working with Bellcore in developing the specifications for AIN.[40] Ameritech states that it will conduct a trial of its version of AIN from July 1991 through the first quarter of 1992. Bell Atlantic projects deployment of Release 0 in 1992, Release 1 in 1994, and Release 2 in 1996. BellSouth projects deployment of Release 0 in 1992, using two SCPs for the entire region. NYNEX states that it is investigating a modified version of AIN, Release 0.1, which if feasible, would not be implemented before 1993. Pactel does not provide a deployment plan. Pactel states that it is currently evaluating AIN, and that if Pactel implements AIN it will be an interim step in the process of developing "NETSYS," its long term concept of an open and intelligent network.[41]

---

[37] Ameritech Further Amendments Sec. IX, B at 18; Bell Atlantic Further Amendments at 20-22; BellSouth Further Amendments at 42 and ATT. D at 11; NYNEX Further Amendments at 28; Pactel Further Amendments at 35; SWBT Further Amendments at 4-7 and App. O; and US West Further Amendments at 42-3. ISDN comes in two local loop configurations: Basic Rate Interface (BRI) and Primary Rate Interface (PRI). BRI denotes an all-digital local loop consisting of: two 64 Kb/s "B" channels, and one 16 Kb/s "D" channel. The BRI B channel loop can be interconnected with a digital central office switch, such as the Northern Telecom DMS-100 or AT&T 5ESS, to obtain switched voice or data service. The 16 Kb/s D channel is ordinarily used for out-of-band signaling to a SS7 network. The D channel may also be used for direct access to packet networks operating under the X.25 protocol. The BRI configuration is frequently referred to as "2B+D." PRI (Primary Rate Interface) denotes a digital loop consisting of 23 "B" channels and one "D" channel, or "23B+D."

[38] Bellcore Special Report SR-NWT-001937, Issue 1, February 1991.

[39] Ameritech Further Amendments Sec. IX, B at 9; Bell Atlantic Further Amendments at 21 and App. J; BellSouth Further Amendments at 41-2 and Att.D at 14; NYNEX Further Amendments at 26-8; Pacific Further Amendments at 34-6; SWBT Further Amendments at 44-7 and App. O; and US West Further Amendments at 42-43.

[40] Intelligent Network is a generic term that subsumes those circuit-switched voice/data networks that use the capabilities of decentralized logic modules (such as Service Control Points (SCPs)) to modify the behavior of a conventional digital, stored-program-controlled switch. AIN is the Bellcore version of one type of intelligent network. Three evolutionary stages of AIN have already been described in various Bellcore publications: Release 0;

25. SWBT has tentative plans to begin AIN deployment in late 1993 or 1994 within a major market-area in one of its five states. US West states that it will conduct a technical trial in the fourth quarter of 1991 and that it anticipates deployment of adjunct architecture capable of deploying new services in the 1993-1994 time period. The deployment plans of the BOCs are discussed further in Appendix F. SWBT states that specific services have not been defined for Release 1 in order to ensure that vendor products are not service-specific. The BOCs list between two and eleven potential AIN services. SWBT's list, which is summarized in Appendix G, is typical and contains several services also proposed by the other BOCs.

26. Positions of the Parties. The ONA Users Group, ITN, and MCI state that the BOCs have not adequately described how the new technologies will be unbundled.[42] AT&T claims that, except for BellSouth, the BOCs did not provide sufficient detail in their SS7 and ISDN deployment projections. AT&T states that only BellSouth has furnished deployment projections for specific market-area and the percent of access lines covered. AT&T urges the Commission to require the other BOCs to report at the same level of detail as BellSouth. MCI contends that the BOC deployment schedules indicate a lack of specific commitment. In reply, Ameritech, NYNEX, and SWBT argue that it is premature to provide detailed deployment information on AIN because its design and utility are still tentative.[43]

27. Discussion. The BOCs have reported their plans for the deployment of SS7, ISDN, and AIN, and the services that these technologies

---

Release 1; and Release 2. Ameritech Further Amendments at IX, B, 23, 26-8; Bell Atlantic Further Amendments at 23-24; BellSouth Further Amendments at 42-3, Att. D at 21-2; NYNEX Further Amendments at 29-31; Pactel Further Amendments at 37-40; SWBT Further Amendments at 54-7, Ex. Q; and US West Further Amendments at 40-1.

[41] Pactel Further Amendments at 38. See also Intelligent Networks, CC Docket 91-346, FCC 91-383 (adopted November 21, 1991) (Intelligent Network Inquiry).

[42] ONA Users Group Comments at 13-15; ITN Comments at ii; MCI Comments at 3, 14-20; AT&T Comments at 7-11. See also ANPA Reply at 5.

[43] Ameritech Reply at 19-22; NYNEX Reply at 9; SWBT Reply at 15.

can support. Generally, the BOCs project deployment of SS7 with a greater degree of uniformity, specificity, and level of commitment, than they do for ISDN or AIN. SS7 is a relatively mature technology and deployment of SS7 is well under way. BOC ISDN deployment commitments are more tentative. Although the BOCs have conducted ISDN trials in the past two years, the BOCs state that future deployment is difficult to predict because of imprecise schedules and the costs associated with the development by non-BOC switch manufacturers of software that would permit interswitch ISDN, the need to develop ISDN-compatible customer premises equipment (CPE), and difficulty in forecasting market-area demand.

28. The deployment plans for AIN are even more tentative than those for ISDN. AIN is in the Technical Advisory (TA) stage, and must still go through the Technical Reference (TR) phase before hardware manufacturers and software providers can provide firm delivery and price quotations. Several BOCs have reported that the development of quotes from manufacturers and software developers is proceeding slowly because of the complexity of Release 1. Some BOCs are experimenting with Release 0, a less complex version of Release 1.

29. AT&T's suggestion that the deployment of new technologies be projected to the same level of detail as BellSouth's projections nevertheless has merit. We find that additional uniformity in deployment projections would be useful, and we therefore require the BOCs to file, on an annual basis, projections of SS7, ISDN, and IN deployment by percentage of access lines, system-wide and by market-area.[44] We also require the BOCs to report annually on new ONA services that will be available through these technologies. In addition, in the Intelligent Network Inquiry, this Commission is beginning a proceeding to gather more information on the benefits and costs of emerging network architectures, such as AIN.[45]

30. We agree with the parties that claim that the BOCs have not adequately discussed how the new network technologies will be unbundled. The BOCs did not explicitly respond to our request that they describe how they will unbundle the services provided through new technologies. We therefore order the BOCs to submit a further one-time amendment that describes the type of physical and/or tariff unbundling contemplated for these new technologies. We also require the BOCs to explain generally how these services will fit into the ONA framework.

---

[44] We require the BOCs to report the SS7 projections by TR-317 (CLASS Services) and TR-394 (Access Service); the ISDN projections by BRI and PRI; and the IN projections by Bellcore Release Number or other type of IN. We delegate to the Common Carrier Bureau the authority to determine more specific details regarding the collection of this information, and to determine whether it might be combined with any other reports.

[45] See Intelligent Network Inquiry, FCC 91-383 (adopted November 21, 1991).

V. UNIFORMITY OF ONA SERVICES

A. Technical and Long-term Uniformity

31. The BOC ONA Amendment Order required each BOC to amend its plan to reflect progress on technical and long-term uniformity issues.[46] Most BOCs cite the consensus achieved on the long-term uniformity issue in the IILC,[47] which approved its final report on October 10, 1990. That report outlined a procedure for maximizing the functional and technical uniformity of newly requested services by giving ESPs the option of submitting a new service request to the IILC before submitting it to individual BOCs.[48] The IILC has also addressed procedures ensuring ongoing ESP input into the BOCs' network planning process. In addition, the IILC has addressed, or is addressing uniformity problems pertaining to various service-specific issues.[49]

---

[46] BOC ONA Amendment Order, 5 FCC Rcd at 3120, para. 149, (B 5, B 7). See also id. at 3111, para. 74-5.

[47] Long-term Uniformity is listed as Issue 021 in Appendix H. Appendix H, IILC Issues, contains a more complete description of these issues addressed by IILC task groups as well as those cited subsequently in this Order. For purposes of clarity, we use short versions of the official IILC issue titles indicated in the appendix. The IILC was established by the Exchange Carriers Standards Association (ECSA) in 1987 as an inter-industry mechanism for the discussion and voluntary resolution of industry-wide concerns about the provision of ONA services and related matters. A number of different industry members participate in the IILC, including local exchange carriers (LECs), ESPs, interexchange carriers (IXCs), large users, and manufacturers, and its meetings are open to the public. BOC ONA Order, 4 FCC Rcd at 31-32, para. 49.

[48] That new service request process has been applied to the ESP request for ESP access to LEC audible ringing for certain ongoing calls and to other new requests. Pactel Further Amendments at 20. The four step new request process involves specification of the request in a uniform format, functional description and operations description, technical description, and analysis of technical feasibility with current and future technologies.

[49] The service-specific issues include: Uniform Access Numbers for ESPs (IILC Issue 011 of Appendix H); ESP/BOC Packet Interconnection (IILC Issue 014 of Appendix H); Uniform Delivery of CNI (IILC Issue 001 of Appendix H); and Control of BOC Switches by End-Users' Computers (IILC Issue 019 of Appendix H). The following additional IILC issues are also cited by various BOCs: ESP Frame Relay Access to ISDN Customers (IILC Issue 010 of Appendix H); and ESP Input to the BOC Network Planning Process (IILC Issue 016 of Appendix H). Ameritech Further Amendments at Section II, C, 3, p. 11-16; Bell Atlantic Further Amendments at 10, 12-13; BellSouth Further Amendments at 14-6, 20-3; NYNEX Further Amendments at 13-16; Pactel Further Amendments at 16-17, 19-22; SWBT Further Amendments at 15-22; and US West Further Amendments at 15-17, 19-23.

32. AT&T is generally dissatisfied with the BOCs' progress in achieving uniformity. AT&T recommends that we require the BOCs to submit reports for public comment, by January 1, 1992, detailing their progress on uniformity and the extent of their implementation of IILC recommendations. AT&T recommends that additional reports be filed at six-month intervals.[50] In reply, BellSouth, Pactel, and SWBT generally argue that the additional reporting requested by AT&T is not necessary because Commission staff attends all of the IILC meetings, the IILC is open to the public, and minutes for each meeting are published regularly.[51]

33. We find that the BOCs have made progress in technical and long-term uniformity issues through the IILC. We are satisfied that a mechanism is in place that will permit the development of uniform technical specifications for any new service that may be presented.[52] We stress, however, the importance of continuing efforts by the BOCs to develop uniformity of ONA services. Accordingly, we require each BOC to report annually on its subsequent activity regarding the implementation of technical and long-term uniformity issues that have been resolved in the IILC process. We also require each BOC to report its progress toward the resolution of active uniformity-related issues in the IILC.

B. Cross Reference Guide

34. The BOC ONA Amendment Order required each BOC to amend its plan to reflect any additional progress at the IILC on the Cross Reference Guide.[53] On July 6, 1991, the BOCs released BOC Special Report No. 5, ONA Services Cross Reference Guide, which will be updated every six months and released in print and diskette format.[54] The BOCs describe the various changes and improvements in the Cross Reference Guide noting that: (1) the Cross Reference Guide is now part of a larger document entitled ONA Services User Guide; (2) the ONA Services User Guide now contains deployment data by wire center and state and federal ONA service tariff references; (3)

---

[50] AT&T Comments at 13.

[51] BellSouth Reply at 20; Pactel Reply at 8; SWBT Reply at 22-23.

[52] The IILC developed a systematic approach to the uniformity of ONA services. See IILC Reference Issue 021 described in Appendix H.

[53] BOC ONA Amendment Order, 5 FCC Rcd at 3120, para. 149, (B 6). See also Id. at 3111, para. 73.

[54] The Cross Reference Guide established a list of generic names for ONA services. This list is accompanied by: (1) a service description; (2) identification of the BOCs that offer the service; and (3) the non-generic service name, if any, which may be used by a given BOC. The task group has designated the term "ONA Services User Guide" to subsume several activities that are being pursued by that group.

information will be available on diskette medium as well as print; and (4) each BOC will update its portion semi-annually.[55]

35. We find that through the ONA Services User Guide and the Cross Reference Guide, the BOCs have been generally responsive to our concerns. We see no reason to alter the direction that we have given to the BOCs to continue developing the ONA Services User Guide within the IILC process. We require the BOCs to file with the Commission a copy of the ONA Services User Guide as it is updated semi-annually.[56]

VI. STATE TARIFFING AND RATEMAKING PRINCIPLES

36. In the BOC ONA Amendment Order, this Commission required that each BOC file with its further amendments copies of pending or effective state tariffs for ONA services, reports on the use of any individual case basis (ICB) rates in intrastate ONA tariffs, and explanations of the ratemaking methods employed by each BOC to compute their state tariffs.[57] In response to our requirements, each BOC provided copies of pending and effective state tariffs for the ONA services they plan to offer on an intrastate basis. In addition, each BOC provided information on their use of ICB rates.[58] Finally, each BOC described its ratemaking method used to compute its state tariffs.[59]

---

[55] Ameritech Further Amendments at II C, 3, 11; Bell Atlantic Further Amendments at 11 and Appendix E; BellSouth Further Amendments at 17-20; NYNEX Further Amendments at 14; Pactel Further Amendments at 18-19; SWBT Further Amendments at 11-13; and US West Further Amendments at 17-19.

[56] We require the BOCs to file both the computer diskette and printed version of the ONA Services User Guide. In addition, the Cross Reference Guide contained three appendices that are not included in the ONA Services User Guide: Appendix A - Relationship Between ESP Requests for Network Capabilities and ONA Services; Appendix B - Individual Regional Company Responses to the 118 ESP Requests (Matrix); Appendix C - Region Specific Services and Generic Technical Descriptions for Circuit Switched Serving Arrangements. We also require that the BOCs file updates to the three appendices originally contained in the Cross Reference Guide that are no longer part of the ONA Services User Guide.

[57] BOC ONA Amendment Order, 5 FCC Rcd at 3113, para. 88, 3121, para. 149 (B 8).

[58] Only two BOCs, Ameritech and BellSouth, do not report any ICB rates. Bell Atlantic Further Amendment at 15-6 and Appendix G; NYNEX Further Amendment at 17, n. 33; Pactel Further Amendments at 22, n.44; SWBT Further Amendments at 29; and US West Further Amendments at 27.

[59] The various ratemaking methods employed by each BOC are described in Appendix I.

37. AICC and MCI address the BOCs' ratemaking methods, and urge this Commission to require cost-based pricing. AICC and MCI also argue that several of the BOCs' ratemaking methods include contributions to subsidize local residential services.[60] In their replies, the BOCs argue that cost-based pricing is not an issue since the Commission previously decided not to require cost-based pricing of intrastate ONA services. The BOCs contend that the states have the authority to prescribe rates for these services, which may include state policies, and political and social objectives such as subsidies for local residential service.[61]

38. The BOCs have complied with our request to provide state tariffs of ONA services.[62] AICC and MCI have not raised any new arguments regarding the BOCs' state ratemaking methods. The ratemaking methods employed by the BOCs do not appear to unduly hamper the development of enhanced services. In order to continue effective monitoring of ONA, however, we require the BOCs to work through the IILC to prepare a consolidated matrix of state and federal ONA tariffs, to be filed in a format that includes all ONA services and the states in which the BOCs have filed tariffs to offer these services.[63] Each BOC currently compiles these data semi-annually on computer diskettes in a uniform format. We also require that each BOC provide this Commission with a copy of its computer diskettes and a print-out of the diskettes.[64]

---

[60] AICC Comments at 17-20, MCI Comments at 24-9.

[61] Bell Atlantic Reply at 1, 8; BellSouth Reply at 15-8; Pactel Reply at ii, 8-9; SWBT Reply at 18-21; and US West Reply at 17-8.

[62] The 410(b) Joint Conference staff report on ONA Uniformity issued in November 1991, recommends that the Joint Conference develop a set of guidelines for tariff structure, terms and conditions, and cost methodology. Joint Conference Staff Report at 3.

[63] The matrix should include the generic name of the ONA service; which operating company offers the service in a particular state; the name of the ONA service as it is titled in a particular state or federal tariff; whether the service is a BSE, BSA, or CNS; and a reference to the place in the tariffs this service can be found. The matrix should be filed with this Commission no later than March 31, 1992, and every six months thereafter. A sample format is attached at Appendix J.

[64] Each BOC currently updates the tariff information contained on its computer diskettes every six months as of July 31, and January 31. We delegate to the Common Carrier Bureau the authority to establish a specific format for the electronic submissions.

VII. ONA SUPPORT SERVICES

A. Provision of Billing Information and Calling Number Identification (CNI)

39. BOC ONA Amendments. The BOC ONA Amendment Order found that the BOCs had shown sufficient progress on these issues to warrant ONA plan approval subject to an ongoing obligation to pursue and report on additional progress. The BOC ONA Amendment Order stated that each BOC must work through the IILC and amend its plan to clarify the specific information that it will make available to ESPs to allow them to bill for their services, as well as develop solutions for delivering CNI, or possible CNI alternatives, to ESPs that purchase line-side connections.[65]

40. Each BOC describes its participation in the IILC issue on ESP Billing and recapitulates the status of its commitments to provide Billing Name and Address (BNA) as summarized in the report on that issue.[66] In addition, some BOCs will offer call detail recording information, for example: time and date; duration of call; and calling and called number. On May 15, 1991, the IILC achieved initial consensus on a working draft report on ESP Billing Information,[67] finding that ESPs need three types of information to bill customers: (1) information identifying the customer CNI; (2) BNA; and (3) details on the call to the ESP (e.g., the length of the call).[68] The report also concluded that generally ESPs can determine the call detail information (CDI) with their own recording equipment. The report notes that where the customers have established an account with an ESP, the ESP can obtain BNA in a two step process: first, obtain the customer's identification from CNI transmitted by the LEC; and second, obtain BNA from the ESP's own list of names and addresses. To bill a casual user, the LEC must obtain CNI from the ESP, and then can provide the BNA information off-line for a fee.

---

[65] CNI provides an ESP with the telephone number of the calling party for billing purposes. The BOCs introduced the following issues related to billing and collection into the IILC process: Information and Delivery Mechanisms for ESP Billing, and Uniform Delivery of Line Side CNI in the Near Future.

[66] Billing name and address provides an ESP with the billing name and address of the ESP's customer. Ameritech Further Amendments Sec. V, B at 1; Bell Atlantic Further Amendments at 2-3; BellSouth Further Amendments at 5-7; NYNEX Further Amendments at 4-5; Pactel Further Amendments at 5-9; SWBT Further Amendments at 4-7; US West Further Amendments at 6-7.

[67] ESP Billing Information is described in IILC Issue 015 of Appendix H.

[68] The BOCs also describe three other tasks related to the provision of CNI upon which consensus has been reached: Calling Number Identification (IILC Issue 001); CNI Control Techniques (IILC Issue 018); and Calling Party Identification Privacy (IILC Issue 024). See Appendix H.

41. Most of the BOCs state that they provide BNA.[69] Some of the BOCs describe the offering of automatic number identification (ANI) through Bulk Calling Line Identification (BCLID), Individual Calling Line Identification (ICLID), SMDI, and Feature Group D.[70] Each BOC describes its participation in the IILC task group on Line-Side CNI.[71] The task group report, completed on June 6, 1990, concluded that in the near term line side CNI should be delivered via either ICLID, BCLID, or SMDI. In the long term, when ISDN becomes generally available, the report recommends that CNI be delivered over the ISDN D-channel via the ISDN Q.931 protocol. All of the BOCs offer to provide CNI under the various existing options (where these are available), e.g., ICLID, BCLID.[72]

42. Positions of the Parties. The ONA Users Group states that the BOCs have done little more than to "report on the status of the IILC billing and collection proposals." The ONA Users Group claims that the further amendments do not result in providing the ESPs with the "information necessary or useful for the performance of billing and collection functions as required by the BOC ONA Amendment Order." The ONA Users Group urges that the Commission require the BOCs other than BellSouth and SWBT to provide BNA and call recordation.[73]

---

[69] IILC Billing Information Issue 015 Report Matrix; US West Further Amendments at 7. Pactel provides BNA only to IXCs. Pactel Further Amendments at 8-10. However, Pactel states that it provides state tariffed billing service to third party providers. Pactel Reply at 2-3.

[70] For example, the SMDI message desk feature provides billing information on incoming calls via a four-wire data link to the ESP's premises. BCLID uses customized local area signaling services (CLASS) to provide ESPs calling and called directory number, or multiline hunt group and terminal number, and the time the call was received. BOC ONA Amendment Order, 5 FCC Rcd at 3126, n. 46. IILC analysis of alternative number delivery methods including ICLID, BCLID, SMDI, FGD Protocol and CNI/ANI via Q.931 Protocol indicated that control of ANI and CNI is dependent on network components involved in a call, including the type of end office originating and terminating the call, and the signaling and carrier network used in handling the call. Some of the number delivery alternatives (for example ICLID, BCLID) are limited by the availability of new technologies such as SS7 and by the switch type. SWBT Further Amendments at 9. ANI usually provides the billing number, while CNI provides the calling party's telephone number. For single line customers, ANI and the customers' directory number are the same. However, for most multiline businesses, ANI indicates the main number of the customer account. Pactel states that ANI is a good alternative to CNI for billing purposes. Pactel Further Amendments at 5.

[71] Line-side CNI is described in IILC Issue 017 of Appendix H.

[72] Ameritech Further Amendments, Sec. V, B at 2; Bell Atlantic Further Amendments at 2; BellSouth Further Amendments at 8-10; NYNEX Further Amendments at 4-7; Pactel Further Amendments at 6-10; SWBT Further Amendments at 7-10; US West Further Amendments at 7-8.

43. Ameritech, NYNEX, and Pactel respond that their plans describe numerous sources of BNA that are not related to Feature Group D.[74] In addition, Pactel contends that it is meeting our interim billing information services requirement by providing state tariffed billing services to third party providers as well as its enhanced services operation. BellSouth argues that it has taken steps to implement and surpass its previous commitment of offering a variety of billing information services, and it has filed tariffs for SMDI in all of its states and for BCLID in all six states where it has deployed SS7.[75] US West states that it provides ICLID in certain areas of its operating territory, but ICLID is dependent upon SS7 deployment. US West adds that it also offers a BNA service that ESPs can purchase.[76]

44. Discussion. The BOCs have reported that they provide or will provide, through a variety of services, the types of information identified by the working draft report on ESP billing information and delivery as necessary for the ESPs to perform their own billing. We find that the BOCs have made progress in providing these services and in working through the IILC to define ESP needs for billing information. Billing information services are essential for ESPs to provide a wide array of enhanced services to customers. The BOCs report that more billing information-type services will be available with the implementation of new technologies, such as SS7 and ISDN. In order to assure that ESPs have access to the billing information they need, we require that the BOCs continue to report on their progress in making this information available to ESPs. Accordingly, we require the BOCs to report annually on their progress in providing BNA, line-side CNI, or possible CNI alternatives, and call detail services to ESPs.[77] By monitoring BOC progress in this area, we can assure that necessary billing information services are provided to ESPs.

B. Provision of OSS Services

45. The BOC ONA Amendment Order concluded that continuing development of OSS capabilities appears to be quite important to the kinds of services ESPs can provide, and required the BOCs to update information on their OSS services.[78] All the BOCs plan to offer indirect access to some OSS services. BellSouth, Pactel, and Ameritech have developed gateways for access to OSS.[79] Ameritech states that it has deployed the Ameritech gateway in a few states but does not plan further deployment because of a lack of customer demand. Ameritech does plan a few individual OSS services. Bell Atlantic is developing a gateway expected to be available in 1992, and SWBT is projecting completion of its gateway in 1993. NYNEX and US West have developed service-specific OSS capabilities. US West also states that it is developing a gateway for deployment planned in mid-1992. A more detailed discussion of the BOC OSS services is included at Appendix K.[80]

---

[73] ONA Users Group Comments at 9-12.

[74] Ameritech Reply at 13-5; NYNEX Reply at 13-4; Pactel Reply at 2-3.

[75] BellSouth Reply at 18.

[76] US West Reply at 26-7.

[77] This Commission is addressing LEC provision of BNA more generally in Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, Notice of Proposed Rulemaking, CC Docket No. 91-115, 6 FCC Rcd 3506 (1991).

46. MCI, the ONA Users Group, and AICC argue that BOCs have not progressed substantially or evenly in the provision of ESP access to OSS services.[81] MCI argues that only BellSouth, Bell Atlantic, and Pactel have made some progress in implementing access to OSS. The ONA Users Group states that BOC progress has been slow and uneven, and that a solution should be found to the diversity in progress. AICC argues that the Commission should require the BOCs to report when they are going to provide additional OSS services.

47. In the BOC Amendment Order we stressed the importance of providing ESPs access to OSS functions. The BOCs have continued to provide such access indirectly.[82] We agree with MCI and the ONA Users Group that BOC progress in providing ESP access to OSS services has been uneven and some BOCs have not progressed substantially in the provision of ESP access to OSS capabilities. Bell Atlantic, BellSouth, and Pactel, however, have made substantial progress in providing ESP access to OSS services. We expect the BOCs to continue developing methods for ESPs to access BOC OSS capabilities. We require all the BOCs to report annually on their continuing progress in developing and implementing methods for ESPs to access OSS service.[83] Because Ameritech, NYNEX, SWBT, and US West have not thus far demonstrated substantial progress in providing ESP access to OSS services, we will be examining their reports with a heightened level of scrutiny.

---

[78] BOC ONA Amendment Order, 5 FCC Rcd at 3108, para. 38, 3120-1, para. 149 (B 3). The BOC ONA Reconsideration Order defined four OSS services as ONA services: (1) service order entry and status; (2) trouble reporting and status; (3) diagnostics, monitoring, testing, and network reconfiguration; and (4) traffic data collection. 5 FCC Rcd at 3087, para. 26.

[79] BellSouth Further Amendments at 24; Pactel Further Amendments at 11; Ameritech Further Amendments, Section V (C) at 2. See also, Bell Atlantic Further Amendments at 4; NYNEX Further Amendments at 8; SWBT Further Amendments at 23-7; US West Further Amendments at 8-11.

[80] US West Reply at 11-3; NYNEX Further Amendments at 8-11.

[81] MCI Comments at 22-3; ONA Users Group Comments at 17, 19; AICC Comments at 6-7.

[82] Pursuant to the BOC ONA Amendment Order, the BOCs' ESP operations must continue to take the same access to OSS services as the BOCs provide to other ESPs, once structural separation requirements are lifted, until the BOCs can show that indirect access is comparably efficient to direct access. Id. at 5 FCC Rcd 3108, para. 43.

C. Uniformity in OSS Services Provision

48. In the BOC Amendment Order we concluded that we should not mandate absolute uniformity in the provision of OSS services. We did require the BOCs to include in their further amendments detailed information concerning additional progress they have made on uniformity questions in the IILC and ECSA T1M1 Committee.[84] BOC efforts on OSS uniformity issues through the IILC and the ECSA T1M1 Committee have focused on service availability, format, and technical interfaces.[85] The IILC adopted a resolution on ESP/Customer access to BOC Network Management Systems that identifies OSS capabilities useful to ESPs, and establishes a commitment to develop a generic software gateway interface. The OSI-Network Management Forum has released an initial set of tentative interface specifications for industry comment for trouble administration, alarm reporting, testing, traffic measurement, and security of the interface. ECSA's T1M1.5 Committee is working to establish interface and communications standards for the link between the OSS gateway and the telephone company's operations support systems.

49. Uniformity of OSS services is important to ESPs because OSS services enable them to manage their networks. Although the BOCs have made progress in developing uniformity in OSS services and interfaces, we conclude that we should continue to monitor the BOCs' progress towards OSS uniformity. We require the BOCs to report annually on their progress individually and through the IILC and other fora on the uniform provision of OSS services, as well as their progress on implementing IILC resolutions that have already been adopted.

---

[83] MCI, AT&T, and AICC argue that the BOCs' activity is not consistent with the ESP-same-access-to-OSS requirements established in the BOC ONA Amendment Order, while the BOCs argue that they have complied with those requirements. MCI Comments at 24; AT&T Comments at 4-6; AICC Comments at 5-6. Pactel Reply at 4-6; Bell Atlantic Reply at 4-5; BellSouth Reply at 5-6. Since the issue of what the Commission intended by "same access" is the subject of several petitions for clarification and reconsideration, we will not address that issue in this proceeding. In addition, AT&T argues that we should require the BOCs to provide same access to BOC databases containing CPNI. AT&T Comments at 4-6. As Pactel states, AT&T is confusing BOC access to OSS capabilities with BOC access to CPNI. Pactel Reply at 6.

[84] BOC ONA Amendment Order, 5 FCC Rcd at 3108-9, para. 46, 3120, para. 149 (B 3).

[85] See e.g., BellSouth Further Amendments at 11; Pactel Further Amendments at 15.

VIII. OTHER NONSTRUCTURAL SAFEGUARDS

A. Procedures for Restricting BOC Access to CPNI

50. BOC ONA Amendment Order. The BOC Amendment Order required the BOCs to apply password/ID systems to all primary databases that are routinely accessed by the BOCs' enhanced services marketing personnel and contain comprehensive CPNI. We did not require, however, that the BOCs implement password/ID systems for auxiliary databases that contain fragmented CPNI and are not routinely accessed by enhanced services personnel.[86]

51. The BOCs report that they have implemented a variety of means to restrict access to restricted CPNI by their enhanced services marketing personnel. They have password-restricted many of their primary files containing CPNI and have also implemented other means of limiting access which accomplish the same function as implementing password/ID systems. For instance, BOCs forbid access to the files, place the files under the control of an administrator who controls access to the database, or remove the restricted CPNI from the database altogether.[87]

52. Positions of the Parties. AICC, the ONA Users Group, and ANPA argue that the BOCs do not uniformly apply password/ID systems to databases.[88] They argue that BOCs should apply password/ID systems to databases with similar functions, such as service order processing. In addition, AICC argues that the Commission should review BOC auxiliary files for consistent treatment, and require the BOCs to eliminate CPNI in supplemental locations such as minicomputers accessible to enhanced services personnel.[89] The ONA Users Group and ANPA also argue that BOC enhanced services personnel should not have access to marketing databases that contain CPNI.[90]

---

[86] BOC ONA Amendment Order, 5 FCC Rcd at 3119, para. 136-7, 3120-1, para. 149 (B 11).

[87] See Appendix L for information on databases identified by the BOCs in their further amendments.

[88] AICC Comments at 32-33; ONA Users Group Comments at 5-7; ANPA Reply at 7. AICC comments on the Commission's CPNI rules and the prior authorization requirement. AICC Comments at 31. That issue is addressed in the BOC Safeguards Order, FCC 91-381 (adopted November 21, 1991).

[89] AICC Comments at 32-3, 36-7. AICC argues further that BOC marketing personnel should not be allowed to extract CPNI information from databases. Id. at 38-9.

[90] ONA Users Group Comments at 7-8; ANPA Reply at 7.

53. The BOCs argue that uniformity in, and further application of, password/ID systems to their databases are unnecessary.[91] Pactel notes that its minicomputers can only be accessed with a security code. NYNEX states that it surveyed all CPNI databases, including those on minicomputers, to which marketing personnel have access for enhanced services. SWBT states that enhanced services personnel do not have direct access to marketing department databases containing CPNI, and can only obtain information consistent with CPNI rules. Bell Atlantic states that databases containing restricted CPNI are password/ID protected wherever they are located. BellSouth notes that only three percent of BellSouth's multiline customers and only one percent of all customers have requested that their CPNI be restricted. BellSouth contends that it would not make sense for its enhanced services marketing personnel to spend the time and effort to piece together information on restricted CPNI since they can access CPNI information on unrestricted accounts.

54. Discussion. The BOCs appear to have made progress in applying password/ID security or limiting access to databases containing comprehensive CPNI pursuant to the requirements of the BOC ONA Amendments Order.[92] Certain parties, however, have expressed concern about the application of password/ID systems to BOC databases.[93] Because our companion BOC Safeguards Order has modified the CPNI rules to deny BOC personnel involved in enhanced services marketing access to the CPNI of customers having more than twenty lines unless the customer has granted prior authorization,[94] we require each BOC to submit a further amendment on any changes resulting from the modified CPNI requirement on the BOC databases that are password/ID or otherwise restricted from access by BOC enhanced services marketing personnel. The further amendment should provide the same information required by the BOC ONA Amendment Order.[95] In addition, each BOC must file an amendment reflecting any other changes that it makes to its existing CPNI plan because of our modified CPNI requirement, including changes to the multiline CPNI notification form, procedures for customer CPNI authorization to BOCs' own enhanced services and to other ESPs, and procedures for restricting customer's CPNI.

---

[91] Pactel Reply at 19-21 and n. 7; NYNEX Reply at 18; SWBT Reply at 11-2, n. 33; Bell Atlantic Reply at 4-5; BellSouth Reply at 7-11.

[92] In addition, in response to the BOC ONA Amendment Order, on July 15, 1990, the BOCs filed modifications regarding nonstructural safeguards: (1) a consolidated definition of CPNI; and (2) a commitment to file quarterly reports on nondiscrimination for installation and maintenance pursuant to the format provided in the BOC ONA Reconsideration Order, 5 FCC Rcd at 3093, paras. 73-80. See BOC ONA Amendment Order, 5 FCC Rcd at 3118, para. 127, 3120, paras. 148, 149 (A 4, 5). The BOCs' modifications are satisfactory.

[93] The record developed in this proceeding on CPNI password/ID systems will be incorporated with the record developed in response to the amendment required in this order on CPNI password/ID systems.

[94] BOC Safeguards Order, FCC 91-381 (adopted November 21, 1991).

[95] BOC ONA Amendment Order, 5 FCC Rcd at 3119, para. 137.

B. Confidentiality of ESP Proprietary Information

55. The BOC ONA Amendment Order required the BOCs to report on their progress in developing, through the IILC, procedures for the safeguarding of an ESP's proprietary marketing and technological information during the process in which a BOC is evaluating an ESP request for a new ONA service.[96] Each BOC amended its plan to reflect subsequent progress in the IILC. The IILC reached consensus on Proprietary Demand Information Protection on October 17, 1990.[97] The IILC report identified procedures for safeguarding proprietary information contained in non-disclosure agreements between BOCs and ESPs. All of the BOCs indicate that they have incorporated these or similar procedures into their standard ONA Nondisclosure Agreement.[98] We have reviewed the non-disclosure agreement procedures and find them reasonable. We therefore approve the BOCs' further amendments in this regard.

IX. ONA MODEL

A. Authorization for ESP Purchases of CNSs for End Users

56. In the BOC Amendment Order, we found that the blanket letter of agency requirement was unnecessary and, as imposed by several BOCs to apply only to non-affiliated ESPs, was a discriminatory burden.[99] We required BellSouth, SWBT, and US West to modify their plans to delete any blanket letter of agency requirements for ESPs that order CNSs on behalf of their customers.

57. BellSouth proposes to modify its plan by expanding the use of the blanket agency letter requirement to apply to BellSouth's enhanced service affiliates. SWBT and US West each propose to delete their blanket letter of agency requirement.[100] Although we have previously found the blanket agency letter requirement unnecessary, since BellSouth proposes to apply the requirement to its own ESP as well as non-affiliated ESPs, we no longer find its procedures discriminatory. Therefore, we approve the modifications.

---

[96] See BOC ONA Amendment Order, 5 FCC Rcd at 3109, para. 50, 3020-1, para. 149 (B 4).

[97] Proprietary Demand Information Protection is described in IILC Issue 013 of Appendix H.

[98] Ameritech Ex Parte Letter in CC Docket No. 88-2, Phase I, from Anthony Alessi, to Donna R. Searcy, Secretary, FCC, filed December 16, 1991 in response to request of Commission staff. Bell Atlantic Further Amendments at 9; BellSouth Further Amendments at 13-4; NYNEX Further Amendments at 13; Pactel Further Amendments at 16; SWBT Further Amendments at 11; and US West Further Amendments at 14.

[99] BOC ONA Amendment Order, 5 FCC Rcd at 3106, para. 23, 3120, para. 149 (A 1).

B. Reclassification of ONA Services

58. In the BOC ONA Amendment Order, we found that the BOCs generally satisfied our requirement that all regulated offerings previously classified as "ancillary" or "other" services be reclassified as BSAs, BSEs, or CNSs.[101] Ameritech and Pactel, however, continued to use additional classifications. In order to avoid confusion or limit the applicability of ONA safeguards, we required all BOCs with classifications other than BSA, BSE, CNS, and ANS (which comprises non-Title II services) to modify their plans by July 15, 1990, to eliminate these classifications. We conclude that the modifications filed by Ameritech and Pactel satisfy our reclassification requirement.[102]

59. AT&T argues that the BOCs vary on whether a service is a BSE or CNS. AT&T states that some services are classified as BSEs by some BOCs and as CNSs by other BOCs.[103] In reply, Bell Atlantic and Pactel state that the distinction between a BSE and a CNS is not made by the carrier but depends upon whether a service is requested by an ESP or a end user.[104] We have not required strict uniformity in the BOCs' classifications of ONA services as BSEs and/or CNSs, but we agree with AT&T that greater uniformity would advance the objectives of ONA. Therefore, we require each BOC to amend its plan to list CNSs that should also be BSEs based on a review of the ONA service classifications used by other BOCs, and the potential use of ONA services by ESPs.

C. BSEs Used by BOCs

60. We directed each BOC to amend its plan to list all BSEs that it uses in the provision of its own enhanced services.[105] We concluded that this information would enable us to ensure more effectively that the BOCs do not discriminate in favor of their own enhanced services.

---

[100] BellSouth Modification at 1-2; SWBT Modification at 2-3; US West Modification at 3.

[101] BOC ONA Amendment Order, 5 FCC Rcd at 3106, para 26, 3120 at para. 149 (B 1); Erratum, 5 FCC Rcd at 4045.

[102] Ameritech Modification at 4-5; Pactel Modification at 2-3.

[103] AT&T Comments at 12.

[104] Bell Atlantic Reply at 6-7; Pactel Reply at 7.

[105] BOC ONA Amendment Order, 5 FCC Rcd at 3125, n. 25, 3120-1 at para. 149 (B 12).

61. All of the BOCs complied with this request.[106] A list of the BSEs used by each BOC in providing its own enhanced services is included at Appendix M. It appears that the BOCs use only those BSEs offered in their tariffs in providing their own enhanced services. In addition, it is clear that the BOCs are not limiting their deployment of BSEs to only those BSEs used in providing their own enhanced services.[107] We do, however, require each BOC to continue reporting annually on the BSEs used in providing its own enhanced services in order to enable us to continue monitoring its future use of ONA services.

X. CONCLUSION

62. Generally, we find that the BOCs' Further Amendments are responsive to the requirements of the BOC ONA Amendment Order. The Further Amendments reflect BOC active participation in IILC activities, and progress in developing and providing evolutionary ONA services to ESPs within the ONA model that the Commission has adopted.

63. In the BOC ONA Amendment Order, we stated that we would continue to monitor the evolution of ONA with periodic reports, further amendments, or other Commission actions. With the exception of certain remaining issues on which we require additional amendments, we conclude that annual reports on specific ONA issues will enable us to monitor the progress of ONA. The specific requirements established for the BOCs in this Order and the dates for filing responses are listed at Appendix B. As we stated in the BOC ONA Amendment Order, we recognize that on-going ONA oversight is necessary because a number of longer term ONA issues are not yet ripe for resolution and further issues are likely to arise in the future.[108]

---

[106] Ameritech currently does not offer any BSEs for use by affiliated or unaffiliated ESPs. Ameritech states that it is awaiting Commission approval of pending tariff revisions before implementing its initial BSAs and BSEs for use by affiliated or unaffiliated ESPs. Ameritech Further Amendments at Section IX.E.2 (Addendum: Update on ESP Support Activities). See also Bell Atlantic Further Amendments at 28 and Ex Parte Letter to Donna R. Searcy, Secretary, FCC, from Lawrence W. Katz, Attorney, Bell Atlantic, dated May 21, 1991; BellSouth Further Amendments at 34-5; NYNEX Further Amendments at 12; NYNEX Reply at 3; Pactel Further Amendments at 4 and Exhibit A; Pactel Reply at 10-11; SWBT Further Amendments at 30; US West Further Amendments at 52-3. BellSouth notes in its reply that it has filed tariffs for services it does not use, and that, for services it does intend to use, it files tariffs well before it plans to use the services in its own provision of enhanced services. BellSouth Reply at 17, n. 26.

[107] See supra para. 12.

[108] BOC ONA Amendment Order, 5 FCC Rcd at 3104, para. 1.

64. The Commission's approach for ONA has been an evolutionary one. In the near term the BOCs will implement the initial set of ONA services at federal and state levels. The BOCs' Further Amendments have described further information on the progress in providing ONA services and implementing new technologies. We establish in this proceeding new annual report requirements to enable the Commission to monitor the BOCs' progress in providing ONA capabilities to ESPs. We will review these reports and take action if we believe it is necessary. We are also prepared to require the BOCs to make further amendments to their ONA plans as long-term ONA issues become ripe for consideration, and as we determine the future of ONA in such proceedings as the Intelligent Network Inquiry.[109]

XI. ORDERING CLAUSES

65. IT IS HEREBY ORDERED, that pursuant to Sections 1, 4(i) and (j), 201, 202, 203, 205, 214, 218, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201, 202, 203, 205, 214, 218, and 403, the BOC ONA Plan Further Amendments of Ameritech, Bell Atlantic, BellSouth, NYNEX, Pactel, SWBT, and US West ARE APPROVED, subject to the conditions described herein.

66. IT IS FURTHER ORDERED that the BOCs must provide the reports and amendments as described herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

---

[109] Intelligent Network Inquiry, FCC 91-383 (adopted November 21, 1991).

APPENDIX A

List of Commenters

BOCs Filing ONA Further Amendments

Ameritech Operating Companies (Ameritech)
Bell Atlantic Companies (Bell Atlantic)
BellSouth Corporation (BellSouth)
NYNEX Telephone Companies (NYNEX)
Pacific Bell and Nevada Bell (Pactel)
Southwestern Bell Telephone Company (SWBT)
US West Inc. (US West)

Parties Filing Comments

Alarm Industry Communications Committee (AICC)
American Telephone and Telegraph Company (AT&T)
California Bankers Clearing House Association, Mastercard International Inc., The New York Clearinghouse Association, VISA U.S.A., Inc. (ONA Users Group)
People of the State of California and the California Public Utilities Commission (California)
Coalition of Open Network Architecture Parties (CONAP)
Independent Telecommunications Network (ITN)
MCI Telecommunications Corporation (MCI)
Unifi Communications Corp. (Unifi)

Parties Filing Replies

Ameritech
American Newspaper Publishers Association (ANPA)
Bell Atlantic
BellSouth
MCI
NYNEX
Pactel
SWBT
US West

APPENDIX B

Future BOC Filing Requirements

The Commission requires each BOC to amend its ONA plan prior to offerin an enhanced service that uses a BSA, BSE, or CNS, other than those listed i its approved ONA plan. (See para. 13.)

The Commission requires each BOC to amend its ONA plan by February 14 1992, to include:

(1) A description of its plans for the unbundling of SS7, ISDN, and IN and generally how these services will fit into the ONA framework. (See para 30.)

(2) A description of changes to its CPNI plan that it makes to reflec the Commission's modified CPNI requirement adopted in the BOC Safeguard Order, including changes to the multiline CPNI notification form, procedure for customer's CPNI authorization to BOCs' own enhanced services and to othe ESPs, and procedures for restricting customer's CPNI. (See para. 54.)

The Commission requires each BOC to amend its ONA Plan by April 15 1992, to include:

(1) A description of changes in its databases that are password/ID o otherwise restricted from access by BOC enhanced services marketing personne to reflect the Commission's modified CPNI requirement adopted in the BO Safeguards Order. (See para. 54.)

(2) Additional CNSs that will be offered as BSEs. (See para. 59.)

The Commission requires each BOC to report on the following initially b April 15, 1992, and on or before April 15 annually thereafter:

(1) Annual projected deployment schedules for its ONA services by typ of ONA service (BSA, BSE, CNS, or ANS) in terms of percentage of access line served system-wide and by market-area. The April 15, 1992 report should cove the years beginning July 1, 1993, 1994, and 1995. Subsequent reports shoul cover the three year period for the three corresponding future years.[110] (Se para. 9 and n. 22.)

(2) New ONA service requests from ESPs and their disposition, an disposition of ONA service requests that have previously been designated fo further evaluation. (See para. 18.)

---

[110] The BOCs must use generic ONA Services User Guide names as well a individual BOC ONA service names for all reports. See supra para. 9, note 22

(3) Those ONA service requests previously deemed technically infeasible, and their disposition. (See para. 19.)

(4) SS7, ISDN, and IN projected deployment in terms of percentage of access lines served system-wide and on a market-area basis. SS7 data should be reported by TR 317 and TR 394, ISDN data by BRI and PRI, and IN data by release number or other designation by type. (See para. 29 and n. 44.)

(5) New ONA services available through SS7, ISDN and IN, and plans to provide these services. (See para. 29.)

(6) Progress on the efforts in the IILC on continuing activities for the implementation of service-specific and long-term uniformity issues. (See para. 33.)

(7) Progress in providing billing information including BNA, line-side CNI, or possible CNI alternatives, and call detail services to ESPs. (See para. 44.)

(8) Progress in developing and implementing OSS services and ESP access to those services. (See para. 47.)

(9) Progress on the uniform provision of OSS services. (See para. 49.)

(10) List of BSEs used in the provision of BOC's own enhanced services. (See para. 61.)

The Commission requires each BOC to do the following by March 31, 1992, and every six months thereafter:

(1) Work through the IILC to develop one consolidated nationwide matrix of BOC ONA services and state and federal ONA tariffs, and file the matrix with the Commission.[111] (See para. 38 and n. 63.)

(2) File computer diskettes and print outs of data regarding state and federal tariffs. (See para. 38.)

(3) File a printed copy and computer diskette of the ONA Services User Guide. (See para. 35.)

(4) File updated information contained in Appendix A of the January 31, 1991 Cross Reference Guide on ESP requests received and how they were addressed by the BOCs with details and matrices. (See para. 35 and n. 56.)

(5) File updated information contained in Appendix B of the January 31, 1991 Cross Reference Guide on BOC responses to the requests and matrix. (See para. 35 and n. 56.)

---

[111] Format at Appendix J.

(6) File updated information contained in Appendix C of the January 31 1991 Cross Reference Guide on services offered by the BOC in response to th requests. (See para. 35 and n. 56.)

APPENDIX C

ESP Service Requests Previously Deemed Infeasible

Ameritech

Technically Feasible

1. Call Forwarding w/Call Screening
2. Single Number Access for Multiple Locations
3. Provision for Sharing ESP Customer Among ESPs
4. Common Channel Signaling Access

Bell Atlantic

Services that can be met with existing technology

1. Call Forwarding With Call Waiting
2. Provision of RBOC Network Status Information*
3. Real Time Access to Exchange Network Testing*
4. User Initiated Diagnostics*
5. Pass Through Diagnostics to User*
6. Real Time Usage Data*

* Offered as part of IntelliView network management service.

Services that can be met with new technologies

1. B Channel Switched and Dedicated Access (ISDN)
2. Access to Future Intelligent Functions of ISDN (ISDN)
3. Common Channel Signaling Access (CCS7 Option to FGD)

BellSouth

1. Single Number Access for Multiple Locations
2. Call Forwarding With Call Waiting
3. Call Forwarding Busy Line/Don't Answer

NYNEX

Future opportunities determined to be technically feasible

1. Improved SMDI (with Automatic Ringback)
2. Delivery of Dialed Number (Called Number Identification)
3. CLASS Feature Interoffice
4. Suppressed Ringing
5. Access to Extend Superframe Data
6. Answer Supervision on the Line Side
7. Interconnection for Specialized Terminal Equipment
8. Common Channel Signaling Access

9. Derived Channels Compatible with ISDN
10. Error Detection/Error Correction
11. Distinctive Ringing
12. Access to Clear Channel Transmission
13. Passive In-Band DTMF Transmission
14. Delivery of Traveling Class Mark
15. Automatic Ring Back

Pactel

Services Tariffed

1. Answer Supervision Line Side
2. Warm Line

Services Awaiting CPUC Approval

1. Call Block CLASS
2. Repeat Dialing CLASS
3. Caller ID CLASS
4. Call Return CLASS
5. Priority Ringing CLASS
6. Select Call Forwarding CLASS
7. Call Trace CLASS
8. Per Call Privacy CLASS
9. Calling Directory Number Delivery via ICLID

SWBT

Technically Feasible

1. Call Forwarding Variable Activated w/o Call to ESP
2. Call Forwarding w/ Called and Calling Number
3. Call Forwarding w/ Customer Override of CFBL/DA
4. Call Information Delivery
5. Derived Local Channels
6. Answer Supervision (Line Side)
7. Common Channel Signaling Access
8. Speed Call Menu Builder (currently tariffed in Packet)
9. Traveling Class Mark

US West

Introduced or trialed

1. Warm Line
2. Hot Line
3. Distinctive Ringing
4. Custom Ringing
5. Customer Programmable Call Forwarding

6. Remote Activation of Call Forwarding
7. Selective Call Forwarding
8. Activation of Call Forwarding Without Call Completion

APPENDIX D

ISDN Deployment

Ameritech. Ameritech states that it will deploy ISDN in six metropolitan areas by YE 1992, but that such deployment is contingent upon price and delivery commitments from customer premises equipment (CPE) and switch vendors. Ameritech Further Amendments Sec. IX,B at 18-19.

Bell Atlantic. Bell Atlantic states that ISDN will be generally available on a system-wide basis by 1995. Bell Atlantic states that it will initially implement ISDN via ISDN islands on an intraswitch basis. At present most ISDN service is restricted to so-called intraswitch ISDN "islands." Software developments currently in progress will eventually permit interswitch interLATA service. When vendors provide the required software, Bell Atlantic states that it plans to extend ISDN to interswitch intra-LATA by YE 1991 and to interLATA in 1992. Bell Atlantic projects 213,500 BRI access lines and 2100 PRI lines by YE 1991. Bell Atlantic Further Amendments at 20-22.

BellSouth. BellSouth states that its deployment plans are based on its adoption of Bellcore's redefinition of the initial phase of ISDN, known as National ISDN 1 (NI 1). BellSouth projects a deployment of BRI ISDN to 3100 lines by YE 1991 and to 10,500 lines by YE 1994. According to BellSouth, National ISDN 1 is "a marketable and maintainable package of ISDN capabilities ... that switch vendors can develop in the 1991-92 time frame ...[that] is fully described in Bellcore Special Report SR-NWT-001937, Issue 1, February 1991." BellSouth Further Amendments Attachment D.

NYNEX. NYNEX projects a BRI ISDN deployment to five percent of its access lines by YE 1991 and to fourteen percent of its access lines by YE 1993. NYNEX states that initial deployment will be focused on mid-town and lower Manhattan and eastern Massachusetts. NYNEX Further Amendments at 26-27.

Pactel. Pactel states that by YE 1991 it will have deployed ISDN to eighty-five central offices on a provisional basis. Pactel is also working with vendors to develop interswitch ISDN. Pactel Further Amendments at 32-34.

SWBT. SWBT makes the following projections for NI 1 BRI ISDN: YE 1991--eleven percent of the 476 end offices in twelve market-areas; and YE 1992--twenty-eight percent of the 476 end offices in twelve market-areas. SWBT observes that ISDN growth is linked to that of SS7. SWBT Further Amendments at 41-43 and Exhibit L.

US West. US West makes these projections for BRI deployment: YE 1991--twenty-three percent of access lines; and YE 1994--fifty-two percent of access lines. US West Further Amendments at 38-39.

APPENDIX E

National ISDN-1 Services
Basic Rate Interface

ISDN Voice and Circuit Switched Data Services

1. Call Forwarding
2. Automatic Callback
3. Call Hold
4. Additional Call
5. Flexible Calling
6. Calling Number Identification Services
7. Message Service
8. Display Service
9. Electronic Key Telephone System (EKTS)
10. Station Message Detail Recording
11. Multiline Hunt Groups
12. Basic Business Group
13. Business Group Dial Access Features
14. Call Pickup

ISDN Packet Mode Services

1. ISDN Call Control
2. PPSN Call Control and Features
3. Numbering and Routing
4. User to User with Call Control
5. ISDN X.25 Supplementary Services
6. Basic Business Group
7. Business Group Dialing Plan
8. Multiline Hunt Group
9. ISDN Calling Number ID
10. ISDN AMA

Source: SWBT Further Amendments, Exhibit O

APPENDIX F

AIN Deployment

Ameritech. Ameritech states that it will conduct a trial of its version of AIN from July 1991 through the first quarter of 1992. Ameritech Further Amendments at IX, B, 23.

Bell Atlantic. Bell Atlantic projects this deployment: 1992 -- Release 0; 1994 -- Release 1; 1996 -- Release 2 (tentatively). Bell Atlantic states that deployment will not extend to all Bell Atlantic switches. Bell Atlantic Further Amendments at 23.

BellSouth. BellSouth states that its vendors have indicated that the Release 1 architecture is too complex and that the vendors and BellSouth will need more market-area inputs. BellSouth estimates that Release 1 specifications may be available by 1995. BellSouth projects deployment of Release 0 in 1992, using two SCPs for the entire region. BellSouth Further Amendments at 43 and Attachment D.

NYNEX. NYNEX states that the development of vendor specifications and quotations for Release 1 is proceeding slowly due to their complexity. NYNEX is, therefore, investigating a modified version, Release 0.1. If the modified version proves feasible, NYNEX would not project implementation before 1993. NYNEX Further Amendments at 30.

Pactel. Pactel states that it does not provide a deployment plan because it anticipates that AIN vendor products will not be available until the 1993-1994 period. Pactel states that it considers AIN to be a transitional architecture and that its long-term goal would be an "Information Network Architecture" in which any ESP could program the network in the service segment mode. Pactel Further Amendments at 36.

SWBT. SWBT states that it does not have sufficient market-area information to make a commitment to deploy Release 0 on either a trial or full-service basis. SWBT states that it is nevertheless actively involved in AIN Release 1 activities and is closely monitoring the Release 0 activities of the other BOCs. SWBT has tentative plans to begin AIN deployment in late 1993 or 1994 within a major market-area in one of SWBT's five states. SWBT states that specific services have not yet been defined for Release 1 in order to ensure that vendor products are not service-specific. SWBT Further Amendments at 55-57.

US West. US West states that it will conduct a technical trial in the fourth quarter of 1991 and that it anticipates deployment of adjunct architecture capable of deploying new services in the 1993-1994 time period. US West Further Amendments at 39-40.

APPENDIX G

Possible AIN Services

- Alternate Destination
- Anywhere Call Pickup
- Area Number Calling (Single Number Service)
- Authorization Codes (control of user access)
- Automatic Call Distribution
- Automatic Callback Incoming
- Calling Name Delivery
- Closest to Routing
- Selective Call Waiting
- Service Activation/Deactivation
- Time of Day/Day of Week Routing

Source: SWBT Further Amendments at Ex. Q.

APPENDIX H

IILC Issues

Each issue cited in this order is identified by its IILC number and it official IILC issue title. The status of each issue is indicated by "A (active) or "R" (resolved).

Issue 001 (Uniform Delivery of Calling Number Identification (CNI) (R))

An IILC task force explored a number of both line-side and trunk-side ANI/CN delivery methods and endorsed ISDN as a long term solution for unifor delivery of line-side CNI. Both SS7 and ISDN must be widely deployed.

Issue 003 (ESP Customer Access to BOC Network Management Systems (R))

On February 22, 1990, the IILC reached consensus on Issue 003 addressin ESP/Customer access to BOC Network Management Systems. The resolutio identifies OSS capabilities useful to ESPs, and establishes a commitment t develop a generic software gateway interface. The Issue 003 report state that ESPs desire passive and interactive access to Configuration and Nam Management (Service Order Entry, Network Reconfiguration); Fault Managemen (Trouble Reporting and Status, Diagnostics, Testing); Accounting Managemen (Traffic Data Collection, Billing and Collection Information, Account Status) Security Management (Authentication, Access Control); and Performanc Management (Surveillance, Network Traffic Management, Performance Statistic and Data). The resolution also calls for BOCs to provide annual reports o their progress on providing ESP access to BOC OSS systems.

In addition, the OSI - Network Management Forum has released an initial set o tentative interface specifications for industry comment. This documen provides proposed generic requirements of a BOC for an open system interconnection (OSI) customer network management (NMS) interface for troubl administration, alarm reporting, testing, traffic measurement, and security o the interface. ECSA's T1M1.5 Committee is working to establish interface an communications standards for the link between an OSS access gateway and th telephone company's operations support systems. Specification of an OSI-base CNM interface between a BOC gateway-NMS and a customer CPE-NMS, December 1990 was released as Bellcore TA-INS-001192. Bell Atlantic states that it ha released interface specifications on IntelliView pending adoption an implementation of industry specifications. Bell Atlantic Further Amendments a 8. *See also* Ameritech Further Amendments at 3-5; BellSouth Further Amendment at 10-2.

Issue 006 (Maintenance of ONA Plan Reference Document (R))

The task group addressing this issue is composed of an ad-hoc committee c representatives of each BOC. The committee issues a semi-annual update of th ONA Plan reference document, which consists of: (a) the ONA Services Use

Guide; (b) network capabilities deployment information to the wire center level; and (c) a list of ONA tariffs filed at the state level.

Issue 010 (ESP Frame Relay Access to ISDN Customers (R))

An IILC task group developed a methodology to permit an ESP packet service provider (such as Telenet or BT Tymnet) to have direct access to ISDN customers that use the frame relay transmission protocol.

Issue 011 (Uniform Access Numbers for ESPs (A))

The ESPs have requested the IILC to investigate the feasibility of allowing users to access an ESP's facility from any geographical location with the use of the same calling number.

Issue 013 (Proprietary Demand Information Protection (R))

The IILC task group developed procedures for the safeguarding of an ESP's proprietary marketing and technological information during the process in which a BOC is evaluating an ESP request for a new network capability.

Issue 014 (Direct ESP Packet Connections to ISDN End Office (R))

An IILC task group developed a methodology and a standard to permit an ESP packet service provider (such as Telenet or BT Tymnet) to interconnect directly to an ISDN end office under the X.75 internetwork protocol.

Issue 015 (Information and Delivery Mechanisms for ESP Billing (A))

An IILC task force concluded that ESPs need three types of information to bill customers: (1) information identifying the customer; (2) billing name and address; and (3) details on the call to the ESP. That report also concluded that generally ESPs can determine the call detail information (CDI) with their own recording equipment. The working draft report notes that whenever customers have established an account with an ESP, the ESP can obtain BNA in a two step process: first, obtain the customer's identification from CNI transmitted by the LEC; and second, obtain BNA from the ESP's own list of names and addresses. BNA information may also be made available by parties that are not affiliated with a LEC.

Issue 016 (ESP Input to the BOC Network Planning Process (A))

The BOC ONA Order required the BOCs to establish a procedure, within the IILC process, to permit ESPs and end users to provide inputs to the BOC network planning process. The BOCs responded by establishing an annual seminar and workshop wherein the BOCs provide briefings on new network developments and non-BOCs are given an opportunity to comment and to offer suggestions regarding new services that the non-BOCs would find useful.

Issue 017 (Uniform Delivery of Line-side CNI in the Near Future (R))

The BOCs, in conjunction with ESP and switch manufacturer representatives, investigated the feasibility of providing uniform delivery of line-side CNI in the near future. The task group found that no short-term methods are feasible in the near future. The task group recommended that, when ISDN becomes available, the "D" channel be used for such a purpose.

Issue 018 (Ability to Control CNI Delivery (R))

A BOC task group has identified what the network in general is technically capable of doing now and in the near future to restrict the release of CNI and ANI.

Issue 019 (Computer-Telecommunications Switch Call Control (A))

At the request of IBM, an IILC task force is investigating methods whereby an end user's or ESP's computer can be used to modify certain end-office switching functions.

Issue 021 (Systematic Approach to Uniformity of ONA Services (R))

The BOCs, in conjunction with ESPs, developed a procedure for the uniform specification of new ONA service requests. That report outlined a procedure for maximizing the functional and technical uniformity of newly requested services. Under this procedure, an ESP would submit a new service request to an IILC working committee, which would then prepare, in consultation with the requesting ESP and the BOCs, a uniform functional and technical description of the proposed service. If the service request passes a preliminary technical feasibility screening by the BOCs, the ESP may then, at its discretion, submit its service request to any or all of the BOCs. The IILC follows a standardized four step procedure, which is described in the IILC final report: (1) documentation of ESP request; (2) description of the functionality; (3) description of technical characteristics (architecture and interface specifications); and (4) a preliminary technical feasibility analysis.

Issue 024 (Calling Party Identification (CPID) (A))

A task force is reviewing privacy and anonymity concerns related to the widespread delivery of CPID.

APPENDIX I

State Ratemaking Methods

Ameritech. Ameritech states that the rates for its interstate ONA services were based on costing principles consistent with the Commission's Part 69 rules, and that it employs this same basis for calculating its intrastate access tariffs. Ameritech does note, however, that in some cases, state-specific costs were used rather than regional costs. Ameritech Further Amendments at Addendum F, 2.

Bell Atlantic. According to Bell Atlantic, ONA services are generally indistinguishable from end user services and encompass most of its state and federal service offerings. Thus, Bell Atlantic states that for ONA services, it employs ratemaking methodologies for end user services that have been approved in each state jurisdiction. Bell Atlantic states that several of its territories have "incentive regulation" plans that generally allow some degree of pricing flexibility for competitive services while capping or restricting rate changes for other than competitive services. Bell Atlantic claims that these incentive regulation plans limit its ability to change prices for existing ONA services. Bell Atlantic Further Amendments at 14-15.

BellSouth. Although costs are important, BellSouth states that prices also reflect a complex set of social, political, and economic objectives. BellSouth states that its ratemaking principles take into consideration a number of factors, such as costs, market-area and service cross-elasticities, value to customers, financial support requirements for other services, and traditional pricing methodologies. BellSouth states, however, that these principles are constant for all services, whether or not the new rate element is an ONA service. BellSouth states that its approach results in different ratemaking methods for different products and services, but the rates are under the control of the respective state commissions. BellSouth Further Amendments at 32-3.

NYNEX. NYNEX states that its pricing policy consists of two major components -- a commitment to cost-based, fair and reasonable pricing, and a commitment to price parity. In developing prices for its services, NYNEX considers product costs, rate uniformity and stability, business risk, and a reasonable rate of return. NYNEX states that the Commission found that this approach, although varied from the pricing approach used in the federal access tariffs, permits ESPs to take ONA services on an economical and efficient basis. NYNEX Further Amendments at 18-9 and citing BOC ONA Order, 4 FCC Rcd at 166-7 at para. 317 and BOC ONA Amendment Order, 5 FCC Rcd at 3112-3, para. 83.

Pactel. According to Pactel, its ratemaking for ONA services employs direct embedded costing methodologies required by the California PUC (i.e., direct embedded cost plus a contribution to subsidize the provision of local exchange residential services). Pactel states that the California PUC does permit market-based pricing alternatives within the confines of its Alternative Regulatory Framework. Pactel states that the ratemaking methods to compute the rates for ONA services vary depending on whether the ONA services are: (1) new ONA services specifically developed for ESPs; (2) augmentations to existing business services only incidentally useful to ESPs; (3) substitutes for existing services; or (4) new services used primarily by customers other than ESPs.[112] Pacific Further Amendments at 22-3.

SWBT. SWBT describes various ratemaking methods for each of its new ONA services, but it does not provide ratemaking methods for its ONA services that have been in place for a long time. SWBT employs a method of recurring and nonrecurring charges based on such factors as market-area conditions, benefit to the customers, and willingness to pay. SWBT Further Amendments at 28 and Appendix I.

US West. US West states that its ratemaking methods employ several guidelines such as: (1) services are priced above long-run incremental costs; (2) services are priced at a rate designed to return a reasonable contribution toward common overheads, recognizing market-area conditions; (3) services are priced to stimulate development of enhanced services application, at a rate that optimizes total market-area demand for the basic service in question, not just ESP demand; (4) services are priced to minimize product revenue cross elastic implications which create or encourage tariff arbitrage for the same or substitute basic service prices; (5) services are priced in compliance with state and federal requirements and pricing is done on a nondiscriminatory basis; and (6) US West's ESP purchases ONA services at tariffed rates, where such services are offered under tariff, and if the services have been deregulated or detariffed, the services are offered through a price list which is applicable to both US West's ESP and unaffiliated ESPs. US West Further Amendments at 25-26.

---

[112] California states that Pactel mischaracterizes its ratemaking methods because California did not explicitly require a direct embedded cost methodology for ONA services. California Comments at 2-3. According to Pactel, California has special filing procedures that apply to the introduction of new ONA services, and that there is no prescribed pricing method that applies to all such services. Pactel states that the ratemaking methods filed with its Further Amendment reflected California's traditional costing methods for basic services. See Ex Parte Letter in CC Docket No. 88-2, Phase I, from Celia Nogales, Pactel, Federal Regulatory Relations, to Peggy Reitzel, FCC, July 18, 1991.

APPENDIX J

Sample Matrix of ONA Services and State & Federal Tariffs

FORMAT:

	State		
	Name of operating company		
Generic Name of ONA Service[1]	Name that company uses for the service Type of service (i.e. BSA,BSE, and/or CNS) State Tariff Reference Federal Tariff Reference		

SAMPLE:

	Arizona	Colorado	
	US West Communications	US West Communications	
Alternate Routing	Alternate Traffic Routing BSE AZ Access Services Tariff §6 FCC Tariff No.1 §6	Alternate Traffic Routing BSE CO Access Services Tariff §6 FCC Tariff No.1 §6	
Automatic Protection Switching	Automatic Loop Transfer BSE AZ Tariff: NONE FCC Tariff No.1 §7	Automatic Loop Transfer BSE CO Access Services Catalog §7, Tariff §7 FCC Tariff No.1 §7	

This chart illustrates the format that should be used for the hard copy display of the ONA data requested in this order. These data should also be submitted to the FCC on diskettes in a format that permits subsets of the data to be selectively sorted (e.g. by particular BSE), retrieved, displayed, and printed. The Common Carrier Bureau is hereby delegated authority to specify the details of the format for electronic submissions.

---

[1] The list of ONA services should include all BSEs, BSAs, and CNSs provided and should not be limited to only those ONA services listed in the ONA Services User Guide.

APPENDIX K

OSS Services

Ameritech. Ameritech states that it has deployed the Ameritech Services Management System (ASMS) in a few states but does not plan further deployment because of a lack of customer demand. Ameritech states that despite several efforts to interest ESPs in three states in ASMS, there are only two paying customers. Ameritech has sought ESP comment on the problem with ASMS. Ameritech does plan to offer a network reconfiguration system enabling customers to perform digital private line service reconfiguration, and ORDERMATE, an order input and status monitoring system. Ameritech Further Amendments, Section V.C. at 2 and Ameritech Reply at 10-13.

Bell Atlantic. Bell Atlantic is developing Intelliview, which is planned for availability in 1992. Initial services planned for Intelliview include service order status, trouble reporting, traffic measurements, inventory, billing management, and customer requested testing. Bell Atlantic Further Amendments at 4-7.

BellSouth. BellSouth's OSS gateway service -- Administrative Management Service (AMS) -- provides: trouble reporting and status, service order entry, access to customer billing information and customer records, miscellaneous messaging to telco, ESSX service station rearrangements, facility monitoring and re-arrangements via FlexServ Service, and administrative reports on service usage. ESSX service station rearrangements allows the customer to rearrange, add, move, and change its ESSX service system configuration. In the future, BellSouth plans to add PIC Inquiry and Order, access service order status, product information, and access billing information. BellSouth Further Amendments at 24-30.

NYNEX. NYNEX states service-specific capabilities are available on Network Reconfiguration Service, Diagnostic Channel on DSO Lines, and Centrex Service. Like SWBT, NYNEX states that it originally offered OSS services through CUSTOMate but found it too costly, operationally difficult, and lacking in customer demand. NYNEX states that it is investigating the possible provision of Universal Feature Control, which would provide customers access to network features for the purpose of activating, changing, and deactivating features to which a customer either subscribes or controls for another party. NYNEX Further Amendments at 8-11 and NYNEX Reply at 14-7.

Pactel. Pactel provides access to OSS through Service Manager, its electronic gateway service. The current OSS capabilities available on Service Manager include service order and status, trouble reporting and status, and service testing. Pactel Further Amendments at 11-4.

SWBT. SWBT is developing an OSS gateway, projected for completion in 1993, that is expected to include such functions as service order entry and status, billing information and service records, trouble reporting and status, testing, and traffic data collection for certain services. SWBT previously provided access to OSS capabilities on a limited basis through Network

Management Service (NMS), based on Bellcore's CUSTOMate Software package, but SWBT states that it withdrew NMS because it had a high cost to low benefit ratio. SWBT Further Amendments at 23-7.

US West. US West has developed service-specific OSS capabilities. US West has developed Traffic Data Report Service, Trouble Resolution for Access Circuits, and Centrex Customer Rearrangement. In addition, US West states that it is currently designing and developing a gateway for third party access to OSS capabilities with deployment planned for mid-1992. The initial applications being considered by US West are trouble administrative services and diagnostic provisioning of reserved DS1 and DS3. US West Further Amendments at 10-12.

APPENDIX L

BOC Databases Containing Comprehensive CPNI

Ameritech. Ameritech states that its databases containing CPNI have either password/ID systems, are not accessible from sales personnel terminals, or exclude blocked accounts. Ameritech Further Amendments at Addendum 6.

Bell Atlantic. Bell Atlantic states that three databases containing CPNI are available to enhanced services personnel. The Business Office Support System (BOSS), the primary database that contains restricted CPNI, is password restricted. The service order processing system (SOP) will not be password restricted for two years, while the Customer Analytical Profile System (CAPS) will be password restricted in the fall of 1991. Bell Atlantic states that the service order processing systems in its various companies are incompatible and must be integrated before a password/ID system is implemented. Bell Atlantic identifies a number of other files that contain CPNI but are not available to enhanced services personnel. Bell Atlantic Further Amendments at 25; Bell Atlantic Reply at 5.

BellSouth. BellSouth states that all primary databases routinely accessed by its enhanced services personnel are subject to password restrictions. BellSouth, however, does not plan to implement a password ID systems for its service order communications system (SOCS), Loop Maintenance Operation System (LMOS), or Trunk Integrated Recordkeeping System (TIRKS). BellSouth indicates that SOCS provides only temporary status information, LMOS and TIRKS provide information only about individual circuits. Therefore, BellSouth argues, password/ID systems are not necessary. BellSouth states that all the other BellSouth databases either have password/ID systems or do not contain CPNI. BellSouth Further Amendments at 43-7.

NYNEX. NYNEX indicates that it has implemented password protection for its primary databases, Customer Record Information (CRIS) and Carrier Access Billing Systems (CABS), and is also implementing a password/ID system for its service order processing (SOP) system. NYNEX does not plan to implement a password/ID system for several marketing files that are not utilized by sales representatives, but plans to deny access to these systems or remove restricted CPNI. NYNEX also indicates that it does not plan to implement password/ID systems for TIRKS, LMOS, PREMIS-LAS (address verification) and Central Office Equipment Assignment (COSMOS), which are infrequently used as auxiliary data bases for specific purposes, but which can be accessed by sales representatives. NYNEX states that PREMIS does not need to be password restricted because it contains fragmented CPNI (name address and telephone number) and is used to validate new account addresses, detect fraud, and assign a telephone number. In addition, the database is segregated only by address. NYNEX Further Amendments at 35-40.

Pactel. Pactel states that it has applied password/ID systems to all its files containing comprehensive as well as fragmented CPNI except PREMIS information system, and CPNI Notifications Database. Pactel notes that PREMIS, a Bellcore system, will not be password restricted, but argues that it does not have to be password restricted because it has only fragmented CPNI and is used to validate customer's addresses. The CPNI Notifications Database provides information about a customer's restriction of its CPNI and does not provide information in a manner useful for marketing personnel. Pactel Further Amendments at 46-51; Pactel Reply at 19.

SWBT. SWBT states that it has implemented password/ID systems for its systems which are routinely accessed by marketing personnel, including BOSS and Southwestern Order Retrieval and Distribution (SORD). SWBT has also implemented password/ID systems for billing systems including Customer Records Information System (CRIS) and Customer Access Billing System (CABS). SWBT has limited enhanced services marketing personnel access to several databases for account segmentation, product tracking, and direct marketing. SWBT does not plan to implement password/ID systems for non-marketing files, which it states are primarily for maintaining the network, including LMOS, TIRKS, and Circuit Installation and Maintenance Package (CIMAP). SWBT also states that it will not implement a password/ID system for PREMIS because it: does not contain information on multiline or billed-to numbers; is terminal restricted; is scheduled for replacement in five years; contains only fragmented CPNI; is not used for marketing; and is used to verify facility and location information. SWBT Further Amendments at 65-70; SWBT Reply at 9-10.

US West. US West password restricts Billing & Order Support System (BOSS), Customer Account Retrieval System (CARS), Customer Order Retrieval System (CORS), Service Order Processing & Distribution (SOPAD), Service Order Negotiation & Retrieval (SONAR), Service Order Logistics & Reference (SOLAR), and Effective Data Gathering Expertise (EDGE). US West does not allow access to Residential Customer Analytic Profile (RCAPS), Regional Marketing Information Environment (RMITE), but does not restrict access to Business Office Archive Retrieval System (BOARS), LMOS, Facility Assignment & Control System (FACS). Service representatives are required to access BOSS to determine whether a customer has restricted its account before accessing these systems. If the account is restricted, the customer is handed to a network-only services representative. US West Further Amendment at 46-51.

APPENDIX M

BSEs Used by the BOCs

Bell Atlantic

1. 800 Service
2. Remote Call Forwarding
3. Make Busy Arrangements
4. Messaging Service Interface--Hunting Service Arrangements
5. High Capacity Digital Handoff Service
6. Uniform Call Distribution Service
7. Closed User Group
8. Reverse Charge Acceptance
9. Call Redirection
10. Auto Call Ports
11. Multiple and Network Address

BellSouth

1. Called/Calling Number Information -- SMDI
2. User Transfer
3. Call Distribution Function Including Queue
4. Multiline Hunt Groups
5. Unlimited Size Hunt Groups
6. Individual Access to Each Port in a Hunt Group
7. X.25 Interface to Packet Switch
8. X.75 Interface to Packet Switch
9. Derived Channels that Comply with UL and NFPA
10. Digital Private Lines
11. Error Detection/Error Correction
12. Clear Access to Derived Channels
13. Virtual Dial Tone
14. Packet Switched Options -- Closed User Group
15. Packet Switched -- Fast Select Packet
16. Packet Switched Options -- Hunt Group
17. Packet Switched Options -- Call Redirection
18. Packet Switched Options -- Direct Call
19. Surrogate Client Numbers

NYNEX

1. Direct Inward Dialing Trunk Side Access
2. Line Hunting Service
3. Uniform Call Distribution and Queuing
4. Simplified Message Desk Interface (SMDI)
5. Custom Calling Services

Pactel

1. Called Directory Number Delivery via DID
2. Message Desk (SMDI)
3. Multiline Hunt Group
4. Multiline Hunt Group:
    - Uniform Call Distribution
    - Line Hunting

SWBT

1. DS1 to Voice Grade Multiplexing

US West

1. Message Delivery Service
2. Call Transfer
3. Uniform Call Distribution
4. Hunting
5. Private Line Conditioning
6. Traffic Data Report Service
7. Called Directory Number Delivery
8. Packet Features:
    - Closed User Groups
    - Flow Control Parameters
    - Logical Channel
    - Logical Channel Layout
    - Multiple Network Addresses

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

November 21, 1991

Statement by
Chairman Alfred C. Sikes
on
Open Network Architecture (ONA) Actions

Today's actions on ONA do not deal with the pricing of unbundled network elements. It is not possible, however, to deal with any facet of the new network architecture without talking about prices. The reason is simple.

Prices today are determined through the application of arcane and complex cost allocation and recovery rules which are established bi-jurisdictionally - that is at the Federal and state levels. Often the way costs are allocated and recovered bears little resemblance to the true costs. All too often prices are well under or over cost because of preferences. It is, in a sense, the American version of old-style Soviet pricing - heavily affected by government direction based on social goals.

The problem is that in recent years technological and market developments have revolutionized the communications sector. New ways of delivering services mean that competition is suddenly possible. This results in either the nascent competitor yelling that he or she cannot compete because the phone company is pricing under cost, or the phone company yelling that regulators should not open it to competition because due to a social goal it is forced to subsidize and, therefore, price way above cost.

This then creates a big problem. And, from my standpoint one of the biggest problems is that if prices are not rationalized to costs, competition will not exert the natural downward pressure on costs and prices. Additionally, if network elements are overpriced, network usage will be discouraged. If in the new information world advanced network usage is encouraged then the smaller users will pay less and less of the plant costs. The perverse fact is that some of the cost allocation rules aimed at helping small consumers could hurt them.

It is for these reasons that the Commission has opened notices on access pricing which impedes local competition. It is for this reason that the Federal-State Joint Board on separations, less than 2 weeks ago in San Antonio agreed to do a comprehensive review of the Federal-State cost allocation and recovery rules.

In short, we need to act on all fronts to both encourage competition, and to encourage the telephone companies and new information providers to provide more innovative services. Our actions today are additional steps in that direction. Today we are making it possible for the Bell Operating Companies to more efficiently serve its customers, we are protecting the Enhanced Service Providers from the potential for cross-subsidization and opening up a new proceeding to look way down the road to determine what more can be done to encourage intelligent networks.

November 21, 1991

SEPARATE STATEMENT OF
COMMISSIONER ANDREW C. BARRETT

RE: ONA Actions

I support this Open Network Architecture (ONA) Order which approves additional amendments filed by the BOCs and establishes a set of ONA monitoring provisions. I am confident that this item in conjunction with our companion Notice of Inquiry into future Intelligent Networks is the logical next step in the ONA process. Together, these actions will go a long way towards addressing concerns raised by the Enhanced Service Providers. I am committed to refining the ONA process where needed. Over the long run, ONA should play a large role in encouraging a competitive environment that will permit the development of new and innovative services for the public at large.

ONA is the cornerstone in our efforts to create a network of the future. Access by ESPs is essential to attainment of this Commission's long term network goals. At the same time, our Notice appropriately addresses the relationship between ONA and future network architecture, including the benefits and costs of modularity. The Coalition of Open Network Architecture Parties has challenged us through its petition and presentations on this matter. While we should not prescribe network design concepts, we provide a framework for commenting parties to better address what regulatory changes are necessary to implement the advanced intelligent network of the future.

FCC RECORD

CUMULATIVE INDEX

VOLUME 6

INSTRUCTIONS FOR USE

This cumulative index for Volume 6 of the FCC Record covers the period January 1991 through December 1991. It provides the page number to the FCC Record for each document released to the public.

This index has six sections:

(1) Table of Cases;
(2) Table of FCC and Delegated Authority (DA) Numbers;
(3) Table of Docket Numbers;
(4) Table of Rulemaking Numbers;
(5) Table of Localities; and
(6) Table by Subject Matter.

The Table of Cases is arranged alphabetically except where the first word of the case name is a number. Numbers will appear at the beginning, followed by all upper case letters and finally upper and lower case letters. For example, AZ Co. will appear at the beginning of the "A"s before Able Co.

The Table of FCC and Delegated Authority (DA) Numbers is arranged first by DA then FCC numbers in chronological order by year and then in numerical order.

The Table of Docket Numbers is grouped alphabetically by the Bureau designator, then chronologically by year, and finally, in numerical order.

The Table of Rulemaking Numbers is arranged numerically.

The Table of Localities is arranged alphabetically by city and state.

The Table by Subject Matter is organized alphabetically and is directly related to Title 47 of the Code of Federal Regulations (CFR). The three levels of subject division correspond with the table of contents, rule subparts and rule sections to the CFR. This table is also supplemented with adjudicatory and other statutory topics.

These finding aids were designed to assist with research in the FCC Record. Any corrections and suggestions for improvement should be directed to the FCC, Office of the Secretary, Washington, D.C. 20554 (202) 632-6410, or Shirley Suggs, Chief, Publications Branch (202) 632-0426.

Federal Communications Commission Record

Table of Cases

Volume 6

Issue 1 - 26

Case Name	Page
"Memories...Then and Now"	5013
"Studio 22"	5014
1991 Annual Access Charge Tariffs	1854
1991 Annual Access Tariff Filings	2632
21st Century Cellular	4309
AA Beep	2078
AAlert Paging Company of San Francisco	5336
ABL Network, Inc.	4988
ACC Long Distance Corp.	7230
AJP Communications Investment Co., Inc.	55
ALLTEL Service Corporation	5198
ALLTEL Service Corporation	6972
ARC Professional Services Group, Inc.	3544
ARMIS Report 43-04 (The Access Report)	1008
AT&T Communications	41
AT&T Communications	740
AT&T Communications	745
AT&T Communications	905
AT&T Communications	979
AT&T Communications	1516
AT&T Communications	1517
AT&T Communications	2307
AT&T Communications	3994
AT&T Communications	3467
AT&T Communications	3397
AT&T Communications	3739
AT&T Communications	4197
AT&T Communications	4179
AT&T Communications	4315
AT&T Communications	4450
AT&T Communications	4946
AT&T Communications	4866
AT&T Communications	5146
AT&T Communications	5187
AT&T Communications	5304
AT&T Communications	5353
AT&T Communications	5517
AT&T Communications	5615
AT&T Communications	5648
AT&T Communications	5677
AT&T Communications	5675
AT&T Communications	5813

Case Name	Page
AT&T Communications	6591
AT&T Communications	6690
AT&T Communications	6652
AT&T Communications	6656
AT&T Communications	7039
AT&T Communications	7152
AT&T Communications	7005
AT&T Communications	7461
AT&T Communications v. Pacific Bell and Nevada Bell	5170
AT&T Communications v. Southwestern Bell Telephone Company	444
AT&T and Local Exchange Carriers - Cost Allocation Manuals	445
AT&T's Comparbly Efficient Interconnection Plan	1506
Abacus Broadcasting Corp.	7182
Acceptance of 220-222 MHz Private Land Mobile Applications	3333
Acceptance of 929-930 MHz One-Way Paging Applications	6024
Acceptance of 929-930 MHz One-Way Paging Applications	6825
Access Billing Requirements for Joint Service Provision	2803
Access Long Distance Corporation	615
Access Long Distance Corporation	649
Access Long Distance Corporation	7291
Achernar Broadcasting Company	1748
Achernar Broadcasting Company	5393
Ackerman, Eve	5277
Act III Broadcasting of Rochester, Inc.	7479
Advanced Communications Corporation	2269
Advanced Communications Corporation	6977
Advanced Technology Cellular Telecommunications	6693
Advanced Technology Cellular Telecommunications	7236
Advanced Technology Cellular Telecommunications	7527
Advanced Telecommunications Corporation, and its Subsidiaries	656
Advanced Television Systems	7024
Advisory Committee on Advanced Television Service	79
Advisory Committee on Advanced Television Service	276
Advisory Committee on Advanced Television Service	1523
Advisory Committee on Advanced Television Service	1565
Advisory Committee on Advanced Television Service	2088
Advisory Committee on Advanced Television Service	2220
Advisory Committee on Advanced Television Service	5201
Advisory Committee on Advanced Television Service	6149
Advisory Committee on Advanced Television Service	7462
Afford-A-Call Corp.	1747
Agana Guam FM Radio Limited Partnership	2469
Alascom, Inc.	2969
Alascom, Inc.	3636
Alascom, Inc.	4703
Albany Region Public Safety Plan	3430

FEDERAL COMMUNICATIONS COMMISSION

Case Name	Page
Albert, Marc A.	13
Albert, Marc A.	2603
Albert, Marc A.	7160
Aldridge, Joe L.	994
Alexander, Lenora	4440
Algreg Celluar Engineering	3549
Algreg Cellular Engineering	2921
Algreg Cellular Engineering	5299
Algreg Cellular Engineering	5185
Alhambra-Grantfork Telephone Company	1381
Allnet Communication Services, Inc.	645
Allnet Communication Services, Inc.	980
Allnet Communication Services, Inc.	1515
Allnet Communication Services, Inc.	2608
Allnet Communication Services, Inc.	5663
Allnet Communication Services, Inc.	7289
Allnet Communications Services, Inc.	7284
Allvend, Inc.	6031
Alpha Lyracom Carrier Services, Inc.	5039
Altamaha Broadcasting	2098
Altamaha Broadcasting	3456
Alternative Dispute Resolution Procedures	2267
Alternative Dispute Resolution Procedures	5669
Amateur Radio Handicap Accessibility	5083
Amateur Transceivers Reception	1305
Amateur Volunteer Examiners Reimbursement Fee	6094
Amendment of Part 0 - Information Collection Requirements	5589
Amendment of Part 1 - Anti-Drug Abuse Act of 1988	7551
Amendment of Part 1 - Computation of Time	4797
Amendment of Part 15 - Cordless Telephone Operation	434
Amendment of Part 15 - Frequency Devices	3593
Amendment of Part 15 - Home Automation/Communication Technology	5409
Amendment of Part 15 - Television Decoder	2420
Amendment of Part 15 - Television Decoder Circuity Act of 1990	449
Amendment of Part 2 - Radio Frequency Devices	3296
Amendment of Part 2 - Radio Frequency Devices	5958
Amendment of Part 22 - Air-Ground Service	4582
Amendment of Part 22 - Cellular Service Applications	6185
Amendment of Part 22 - Cellular Service Applications	6158
Amendment of Part 25 - Satellite Communications	2806
Amendment of Part 36 - Establishment of a Joint Board	2936
Amendment of Part 36 - Establishment of a Joint Board	4481
Amendment of Part 36 - Establishment of a Joint Board	5680
Amendment of Part 36 - MTS and WATS Market Structure	547
Amendment of Part 63 - Environmental Rules	1716
Amendment of Part 63 - Service Disruptions of Carriers	5531

Case Name	Page
Amendment of Part 67(New Part 36) - Federal-State Joint Board	383
Amendment of Part 69 - Access Charge Rules	4524
Amendment of Part 73 - Broadcast Hoaxes	6935
Amendment of Part 73 - Commercial FM Broadcast Applications	7265
Amendment of Part 73 - Emergency Broadcast System	6739
Amendment of Part 73 - FM Station (Class C3)	3417
Amendment of Part 73 - Short-Spaced Criteria (ERRATUM)	6537
Amendment of Part 73 - Short-Spaced FM Station Assignments	5777
Amendment of Part 73 - Short-Spacing Criteria	5356
Amendment of Part 74 - FM Booster Stations	6060
Amendment of Part 74 - FM Translator Stations	1820
Amendment of Part 74 - FM Translator Stations	2163
Amendment of Part 74 - FM Translator Stations	2334
Amendment of Part 74 - Use of Digital Voice Emission	3457
Amendment of Part 80 - Correspondence Channels 156-162 MHz Band	5991
Amendment of Part 80 - Frequency Coordinator	714
Amendment of Part 80 - High Frequency Channels	4232
Amendment of Part 80 - Ship Earth Station Equipment	5989
Amendment of Part 80 - Ship Station Transmitters	310
Amendment of Part 80 - Synthesized Voice on VHF Marine Channel 16	5994
Amendment of Part 80 - VHF Channels 67 and 72	506
Amendment of Part 80 - VHF Ship Station Transmitters	5985
Amendment of Part 87 - Air-To-Air Frequencies	1985
Amendment of Part 87 - Aviation Frequency Tolerance	4692
Amendment of Part 90 - Emergency Medical Radio Service	2017
Amendment of Part 90 - Fixed Tone Signaling and Alarm Operations	6898
Amendment of Part 90 - Private Land Mobile Frequencies	542
Amendment of Part 90 - Private Land Mobile Radio Stations	446
Amendment of Part 90 - Relocation of Frequency Privileges	337
Amendment of Part 90 - Revising Authorized Bandwidths	2145
Amendment of Part 90 - Secondary Fixed Operations	1800
Amendment of Part 90 - Short Spacing of Mobile Radio Systems	4929
Amendment of Part 90 - Short Spacing of SMRS (ERRATUM)	6650
Amendment of Part 90 - Specialized Mobile Radio Systems	975
Amendment of Part 90 - Use of the 220-222 MHz Band	2356
Amendment of Part 90 - Use of the 220-222 MHz Band	4229
Amendment of Part 90.69 - Motion Picture Radio Service	1966
Amendment of Part 94 - Multiple Address System Frequencies	3721
Amendment of Part 94 - Video Distribution Systems	1270
Amendment of Part 94 - Video Entertainment	7133
Amendment of Part 95 - Technical Standards	1975
Amendment of Part 97 - Amateur Radio Service	4811
Amendment of Part 97 - Amateur Radio Service (ERRATUM)	5147
Amendment of Parts - 21, 43, 74, 78, and 94 - Wireless Cable	6764
Amendment of Parts 0, 1, 2 and 95 - Video Data Services	1368
Amendment of Parts 0,1,2, and 95 - Emergency Locator Transmitter	4813

Case Name	Page
Amendment of Parts 1 and 90 - Private Land Mobile Radio	7297
Amendment of Parts 1, 21, 22, 74, and 94 - Fixed Service	7238
Amendment of Parts 1, 21, 22, 74, and 94 - Fixed Service Usage	4320
Amendment of Parts 13 and 80 - Distress and Safety Systems	6
Amendment of Parts 2 and 25 - Orb-85/Orb-88 Implementation	1750
Amendment of Parts 2 and 80 - Automated Maritime Communications	437
Amendment of Parts 2 and 80 - High Frequency Channels	786
Amendment of Parts 2 and 80 - Maritime Telecommunications Systems	2171
Amendment of Parts 2 and 87 - Aviation Services	2291
Amendment of Parts 2 and 87 - Use of 143.75 MHz Band	5413
Amendment of Parts 2 and 90 - Stolen Vehicle Recovery Systems	622
Amendment of Parts 2 and 97 - Allocation of the 216-220 MHz Band	4578
Amendment of Parts 2, 22 and 25 - Mobile Satellite Service	4900
Amendment of Parts 2, 73, 74, and 78 - Authorization Procedures	1989
Amendment of Parts 21 and 94-Rechannelization of Frequency Bands	972
Amendment of Parts 21, 43, 74, 78 and 94-Microwave Radio Services	6792
Amendment of Parts 21, 43, 74, 78, and 94 - Frequency Use (ERR)	7232
Amendment of Parts 80 and 87 - Emergency Locator Transmitters	1456
Amendment of Rules - Auxilliary and Non-Common Carrier Services	7466
Amendment of Rules for Auxilliary and Non-Common Carrier Services	6827
Amendment of Section 2.106 - Computing Devices	1566
Amendment of Section 2.106 - Low-Earth Orbit Satellites	6653
Amendment of Section 2.106 - Mobile Satellite Service	5932
Amendment of Section 22.521(b) - Air-Ground Stations	1863
Amendment of Section 22.521(b) - Air-ground Stations	2238
Amendment of Section 43.61 - Telecommunications Traffic	1424
Amendment of Section 61.58(a)(2)-Notice Periods for Tariff Filing	275
Amendment of Section 73.3525 - Settlement Agreements	2901
Amendment of Section 73.3525 - Settlement Agreements	5703
Amendment of Section 73.3535 - Settlement Agreements	85
Amendment of Section 90.21 - Fire Radio Service Output Power	3426
Amendment of Sections 1.23 and 1.24 - Temporary Suspensions	2203
Amendment of Sections 1.420 and 73.3584	3380
Amendment of Subpart S of Part 90 - Licensing in the 800 MHz Band	4766
Amendment of the Amateur Service Rules	4433
Amendment of the Maritime Service Rules (Part 80)	3484
Amendment of the Maritime Services Rules (Part 80)	1969
Amendments to Part 97 - Amateur Radio Services	5978
Americall Systems of Louisville	698
American Airlines, Inc.	5987
American Cellular Services U.S.	65
American Mobile Satellite Corporation	1811
American SMR Network Association, Inc.	1913
American Telecommunications Corporation	241
American Telephone & Telegraph	115
American Telephone & Telegraph Co.	234

Case Name	Page
American Telephone & Telegraph Co.	1962
American Telephone & Telegraph Co.	2338
American Telephone & Telegraph Co.	2552
American Telephone and Telegraph Co.	732
American Telephone and Telegraph Co.	1580
American Telephone and Telegraph Co.	1581
American Telephone and Telegraph Co.	1768
American Telephone and Telegraph Co.	7189
American Telephone and Telegraph Co.	7191
American Telephone and Telegraph Co.	7192
American Telephone and Telegraph Company	44
American Telephone and Telegraph Company	357
American Telephone and Telegraph Company	375
American Telephone and Telegraph Company	377
American Telephone and Telegraph Company	425
American Telephone and Telegraph Company	742
American Telephone and Telegraph Company	651
American Telephone and Telegraph Company	998
American Telephone and Telegraph Company	1250
American Telephone and Telegraph Company	1251
American Telephone and Telegraph Company	1362
American Telephone and Telegraph Company	1446
American Telephone and Telegraph Company	1594
American Telephone and Telegraph Company	1689
American Telephone and Telegraph Company	1741
American Telephone and Telegraph Company	1742
American Telephone and Telegraph Company	1817
American Telephone and Telegraph Company	1895
American Telephone and Telegraph Company	1897
American Telephone and Telegraph Company	1997
American Telephone and Telegraph Company	2321
American Telephone and Telegraph Company	2330
American Telephone and Telegraph Company	2567
American Telephone and Telegraph Company	2870
American Telephone and Telegraph Company	3329
American Telephone and Telegraph Company	3687
American Telephone and Telegraph Company	3645
American Telephone and Telegraph Company	4211
American Telephone and Telegraph Company	4311
American Telephone and Telegraph Company	4313
American Telephone and Telegraph Company	4316
American Telephone and Telegraph Company	4426
American Telephone and Telegraph Company	4982
American Telephone and Telegraph Company	4790
American Telephone and Telegraph Company	4870
American Telephone and Telegraph Company	4872

Case Name	**Page**
American Telephone and Telegraph Company	4875
American Telephone and Telegraph Company	4839
American Telephone and Telegraph Company	4884
American Telephone and Telegraph Company	4983
American Telephone and Telegraph Company	5261
American Telephone and Telegraph Company	5263
American Telephone and Telegraph Company	5272
American Telephone and Telegraph Company	5612
American Telephone and Telegraph Company	5661
American Telephone and Telegraph Company	5811
American Telephone and Telegraph Company	5865
American Telephone and Telegraph Company	6654
American Telephone and Telegraph Company	6934
American Telephone and Telegraph Company	7038
American Telephone and Telegraph Company	7473
American Telephone and Telegraph Company (ERRATUM)	1890
American Telesystems and TeleConcepts, Inc.	1406
American Teltronix	1942
Ameritech Operating Companies	415
Ameritech Operating Companies	694
Ameritech Operating Companies	746
Ameritech Operating Companies	1348
Ameritech Operating Companies	1541
Ameritech Operating Companies	2085
Ameritech Operating Companies	3716
Ameritech Operating Companies	4944
Ameritech Operating Companies	5186
Ameritech Operating Companies	7472
Amherst Telephone Company	1795
Anchor Broadcasting Limited Partnership	721
Anderson Cablevision v. Duke Power Company	1562
Annual 1988 Access Tariff Filings	4156
Annual 1988 Access Tariff Filings	4415
Annual 1988 Access Tariff Filings	6103
Annual 1991 Access Tariff Filings	3792
Annual Report Form M - Conversion to Metric System	3387
Answering Service & Doctor's Exchange	1885
Applications of Certain TV Stations - California	2340
Arizona Public Safety Plan	2906
Arizona Public Safety Plan	4802
Arizona Region Public Safety Plan	5335
Arizona Western College	7476
Arkansas Educational Television Commission	478
Arms, Lorraine Walker	1777
Arms, Lorraine Walker	5586
Ascom Autelca Communications, Ltd.	4989

Case Name	Page
Aspen FM, Inc.	1602
Aspen FM, Inc. (ERRATUM)	4981
Asset Management Corporation	6538
Atlantic City Community Broadcasting, Inc.	925
Atlantic Radio Communications, Inc.	4716
Atlantic Tele-Network, Inc.	6529
Automatic Transmitter Identification System	1852
Automatic Transmitter Identification System	2470
Auxiliary Services - Definition of Congested Areas	291
B.F. Investments, Inc.	7127
BSN Telecom Co.	6938
Bahr, Joseph	4488
Baker Communications Company	4444
Baldwin, Bruce W.	2571
BankAmerica Corporation	2588
Banner Broadcasting Corporation	1900
Barger, John W.	2261
Baton Rouge MSA Limited Partnership	5948
Bay, Susan H.	326
Beach Broadcasting Limited Partnership	885
Beach Broadcasting Limited Partnership	4485
Beauchamp, Susan	490
Beaver Springs Broadcasting Limited	3359
Bee Broadcasting Associates, A Limited Partnership	3347
Bell Atlantic	1559
Bell Atlantic Operating Companies	2542
Bell Atlantic Telephone Companies	46
Bell Atlantic Telephone Companies	971
Bell Atlantic Telephone Companies	1436
Bell Atlantic Telephone Companies	1595
Bell Atlantic Telephone Companies	1813
Bell Atlantic Telephone Companies	2907
Bell Atlantic Telephone Companies	2908
Bell Atlantic Telephone Companies	4462
Bell Atlantic Telephone Companies	4617
Bell Atlantic Telephone Companies	4891
Bell Atlantic Telephone Companies	4794
Bell Atlantic Telephone Companies	6141
Bell Atlantic Telephone Companies	7241
Bell Atlantic and NYNEX	4792
Bell Atlantic's Waiver to Offer Coin Message Delivery Service	3400
Bell Operating Companies	6933
BellSouth	47
BellSouth Corporation	3336
BellSouth Corporation	4196
BellSouth Corporation	4405

Case Name	Page
BellSouth Services	3743
BellSouth Telephone Companies	43
BellSouth Telephone Companies	373
BellSouth Telephone Companies	447
BellSouth Telephone Companies	1592
BellSouth Telephone Companies	2106
BellSouth Telephone Companies	3686
BellSouth Telephone Companies	5591
BellSouth's Petition for Waiver of Computer II	1807
BellSouth's Petition for Waiver of Computer II	6544
Benns, Michael J.	2182
Benns, Robert A.	902
Benns, William E., IV	2322
Benns, William E., IV	6997
Benton Ridge Telephone Company	1615
BerkmaeinDaEdwin A.	[illegible]
Bernstein, Edwin A.	6841
Bible Broadcasting Network, Inc.	3576
Bible Broadcasting Network, Inc.	5760
Big Country Communications	1247
Big Island Broadcasting Company, Ltd.	422
Black Hills Christian Communications, Inc.	500
Black Television Workshop of Los Angeles, Inc.	381
Black Television Workshop of Los Angeles, Inc.	4431
Black Television Workshop of Los Angeles, Inc.	6525
Boedker, Rebecca L.	2557
Bomberger, John D.	880
Bowen, Carol Sue	10
Bowman, Carol Sue	869
Bowman, Carol Sue	4723
Branstine Flying Service, Inc.	2787
Branton, Peter	610
Briarwood Presbyterian Church	536
Broadcast Auxiliary Services and Cable TV Relay Service	5658
Broadcast Character Requirements	4787
Broadcast Character Requirements (ERRATUM)	5017
Brown, Susan D.	4407
Brown, Susan D.	7210
Bryant, Joseph F.	6121
Bundling of Cellular Equipment and Cellular Service	3374
Busch, Kelly Vaughan	59
Butler, Robert J.	5414
Butte Cellular Group	6745
C&W Communications, Inc.	3431
C,C&S Telco, Inc.	349

Case Name	**Page**
C-Band Satellite Orbital Spacing Policies	1844
C-TEC Cable Systems of Michigan, Inc.	5549
CICI, Inc.	4270
CICI, Inc.	4984
CICI, Inc.	5568
CICI, Inc.	5789
COM Systems, Inc. v. Pacific Bell	2949
COMSAT General Corporation	347
COMSAT General Corporation	1576
CPS Operator Services, Inc.	242
CPS Operator Services, Inc.	6720
CR Broadcasting	1384
CR Broadcasting	4180
CRB of Florida, Inc.	2303
Cable & Wireless Communications, Inc.	33
Cable & Wireless Communications, Inc.	236
Cable & Wireless Communications, Inc.	697
Cable & Wireless Communications, Inc.	5674
Cable Television Basic Service Rates	208
Cable Television Basic Service Rates	617
Cable Television Basic Service Rates	4545
Cable Television Technical and Operational Requirements	3673
Cable Television Technical and Operational Requirements	6588
Cable and Wireless Communications, Inc.	613
Cable and Wireless Communications, Inc.	2235
Caddo Broadcasting Company	2007
Cagal Cellular Communications Corporation	285
Cagal Cellular Communications Corporation	401
Caggiano, Christian R.	904
California Broadcasting Corporation	283
California State University, Long Beach Foundation (KLON-FM)	5752
Call America Inc.	699
Call America, Inc.	4319
Call West	6941
Caller Number Identification Service	6752
CanXus Broadcasting Corporation	5399
Cannon Communications Corporation	570
Cannon Communications Corporation	3310
Capital Cities Cable, Inc.	6651
Capital Network Systems, Inc.	5609
Capital Network Systems, Inc.	6707
Capital Telecommunications, Inc.	4318
Capitol City Broadcasting Company	5525
Capitol City Broadcasting Company	5621
Capobianchi, Rita A.	4631
Cardwell Broadcasting	5109

Case Name	Page
Cardwell Broadcasting	6561
Carey, Julie J.	1366
Caribbean Americas Telecommunications Corp.	5275
Carmel Broadcasting Limited Partnership	3287
Carmel Broadcasting Limited Partnership	4633
Carriers File Revisions to Cost Allocation Manuals	2152
Catalina Radio, A California Limited Partnership	687
Cellular Bundling Policies	1732
Cellular Bundling Policies	3332
Cellular Electronics, Inc.	7483
Cellular Resale Policies	1719
Cellular Resale Policies	4827
Cellular of Northwest Ohio, Inc.	1217
Cellutech	736
Cencom of Kentucky	7558
Centel Telephone Companies	1001
Centel Telephone Companies	5144
Centel Telephone Companies	5271
Center for Study and Application of Black Economic Development	4622
Central Atlantic Payphone Association	3546
Central Florida Communications Group, Inc.	522
Central Radio Telegraph Co.	7188
Centrapage of Vermont, Inc.	273
Century Cellunet of Jackson MSA Limited Partnership	6150
Century Chicago Broadcasting, Ltd.	7246
Cereus Broadcasting Company	4158
Certain Broadcast Stations - Alabama and Georgia	5968
Certain Broadcast Stations - Indiana and Tennessee	5637
Certain Broadcast Stations Serving the State of Arkansas	4938
Certain Commercial Television Stations - Philadelphia, PA	4191
Champion Industries, Inc.	7124
Changing Video Marketplace	4961
Channel 32 Broadcasting Company	872
Channel 32 Broadcasting Company	5188
Channel 41, Inc.	4109
Channels for Industrial Cranes	1712
Character Qualifications in Broadcast Licensing	3448
Charisma Broadcasting Corporation	3411
Charter Network Company	292
Charter Network Company	1404
Charter Network Company, L.P.	643
Charter Network Company, L.P.	7292
Chartways Technologies, Inc. v. AT&T Communications	2952
Chase, Arnold L.	7387
Cherokee Broadcasting Corporation	1706
Cherokee Broadcasting Corporation	3624

Case Name	Page
Cherokee Communications, Inc.	3683
Cherokee Communications, Inc.	6700
Cherokee Communications, Inc.	7526
Chesapeake and Potomac Telephone Company	6542
Chicago MDS Company	5367
Chickasaw Telephone Company	4990
Children's Television Programming	2111
Children's Television Programming	3535
Children's Television Programming	5093
Children's Television Programming	5529
Chronicle Cellular	4449
Chronicle Publishing Company	7497
Cincinnati Bell Telephone Company	970
Cincinnati Bell Telephone Company	1309
Cincinnati Bell Telephone Company	1598
Cincinnati Bell Telephone Company	3501
Cincinnati Bell Telephone Company	4284
Cincinnati Bell Telephone Company	7538
Cincinnati Bell's Cost Allocation Manual	713
Cincinnati SMSA Limited Partnership	605
Cincinnati TV 64 Ltd.	7522
Clarksville Radio	2505
Classes A,B and S Emergency Position Indicating Radiobeacons	1462
Classic Radio, Inc.	1835
Cle Broadcasting Limited Partnership	865
Clover Communications, Inc.	324
Coastal Broadcasting Partners	4242
Codification of Political Programming Policies	4499
Codification of Political Programming Policies	5707
Collins, Jerry J.	4382
Colonial Communications, Inc.	2296
Columbia Bible College Broadcasting Co.	516
Columbia Cellular Telephone Company	1408
Columbus Telephone Company, Inc.	6943
Com Systems, Inc.	293
Com Systems, Inc.	648
Com Systems, Inc.	5732
Com Systems, Inc.	6727
Com Systems, Inc.	7294
ComEx, Inc.	3370
Common Carrier Paging Frequencies(ERRATUM)	356
Common Carrier Public Mobile Services Information	4261
Commonwealth Long Distance Company	1410
Communications Professionals v. Southwestern Bell Corporation	5173
Communications Satellite Corp.	1412
Communications Satellite Corporation	379

APPENDIX E

National ISDN-1 Services
Basic Rate Interface

ISDN Voice and Circuit Switched Data Services

1. Call Forwarding
2. Automatic Callback
3. Call Hold
4. Additional Call
5. Flexible Calling
6. Calling Number Identification Services
7. Message Service
8. Display Service
9. Electronic Key Telephone System (EKTS)
10. Station Message Detail Recording
11. Multiline Hunt Groups
12. Basic Business Group
13. Business Group Dial Access Features
14. Call Pickup

ISDN Packet Mode Services

1. ISDN Call Control
2. PPSN Call Control and Features
3. Numbering and Routing
4. User to User with Call Control
5. ISDN X.25 Supplementary Services
6. Basic Business Group
7. Business Group Dialing Plan
8. Multiline Hunt Group
9. ISDN Calling Number ID
10. ISDN AMA

Source: SWBT Further Amendments, Exhibit O

APPENDIX F

AIN Deployment

Ameritech. Ameritech states that it will conduct a trial of its version of AIN from July 1991 through the first quarter of 1992. Ameritech Further Amendments at IX, B, 23.

Bell Atlantic. Bell Atlantic projects this deployment: 1992 -- Release 0; 1994 -- Release 1; 1996 -- Release 2 (tentatively). Bell Atlantic states that deployment will not extend to all Bell Atlantic switches. Bell Atlantic Further Amendments at 23.

BellSouth. BellSouth states that its vendors have indicated that the Release 1 architecture is too complex and that the vendors and BellSouth will need more market-area inputs. BellSouth estimates that Release 1 specifications may be available by 1995. BellSouth projects deployment of Release 0 in 1992, using two SCPs for the entire region. BellSouth Further Amendments at 43 and Attachment D.

NYNEX. NYNEX states that the development of vendor specifications and quotations for Release 1 is proceeding slowly due to their complexity. NYNEX is, therefore, investigating a modified version, Release 0.1. If the modified version proves feasible, NYNEX would not project implementation before 1993. NYNEX Further Amendments at 30.

Pactel. Pactel states that it does not provide a deployment plan because it anticipates that AIN vendor products will not be available until the 1993-1994 period. Pactel states that it considers AIN to be a transitional architecture and that its long-term goal would be an "Information Network Architecture" in which any ESP could program the network in the service segment mode. Pactel Further Amendments at 36.

SWBT. SWBT states that it does not have sufficient market-area information to make a commitment to deploy Release 0 on either a trial or full-service basis. SWBT states that it is nevertheless actively involved in AIN Release 1 activities and is closely monitoring the Release 0 activities of the other BOCs. SWBT has tentative plans to begin AIN deployment in late 1993 or 1994 within a major market-area in one of SWBT's five states. SWBT states that specific services have not yet been defined for Release 1 in order to ensure that vendor products are not service-specific. SWBT Further Amendments at 55-57.

US West. US West states that it will conduct a technical trial in the fourth quarter of 1991 and that it anticipates deployment of adjunct architecture capable of deploying new services in the 1993-1994 time period. US West Further Amendments at 39-40.

APPENDIX G

Possible AIN Services

Alternate Destination
Anywhere Call Pickup
Area Number Calling (Single Number Service)
Authorization Codes (control of user access)
Automatic Call Distribution
Automatic Callback Incoming
Calling Name Delivery
Closest to Routing
Selective Call Waiting
Service Activation/Deactivation
Time of Day/Day of Week Routing

Source: SWBT Further Amendments at Ex. Q.

APPENDIX H

IILC Issues

Each issue cited in this order is identified by its IILC number and its official IILC issue title. The status of each issue is indicated by "A" (active) or "R" (resolved).

Issue 001 (Uniform Delivery of Calling Number Identification (CNI) (R))

An IILC task force explored a number of both line-side and trunk-side ANI/CNI delivery methods and endorsed ISDN as a long term solution for uniform delivery of line-side CNI. Both SS7 and ISDN must be widely deployed.

Issue 003 (ESP Customer Access to BOC Network Management Systems (R))

On February 22, 1990, the IILC reached consensus on Issue 003 addressing ESP/Customer access to BOC Network Management Systems. The resolution identifies OSS capabilities useful to ESPs, and establishes a commitment to develop a generic software gateway interface. The Issue 003 report states that ESPs desire passive and interactive access to Configuration and Name Management (Service Order Entry, Network Reconfiguration); Fault Management (Trouble Reporting and Status, Diagnostics, Testing); Accounting Management (Traffic Data Collection, Billing and Collection Information, Account Status); Security Management (Authentication, Access Control); and Performance Management (Surveillance, Network Traffic Management, Performance Statistics and Data). The resolution also calls for BOCs to provide annual reports on their progress on providing ESP access to BOC OSS systems.

In addition, the OSI - Network Management Forum has released an initial set of tentative interface specifications for industry comment. This document provides proposed generic requirements of a BOC for an open systems interconnection (OSI) customer network management (NMS) interface for trouble administration, alarm reporting, testing, traffic measurement, and security of the interface. ECSA's T1M1.5 Committee is working to establish interface and communications standards for the link between an OSS access gateway and the telephone company's operations support systems. Specification of an OSI-based CNM interface between a BOC gateway-NMS and a customer CPE-NMS, December 1990, was released as Bellcore TA-INS-001192. Bell Atlantic states that it has released interface specifications on IntelliView pending adoption and implementation of industry specifications. Bell Atlantic Further Amendments at 8. See also Ameritech Further Amendments at 3-5; BellSouth Further Amendments at 10-2.

Issue 006 (Maintenance of ONA Plan Reference Document (R))

The task group addressing this issue is composed of an ad-hoc committee of representatives of each BOC. The committee issues a semi-annual update of the ONA Plan reference document, which consists of: (a) the ONA Services User

Guide; (b) network capabilities deployment information to the wire center level; and (c) a list of ONA tariffs filed at the state level.

Issue 010 (ESP Frame Relay Access to ISDN Customers (R))

An IILC task group developed a methodology to permit an ESP packet service provider (such as Telenet or BT Tymnet) to have direct access to ISDN customers that use the frame relay transmission protocol.

Issue 011 (Uniform Access Numbers for ESPs (A))

The ESPs have requested the IILC to investigate the feasibility of allowing users to access an ESP's facility from any geographical location with the use of the same calling number.

Issue 013 (Proprietary Demand Information Protection (R))

The IILC task group developed procedures for the safeguarding of an ESP's proprietary marketing and technological information during the process in which a BOC is evaluating an ESP request for a new network capability.

Issue 014 (Direct ESP Packet Connections to ISDN End Office (R))

An IILC task group developed a methodology and a standard to permit an ESP packet service provider (such as Telenet or BT Tymnet) to interconnect directly to an ISDN end office under the X.75 internetwork protocol.

Issue 015 (Information and Delivery Mechanisms for ESP Billing (A))

An IILC task force concluded that ESPs need three types of information to bill customers: (1) information identifying the customer; (2) billing name and address; and (3) details on the call to the ESP. That report also concluded that generally ESPs can determine the call detail information (CDI) with their own recording equipment. The working draft report notes that whenever customers have established an account with an ESP, the ESP can obtain BNA in a two step process: first, obtain the customer's identification from CNI transmitted by the LEC; and second, obtain BNA from the ESP's own list of names and addresses. BNA information may also be made available by parties that are not affiliated with a LEC.

Issue 016 (ESP Input to the BOC Network Planning Process (A))

The BOC ONA Order required the BOCs to establish a procedure, within the IILC process, to permit ESPs and end users to provide inputs to the BOC network planning process. The BOCs responded by establishing an annual seminar and workshop wherein the BOCs provide briefings on new network developments and non-BOCs are given an opportunity to comment and to offer suggestions regarding new services that the non-BOCs would find useful.

Issue 017 (Uniform Delivery of Line-side CNI in the Near Future (R))

The BOCs, in conjunction with ESP and switch manufacturer representatives, investigated the feasibility of providing uniform delivery of line-side CNI in the near future. The task group found that no short-term methods are feasible in the near future. The task group recommended that, when ISDN becomes available, the "D" channel be used for such a purpose.

Issue 018 (Ability to Control CNI Delivery (R))

A BOC task group has identified what the network in general is technically capable of doing now and in the near future to restrict the release of CNI and ANI.

Issue 019 (Computer-Telecommunications Switch Call Control (A))

At the request of IBM, an IILC task force is investigating methods whereby an end user's or ESP's computer can be used to modify certain end-office switching functions.

Issue 021 (Systematic Approach to Uniformity of ONA Services (R))

The BOCs, in conjunction with ESPs, developed a procedure for the uniform specification of new ONA service requests. That report outlined a procedure for maximizing the functional and technical uniformity of newly requested services. Under this procedure, an ESP would submit a new service request to an IILC working committee, which would then prepare, in consultation with the requesting ESP and the BOCs, a uniform functional and technical description of the proposed service. If the service request passes a preliminary technical feasibility screening by the BOCs, the ESP may then, at its discretion, submit its service request to any or all of the BOCs. The IILC follows a standardized four step procedure, which is described in the IILC final report: (1) documentation of ESP request; (2) description of the functionality; (3) description of technical characteristics (architecture and interface specifications); and (4) a preliminary technical feasibility analysis.

Issue 024 (Calling Party Identification (CPID) (A))

A task force is reviewing privacy and anonymity concerns related to the widespread delivery of CPID.

APPENDIX I

State Ratemaking Methods

Ameritech. Ameritech states that the rates for its interstate ONA services were based on costing principles consistent with the Commission's Part 69 rules, and that it employs this same basis for calculating its intrastate access tariffs. Ameritech does note, however, that in some cases, state-specific costs were used rather than regional costs. Ameritech Further Amendments at Addendum F, 2.

Bell Atlantic. According to Bell Atlantic, ONA services are generally indistinguishable from end user services and encompass most of its state and federal service offerings. Thus, Bell Atlantic states that for ONA services, it employs ratemaking methodologies for end user services that have been approved in each state jurisdiction. Bell Atlantic states that several of its territories have "incentive regulation" plans that generally allow some degree of pricing flexibility for competitive services while capping or restricting rate changes for other than competitive services. Bell Atlantic claims that these incentive regulation plans limit its ability to change prices for existing ONA services. Bell Atlantic Further Amendments at 14-15.

BellSouth. Although costs are important, BellSouth states that prices also reflect a complex set of social, political, and economic objectives. BellSouth states that its ratemaking principles take into consideration a number of factors, such as costs, market-area and service cross-elasticities, value to customers, financial support requirements for other services, and traditional pricing methodologies. BellSouth states, however, that these principles are constant for all services, whether or not the new rate element is an ONA service. BellSouth states that its approach results in different ratemaking methods for different products and services, but the rates are under the control of the respective state commissions. BellSouth Further Amendments at 32-3.

NYNEX. NYNEX states that its pricing policy consists of two major components -- a commitment to cost-based, fair and reasonable pricing, and a commitment to price parity. In developing prices for its services, NYNEX considers product costs, rate uniformity and stability, business risk, and a reasonable rate of return. NYNEX states that the Commission found that this approach, although varied from the pricing approach used in the federal access tariffs, permits ESPs to take ONA services on an economical and efficient basis. NYNEX Further Amendments at 18-9 and *citing* *BOC ONA Order*, 4 FCC Rcd at 166-7 at para. 317 and *BOC ONA Amendment Order*, 5 FCC Rcd at 3112-3, para. 83.

Pactel. According to Pactel, its ratemaking for ONA services employs direct embedded costing methodologies required by the California PUC (i.e., direct embedded cost plus a contribution to subsidize the provision of local exchange residential services). Pactel states that the California PUC does permit market-based pricing alternatives within the confines of its Alternative Regulatory Framework. Pactel states that the ratemaking methods to compute the rates for ONA services vary depending on whether the ONA services are: (1) new ONA services specifically developed for ESPs; (2) augmentations to existing business services only incidentally useful to ESPs; (3) substitutes for existing services; or (4) new services used primarily by customers other than ESPs.[112] Pacific Further Amendments at 22-3.

SWBT. SWBT describes various ratemaking methods for each of its new ONA services, but it does not provide ratemaking methods for its ONA services that have been in place for a long time. SWBT employs a method of recurring and nonrecurring charges based on such factors as market-area conditions, benefit to the customers, and willingness to pay. SWBT Further Amendments at 28 and Appendix I.

US West. US West states that its ratemaking methods employ several guidelines such as: (1) services are priced above long-run incremental costs; (2) services are priced at a rate designed to return a reasonable contribution toward common overheads, recognizing market-area conditions; (3) services are priced to stimulate development of enhanced services application, at a rate that optimizes total market-area demand for the basic service in question, not just ESP demand; (4) services are priced to minimize product revenue cross elastic implications which create or encourage tariff arbitrage for the same or substitute basic service prices; (5) services are priced in compliance with state and federal requirements and pricing is done on a nondiscriminatory basis; and (6) US West's ESP purchases ONA services at tariffed rates, where such services are offered under tariff, and if the services have been deregulated or detariffed, the services are offered through a price list which is applicable to both US West's ESP and unaffiliated ESPs. US West Further Amendments at 25-26.

---

[112] California states that Pactel mischaracterizes its ratemaking methods because California did not explicitly require a direct embedded cost methodology for ONA services. California Comments at 2-3. According to Pactel, California has special filing procedures that apply to the introduction of new ONA services, and that there is no prescribed pricing method that applies to all such services. Pactel states that the ratemaking methods filed with its Further Amendment reflected California's traditional costing methods for basic services. See Ex Parte Letter in CC Docket No. 88-2, Phase I, from Celia Nogales, Pactel, Federal Regulatory Relations, to Peggy Reitzel, FCC, July 18, 1991.

APPENDIX J

Sample Matrix of ONA Services and State & Federal Tariffs

FORMAT:

	State	
	Name of operating company	
Generic Name of ONA Service[1]	Name that company uses for the service Type of service (i.e. BSA,BSE, and/or CNS) State Tariff Reference Federal Tariff Reference	

SAMPLE:

	Arizona	Colorado
	US West Communications	US West Communications
Alternate Routing	Alternate Traffic Routing BSE AZ Access Services Tariff §6 FCC Tariff No.1 §6	Alternate Traffic Routing BSE CO Access Services Tariff §6 FCC Tariff No.1 §6
Automatic Protection Switching	Automatic Loop Transfer BSE AZ Tariff: NONE FCC Tariff No.1 §7	Automatic Loop Transfer BSE CO Access Services Catalog §7, Tariff §7 FCC Tariff No.1 §7

This chart illustrates the format that should be used for the hard copy display of the ONA data requested in this order. These data should also be submitted to the FCC on diskettes in a format that permits subsets of the data to be selectively sorted (e.g. by particular BSE), retrieved, displayed, and printed. The Common Carrier Bureau is hereby delegated authority to specify the details of the format for electronic submissions.

---

[1] The list of ONA services should include all BSEs, BSAs, and CNSs provided and should not be limited to only those ONA services listed in the ONA Services User Guide.

APPENDIX K

OSS Services

Ameritech. Ameritech states that it has deployed the Ameritech Services Management System (ASMS) in a few states but does not plan further deployment because of a lack of customer demand. Ameritech states that despite several efforts to interest ESPs in three states in ASMS, there are only two paying customers. Ameritech has sought ESP comment on the problem with ASMS. Ameritech does plan to offer a network reconfiguration system enabling customers to perform digital private line service reconfiguration, and ORDERMATE, an order input and status monitoring system. Ameritech Further Amendments, Section V.C. at 2 and Ameritech Reply at 10-13.

Bell Atlantic. Bell Atlantic is developing Intelliview, which is planned for availability in 1992. Initial services planned for Intelliview include service order status, trouble reporting, traffic measurements, inventory, billing management, and customer requested testing. Bell Atlantic Further Amendments at 4-7.

BellSouth. BellSouth's OSS gateway service -- Administrative Management Service (AMS) -- provides: trouble reporting and status, service order entry, access to customer billing information and customer records, miscellaneous messaging to telco, ESSX service station rearrangements, facility monitoring and re-arrangements via FlexServ Service, and administrative reports on service usage. ESSX service station rearrangements allows the customer to rearrange, add, move, and change its ESSX service system configuration. In the future, BellSouth plans to add PIC Inquiry and Order, access service order status, product information, and access billing information. BellSouth Further Amendments at 24-30.

NYNEX. NYNEX states service-specific capabilities are available on Network Reconfiguration Service, Diagnostic Channel on DSO Lines, and Centrex Service. Like SWBT, NYNEX states that it originally offered OSS services through CUSTOMate but found it too costly, operationally difficult, and lacking in customer demand. NYNEX states that it is investigating the possible provision of Universal Feature Control, which would provide customers access to network features for the purpose of activating, changing, and deactivating features to which a customer either subscribes or controls for another party. NYNEX Further Amendments at 8-11 and NYNEX Reply at 14-7.

Pactel. Pactel provides access to OSS through Service Manager, its electronic gateway service. The current OSS capabilities available on Service Manager include service order and status, trouble reporting and status, and service testing. Pactel Further Amendments at 11-4.

SWBT. SWBT is developing an OSS gateway, projected for completion in 1993, that is expected to include such functions as service order entry and status, billing information and service records, trouble reporting and status, testing, and traffic data collection for certain services. SWBT previously provided access to OSS capabilities on a limited basis through Network

Management Service (NMS), based on Bellcore's CUSTOMate Software package, but SWBT states that it withdrew NMS because it had a high cost to low benefit ratio. SWBT Further Amendments at 23-7.

US West. US West has developed service-specific OSS capabilities. US West has developed Traffic Data Report Service, Trouble Resolution for Access Circuits, and Centrex Customer Rearrangement. In addition, US West states that it is currently designing and developing a gateway for third party access to OSS capabilities with deployment planned for mid-1992. The initial applications being considered by US West are trouble administrative services and diagnostic provisioning of reserved DS1 and DS3. US West Further Amendments at 10-12.

APPENDIX L

BOC Databases Containing Comprehensive CPNI

Ameritech. Ameritech states that its databases containing CPNI have either password/ID systems, are not accessible from sales personnel terminals, or exclude blocked accounts. Ameritech Further Amendments at Addendum 6.

Bell Atlantic. Bell Atlantic states that three databases containing CPNI are available to enhanced services personnel. The Business Office Support System (BOSS), the primary database that contains restricted CPNI, is password restricted. The service order processing system (SOP) will not be password restricted for two years, while the Customer Analytical Profile System (CAPS) will be password restricted in the fall of 1991. Bell Atlantic states that the service order processing systems in its various companies are incompatible and must be integrated before a password/ID system is implemented. Bell Atlantic identifies a number of other files that contain CPNI but are not available to enhanced services personnel. Bell Atlantic Further Amendments at 25; Bell Atlantic Reply at 5.

BellSouth. BellSouth states that all primary databases routinely accessed by its enhanced services personnel are subject to password restrictions. BellSouth, however, does not plan to implement a password ID systems for its service order communications system (SOCS), Loop Maintenance Operation System (LMOS), or Trunk Integrated Recordkeeping System (TIRKS). BellSouth indicates that SOCS provides only temporary status information, LMOS and TIRKS provide information only about individual circuits. Therefore, BellSouth argues, password/ID systems are not necessary. BellSouth states that all the other BellSouth databases either have password/ID systems or do not contain CPNI. BellSouth Further Amendments at 43-7.

NYNEX. NYNEX indicates that it has implemented password protection for its primary databases, Customer Record Information (CRIS) and Carrier Access Billing Systems (CABS), and is also implementing a password/ID system for its service order processing (SOP) system. NYNEX does not plan to implement a password/ID system for several marketing files that are not utilized by sales representatives, but plans to deny access to these systems or remove restricted CPNI. NYNEX also indicates that it does not plan to implement password/ID systems for TIRKS, LMOS, PREMIS-LAS (address verification) and Central Office Equipment Assignment (COSMOS), which are infrequently used as auxiliary data bases for specific purposes, but which can be accessed by sales representatives. NYNEX states that PREMIS does not need to be password restricted because it contains fragmented CPNI (name address and telephone number) and is used to validate new account addresses, detect fraud, and assign a telephone number. In addition, the database is segregated only by address. NYNEX Further Amendments at 35-40.

Pactel. Pactel states that it has applied password/ID systems to all its files containing comprehensive as well as fragmented CPNI except PREMIS information system, and CPNI Notifications Database. Pactel notes that PREMIS, a Bellcore system, will not be password restricted, but argues that it does not have to be password restricted because it has only fragmented CPNI and is used to validate customer's addresses. The CPNI Notifications Database provides information about a customer's restriction of its CPNI and does not provide information in a manner useful for marketing personnel. Pactel Further Amendments at 46-51; Pactel Reply at 19.

SWBT. SWBT states that it has implemented password/ID systems for its systems which are routinely accessed by marketing personnel, including BOSS and Southwestern Order Retrieval and Distribution (SORD). SWBT has also implemented password/ID systems for billing systems including Customer Records Information System (CRIS) and Customer Access Billing System (CABS). SWBT has limited enhanced services marketing personnel access to several databases for account segmentation, product tracking, and direct marketing. SWBT does not plan to implement password/ID systems for non-marketing files, which it states are primarily for maintaining the network, including LMOS, TIRKS, and Circuit Installation and Maintenance Package (CIMAP). SWBT also states that it will not implement a password/ID system for PREMIS because it: does not contain information on multiline or billed-to numbers; is terminal restricted; is scheduled for replacement in five years; contains only fragmented CPNI; is not used for marketing; and is used to verify facility and location information. SWBT Further Amendments at 65-70; SWBT Reply at 9-10.

US West. US West password restricts Billing & Order Support System (BOSS), Customer Account Retrieval System (CARS), Customer Order Retrieval System (CORS), Service Order Processing & Distribution (SOPAD), Service Order Negotiation & Retrieval (SONAR), Service Order Logistics & Reference (SOLAR), and Effective Data Gathering Expertise (EDGE). US West does not allow access to Residential Customer Analytic Profile (RCAPS), Regional Marketing Information Environment (RMITE), but does not restrict access to Business Office Archive Retrieval System (BOARS), LMOS, Facility Assignment & Control System (FACS). Service representatives are required to access BOSS to determine whether a customer has restricted its account before accessing these systems. If the account is restricted, the customer is handed to a network-only services representative. US West Further Amendment at 46-51.

APPENDIX M

BSEs Used by the BOCs

Bell Atlantic

1. 800 Service
2. Remote Call Forwarding
3. Make Busy Arrangements
4. Messaging Service Interface--Hunting Service Arrangements
5. High Capacity Digital Handoff Service
6. Uniform Call Distribution Service
7. Closed User Group
8. Reverse Charge Acceptance
9. Call Redirection
10. Auto Call Ports
11. Multiple and Network Address

BellSouth

1. Called/Calling Number Information -- SMDI
2. User Transfer
3. Call Distribution Function Including Queue
4. Multiline Hunt Groups
5. Unlimited Size Hunt Groups
6. Individual Access to Each Port in a Hunt Group
7. X.25 Interface to Packet Switch
8. X.75 Interface to Packet Switch
9. Derived Channels that Comply with UL and NFPA
10. Digital Private Lines
11. Error Detection/Error Correction
12. Clear Access to Derived Channels
13. Virtual Dial Tone
14. Packet Switched Options -- Closed User Group
15. Packet Switched -- Fast Select Packet
16. Packet Switched Options -- Hunt Group
17. Packet Switched Options -- Call Redirection
18. Packet Switched Options -- Direct Call
19. Surrogate Client Numbers

NYNEX

1. Direct Inward Dialing Trunk Side Access
2. Line Hunting Service
3. Uniform Call Distribution and Queuing
4. Simplified Message Desk Interface (SMDI)
5. Custom Calling Services

Pactel

1. Called Directory Number Delivery via DID
2. Message Desk (SMDI)
3. Multiline Hunt Group
4. Multiline Hunt Group:
    - Uniform Call Distribution
    - Line Hunting

SWBT

1. DS1 to Voice Grade Multiplexing

US West

1. Message Delivery Service
2. Call Transfer
3. Uniform Call Distribution
4. Hunting
5. Private Line Conditioning
6. Traffic Data Report Service
7. Called Directory Number Delivery
8. Packet Features:
    - Closed User Groups
    - Flow Control Parameters
    - Logical Channel
    - Logical Channel Layout
    - Multiple Network Addresses

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

November 21, 1991

Statement by
Chairman Alfred C. Sikes
on
Open Network Architecture (ONA) Actions

Today's actions on ONA do not deal with the pricing of unbundled network elements. It is not possible, however, to deal with any facet of the new network architecture without talking about prices. The reason is simple.

Prices today are determined through the application of arcane and complex cost allocation and recovery rules which are established bi-jurisdictionally - that is at the Federal and state levels. Often the way costs are allocated and recovered bears little resemblance to the true costs. All too often prices are well under or over cost because of preferences. It is, in a sense, the American version of old-style Soviet pricing - heavily affected by government direction based on social goals.

The problem is that in recent years technological and market developments have revolutionized the communications sector. New ways of delivering services mean that competition is suddenly possible. This results in either the nascent competitor yelling that he or she cannot compete because the phone company is pricing under cost, or the phone company yelling that regulators should not open it to competition because due to a social goal it is forced to subsidize and, therefore, price way above cost.

This then creates a big problem. And, from my standpoint one of the biggest problems is that if prices are not rationalized to costs, competition will not exert the natural downward pressure on costs and prices. Additionally, if network elements are overpriced, network usage will be discouraged. If in the new information world advanced network usage is encouraged then the smaller users will pay less and less of the plant costs. The perverse fact is that some of the cost allocation rules aimed at helping small consumers could hurt them.

It is for these reasons that the Commission has opened notices on access pricing which impedes local competition. It is for this reason that the Federal-State Joint Board on separations, less than 2 weeks ago in San Antonio agreed to do a comprehensive review of the Federal-State cost allocation and recovery rules.

In short, we need to act on all fronts to both encourage competition, and to encourage the telephone companies and new information providers to provide more innovative services. Our actions today are additional steps in that direction. Today we are making it possible for the Bell Operating Companies to more efficiently serve its customers, we are protecting the Enhanced Service Providers from the potential for cross-subsidization and opening up a new proceeding to look way down the road to determine what more can be done to encourage intelligent networks.

November 21, 1991

SEPARATE STATEMENT OF COMMISSIONER ANDREW C. BARRETT

RE: ONA Actions

I support this Open Network Architecture (ONA) Order which approves additional amendments filed by the BOCs and establishes a set of ONA monitoring provisions. I am confident that this item in conjunction with our companion Notice of Inquiry into future Intelligent Networks is the logical next step in the ONA process. Together, these actions will go a long way towards addressing concerns raised by the Enhanced Service Providers. I am committed to refining the ONA process where needed. Over the long run, ONA should play a large role in encouraging a competitive environment that will permit the development of new and innovative services for the public at large.

ONA is the cornerstone in our efforts to create a network of the future. Access by ESPs is essential to attainment of this Commission's long term network goals. At the same time, our Notice appropriately addresses the relationship between ONA and future network architecture, including the benefits and costs of modularity. The Coalition of Open Network Architecture Parties has challenged us through its petition and presentations on this matter. While we should not prescribe network design concepts, we provide a framework for commenting parties to better address what regulatory changes are necessary to implement the advanced intelligent network of the future.

FCC RECORD

CUMULATIVE INDEX

VOLUME 6

INSTRUCTIONS FOR USE

This cumulative index for Volume 6 of the FCC Record covers the period January 1991 through December 1991. It provides the page number to the FCC Record for each document released to the public.

This index has six sections:

(1) Table of Cases;
(2) Table of FCC and Delegated Authority (DA) Numbers;
(3) Table of Docket Numbers;
(4) Table of Rulemaking Numbers;
(5) Table of Localities; and
(6) Table by Subject Matter.

The Table of Cases is arranged alphabetically except where the first word of the case name is a number. Numbers will appear at the beginning, followed by all upper case letters and finally upper and lower case letters. For example, AZ Co. will appear at the beginning of the "A"s before Able Co.

The Table of FCC and Delegated Authority (DA) Numbers is arranged first by DA then FCC numbers in chronological order by year and then in numerical order.

The Table of Docket Numbers is grouped alphabetically by the Bureau designator, then chronologically by year, and finally, in numerical order.

The Table of Rulemaking Numbers is arranged numerically.

The Table of Localities is arranged alphabetically by city and state.

The Table by Subject Matter is organized alphabetically and is directly related to Title 47 of the Code of Federal Regulations (CFR). The three levels of subject division correspond with the table of contents, rule subparts and rule sections to the CFR. This table is also supplemented with adjudicatory and other statutory topics.

These finding aids were designed to assist with research in the FCC Record. Any corrections and suggestions for improvement should be directed to the FCC, Office of the Secretary, Washington, D.C. 20554 (202) 632-6410, or Shirley Suggs, Chief, Publications Branch (202) 632-0426.

Federal Communications Commission Record

Table of Cases
Volume 6
Issue 1 - 26

Case Name	**Page**
"Memories...Then and Now"	5013
"Studio 22"	5014
1991 Annual Access Charge Tariffs	1854
1991 Annual Access Tariff Filings	2632
21st Century Cellular	4309
AA Beep	2078
AAlert Paging Company of San Francisco	5336
ABL Network, Inc.	4988
ACC Long Distance Corp.	7230
AJP Communications Investment Co., Inc.	55
ALLTEL Service Corporation	5198
ALLTEL Service Corporation	6972
ARC Professional Services Group, Inc.	3544
ARMIS Report 43-04 (The Access Report)	1008
AT&T Communications	41
AT&T Communications	740
AT&T Communications	745
AT&T Communications	905
AT&T Communications	979
AT&T Communications	1516
AT&T Communications	1517
AT&T Communications	2307
AT&T Communications	3994
AT&T Communications	3467
AT&T Communications	3397
AT&T Communications	3739
AT&T Communications	4197
AT&T Communications	4179
AT&T Communications	4315
AT&T Communications	4450
AT&T Communications	4946
AT&T Communications	4866
AT&T Communications	5146
AT&T Communications	5187
AT&T Communications	5304
AT&T Communications	5353
AT&T Communications	5517
AT&T Communications	5615
AT&T Communications	5648
AT&T Communications	5677
AT&T Communications	5675
AT&T Communications	5813

Case Name	Page
AT&T Communications	6591
AT&T Communications	6690
AT&T Communications	6652
AT&T Communications	6656
AT&T Communications	7039
AT&T Communications	7152
AT&T Communications	7005
AT&T Communications	7461
AT&T Communications v. Pacific Bell and Nevada Bell	5170
AT&T Communications v. Southwestern Bell Telephone Company	444
AT&T and Local Exchange Carriers - Cost Allocation Manuals	445
AT&T's Comparbly Efficient Interconnection Plan	1506
Abacus Broadcasting Corp.	7182
Acceptance of 220-222 MHz Private Land Mobile Applications	3333
Acceptance of 929-930 MHz One-Way Paging Applications	6024
Acceptance of 929-930 MHz One-Way Paging Applications	6825
Access Billing Requirements for Joint Service Provision	2803
Access Long Distance Corporation	615
Access Long Distance Corporation	649
Access Long Distance Corporation	7291
Achernar Broadcasting Company	1748
Achernar Broadcasting Company	5393
Ackerman, Eve	5277
Act III Broadcasting of Rochester, Inc.	7479
Advanced Communications Corporation	2269
Advanced Communications Corporation	6977
Advanced Technology Cellular Telecommunications	6693
Advanced Technology Cellular Telecommunications	7236
Advanced Technology Cellular Telecommunications	7527
Advanced Telecommunications Corporation, and its Subsidiaries	656
Advanced Television Systems	7024
Advisory Committee on Advanced Television Service	79
Advisory Committee on Advanced Television Service	276
Advisory Committee on Advanced Television Service	1523
Advisory Committee on Advanced Television Service	1565
Advisory Committee on Advanced Television Service	2088
Advisory Committee on Advanced Television Service	2220
Advisory Committee on Advanced Television Service	5201
Advisory Committee on Advanced Television Service	6149
Advisory Committee on Advanced Television Service	7462
Afford-A-Call Corp.	1747
Agana Guam FM Radio Limited Partnership	2469
Alascom, Inc.	2969
Alascom, Inc.	3636
Alascom, Inc.	4703
Albany Region Public Safety Plan	3430

Case Name	Page
Albert, Marc A.	13
Albert, Marc A.	2603
Albert, Marc A.	7160
Aldridge, Joe L.	994
Alexander, Lenora	4440
Algreg Celluar Engineering	3549
Algreg Cellular Engineering	2921
Algreg Cellular Engineering	5299
Algreg Cellular Engineering	5185
Alhambra-Grantfork Telephone Company	1381
Allnet Communication Services, Inc.	645
Allnet Communication Services, Inc.	980
Allnet Communication Services, Inc.	1515
Allnet Communication Services, Inc.	2608
Allnet Communication Services, Inc.	5663
Allnet Communication Services, Inc.	7289
Allnet Communications Services, Inc.	7284
Allvend, Inc.	6031
Alpha Lyracom Carrier Services, Inc.	5039
Altamaha Broadcasting	2098
Altamaha Broadcasting	3456
Alternative Dispute Resolution Procedures	2267
Alternative Dispute Resolution Procedures	5669
Amateur Radio Handicap Accessibility	5083
Amateur Transceivers Reception	1305
Amateur Volunteer Examiners Reimbursement Fee	6094
Amendment of Part 0 - Information Collection Requirements	5589
Amendment of Part 1 - Anti-Drug Abuse Act of 1988	7551
Amendment of Part 1 - Computation of Time	4797
Amendment of Part 15 - Cordless Telephone Operation	434
Amendment of Part 15 - Frequency Devices	3593
Amendment of Part 15 - Home Automation/Communication Technology	5409
Amendment of Part 15 - Television Decoder	2420
Amendment of Part 15 - Television Decoder Circuity Act of 1990	449
Amendment of Part 2 - Radio Frequency Devices	3296
Amendment of Part 2 - Radio Frequency Devices	5958
Amendment of Part 22 - Air-Ground Service	4582
Amendment of Part 22 - Cellular Service Applications	6185
Amendment of Part 22 - Cellular Service Applications	6158
Amendment of Part 25 - Satellite Communications	2806
Amendment of Part 36 - Establishment of a Joint Board	2936
Amendment of Part 36 - Establishment of a Joint Board	4481
Amendment of Part 36 - Establishment of a Joint Board	5680
Amendment of Part 36 - MTS and WATS Market Structure	547
Amendment of Part 63 - Environmental Rules	1716
Amendment of Part 63 - Service Disruptions of Carriers	5531

Case Name	Page
Amendment of Part 67(New Part 36) - Federal-State Joint Board	383
Amendment of Part 69 - Access Charge Rules	4524
Amendment of Part 73 - Broadcast Hoaxes	6935
Amendment of Part 73 - Commercial FM Broadcast Applications	7265
Amendment of Part 73 - Emergency Broadcast System	6739
Amendment of Part 73 - FM Station (Class C3)	3417
Amendment of Part 73 - Short-Spaced Criteria (ERRATUM)	6537
Amendment of Part 73 - Short-Spaced FM Station Assignments	5777
Amendment of Part 73 - Short-Spacing Criteria	5356
Amendment of Part 74 - FM Booster Stations	6060
Amendment of Part 74 - FM Translator Stations	1820
Amendment of Part 74 - FM Translator Stations	2163
Amendment of Part 74 - FM Translator Stations	2334
Amendment of Part 74 - Use of Digital Voice Emission	3457
Amendment of Part 80 - Correspondence Channels 156-162 MHz Band	5991
Amendment of Part 80 - Frequency Coordinator	714
Amendment of Part 80 - High Frequency Channels	4232
Amendment of Part 80 - Ship Earth Station Equipment	5989
Amendment of Part 80 - Ship Station Transmitters	310
Amendment of Part 80 - Synthesized Voice on VHF Marine Channel 16	5994
Amendment of Part 80 - VHF Channels 67 and 72	506
Amendment of Part 80 - VHF Ship Station Transmitters	5985
Amendment of Part 87 - Air-To-Air Frequencies	1985
Amendment of Part 87 - Aviation Frequency Tolerance	4692
Amendment of Part 90 - Emergency Medical Radio Service	2017
Amendment of Part 90 - Fixed Tone Signaling and Alarm Operations	6898
Amendment of Part 90 - Private Land Mobile Frequencies	542
Amendment of Part 90 - Private Land Mobile Radio Stations	446
Amendment of Part 90 - Relocation of Frequency Privileges	337
Amendment of Part 90 - Revising Authorized Bandwidths	2145
Amendment of Part 90 - Secondary Fixed Operations	1800
Amendment of Part 90 - Short Spacing of Mobile Radio Systems	4929
Amendment of Part 90 - Short Spacing of SMRS (ERRATUM)	6650
Amendment of Part 90 - Specialized Mobile Radio Systems	975
Amendment of Part 90 - Use of the 220-222 MHz Band	2356
Amendment of Part 90 - Use of the 220-222 MHz Band	4229
Amendment of Part 90.69 - Motion Picture Radio Service	1966
Amendment of Part 94 - Multiple Address System Frequencies	3721
Amendment of Part 94 - Video Distribution Systems	1270
Amendment of Part 94 - Video Entertainment	7133
Amendment of Part 95 - Technical Standards	1975
Amendment of Part 97 - Amateur Radio Service	4811
Amendment of Part 97 - Amateur Radio Service (ERRATUM)	5147
Amendment of Parts - 21, 43, 74, 78, and 94 - Wireless Cable	6764
Amendment of Parts 0, 1, 2 and 95 - Video Data Services	1368
Amendment of Parts 0,1,2, and 95 - Emergency Locator Transmitter	4813

Case Name	Page
Amendment of Parts 1 and 90 - Private Land Mobile Radio	7297
Amendment of Parts 1, 21, 22, 74, and 94 - Fixed Service	7238
Amendment of Parts 1, 21, 22, 74, and 94 - Fixed Service Usage	4320
Amendment of Parts 13 and 80 - Distress and Safety Systems	6
Amendment of Parts 2 and 25 - Orb-85/Orb-88 Implementation	1750
Amendment of Parts 2 and 80 - Automated Maritime Communications	437
Amendment of Parts 2 and 80 - High Frequency Channels	786
Amendment of Parts 2 and 80 - Maritime Telecommunications Systems	2171
Amendment of Parts 2 and 87 - Aviation Services	2291
Amendment of Parts 2 and 87 - Use of 143.75 MHz Band	5413
Amendment of Parts 2 and 90 - Stolen Vehicle Recovery Systems	622
Amendment of Parts 2 and 97 - Allocation of the 216-220 MHz Band	4578
Amendment of Parts 2, 22 and 25 - Mobile Satellite Service	4900
Amendment of Parts 2, 73, 74, and 78 - Authorization Procedures	1989
Amendment of Parts 21 and 94-Rechannelization of Frequency Bands	972
Amendment of Parts 21, 43, 74, 78 and 94-Microwave Radio Services	6792
Amendment of Parts 21, 43, 74, 78, and 94 - Frequency Use (ERR)	7232
Amendment of Parts 80 and 87 - Emergency Locator Transmitters	1456
Amendment of Rules - Auxilliary and Non-Common Carrier Services	7466
Amendment of Rules for Auxilliary and Non-Common Carrier Services	6827
Amendment of Section 2.106 - Computing Devices	1566
Amendment of Section 2.106 - Low-Earth Orbit Satellites	6653
Amendment of Section 2.106 - Mobile Satellite Service	5932
Amendment of Section 22.521(b) - Air-Ground Stations	1863
Amendment of Section 22.521(b) - Air-ground Stations	2238
Amendment of Section 43.61 - Telecommunications Traffic	1424
Amendment of Section 61.58(a)(2)-Notice Periods for Tariff Filing	275
Amendment of Section 73.3525 - Settlement Agreements	2901
Amendment of Section 73.3525 - Settlement Agreements	5703
Amendment of Section 73.3535 - Settlement Agreements	85
Amendment of Section 90.21 - Fire Radio Service Output Power	3426
Amendment of Sections 1.23 and 1.24 - Temporary Suspensions	2203
Amendment of Sections 1.420 and 73.3584	3380
Amendment of Subpart S of Part 90 - Licensing in the 800 MHz Band	4766
Amendment of the Amateur Service Rules	4433
Amendment of the Maritime Service Rules (Part 80)	3484
Amendment of the Maritime Services Rules (Part 80)	1969
Amendments to Part 97 - Amateur Radio Services	5978
Americall Systems of Louisville	698
American Airlines, Inc.	5987
American Cellular Services U.S.	65
American Mobile Satellite Corporation	1811
American SMR Network Association, Inc.	1913
American Telecommunications Corporation	241
American Telephone & Telegraph	115
American Telephone & Telegraph Co.	234

Case Name	Page
American Telephone & Telegraph Co.	1962
American Telephone & Telegraph Co.	2338
American Telephone & Telegraph Co.	2552
American Telephone and Telegraph Co.	732
American Telephone and Telegraph Co.	1580
American Telephone and Telegraph Co.	1581
American Telephone and Telegraph Co.	1768
American Telephone and Telegraph Co.	7189
American Telephone and Telegraph Co.	7191
American Telephone and Telegraph Co.	7192
American Telephone and Telegraph Company	44
American Telephone and Telegraph Company	357
American Telephone and Telegraph Company	375
American Telephone and Telegraph Company	377
American Telephone and Telegraph Company	425
American Telephone and Telegraph Company	742
American Telephone and Telegraph Company	651
American Telephone and Telegraph Company	998
American Telephone and Telegraph Company	1250
American Telephone and Telegraph Company	1251
American Telephone and Telegraph Company	1362
American Telephone and Telegraph Company	1446
American Telephone and Telegraph Company	1594
American Telephone and Telegraph Company	1689
American Telephone and Telegraph Company	1741
American Telephone and Telegraph Company	1742
American Telephone and Telegraph Company	1817
American Telephone and Telegraph Company	1895
American Telephone and Telegraph Company	1897
American Telephone and Telegraph Company	1997
American Telephone and Telegraph Company	2321
American Telephone and Telegraph Company	2330
American Telephone and Telegraph Company	2567
American Telephone and Telegraph Company	2870
American Telephone and Telegraph Company	3329
American Telephone and Telegraph Company	3687
American Telephone and Telegraph Company	3645
American Telephone and Telegraph Company	4211
American Telephone and Telegraph Company	4311
American Telephone and Telegraph Company	4313
American Telephone and Telegraph Company	4316
American Telephone and Telegraph Company	4426
American Telephone and Telegraph Company	4982
American Telephone and Telegraph Company	4790
American Telephone and Telegraph Company	4870
American Telephone and Telegraph Company	4872

Case Name	**Page**
American Telephone and Telegraph Company	4875
American Telephone and Telegraph Company	4839
American Telephone and Telegraph Company	4884
American Telephone and Telegraph Company	4983
American Telephone and Telegraph Company	5261
American Telephone and Telegraph Company	5263
American Telephone and Telegraph Company	5272
American Telephone and Telegraph Company	5612
American Telephone and Telegraph Company	5661
American Telephone and Telegraph Company	5811
American Telephone and Telegraph Company	5865
American Telephone and Telegraph Company	6654
American Telephone and Telegraph Company	6934
American Telephone and Telegraph Company	7038
American Telephone and Telegraph Company	7473
American Telephone and Telegraph Company (ERRATUM)	1890
American Telesystems and TeleConcepts, Inc.	1406
American Teltronix	1942
Ameritech Operating Companies	415
Ameritech Operating Companies	694
Ameritech Operating Companies	746
Ameritech Operating Companies	1348
Ameritech Operating Companies	1541
Ameritech Operating Companies	2085
Ameritech Operating Companies	3716
Ameritech Operating Companies	4944
Ameritech Operating Companies	5186
Ameritech Operating Companies	7472
Amherst Telephone Company	1795
Anchor Broadcasting Limited Partnership	721
Anderson Cablevision v. Duke Power Company	1562
Annual 1988 Access Tariff Filings	4156
Annual 1988 Access Tariff Filings	4415
Annual 1988 Access Tariff Filings	6103
Annual 1991 Access Tariff Filings	3792
Annual Report Form M - Conversion to Metric System	3387
Answering Service & Doctor's Exchange	1885
Applications of Certain TV Stations - California	2340
Arizona Public Safety Plan	2906
Arizona Public Safety Plan	4802
Arizona Region Public Safety Plan	5335
Arizona Western College	7476
Arkansas Educational Television Commission	478
Arms, Lorraine Walker	1777
Arms, Lorraine Walker	5586
Ascom Autelca Communications, Ltd.	4989

Case Name	**Page**
Aspen FM, Inc.	1602
Aspen FM, Inc. (ERRATUM)	4981
Asset Management Corporation	6538
Atlantic City Community Broadcasting, Inc.	925
Atlantic Radio Communications, Inc.	4716
Atlantic Tele-Network, Inc.	6529
Automatic Transmitter Identification System	1852
Automatic Transmitter Identification System	2470
Auxiliary Services - Definition of Congested Areas	291
B.F. Investments, Inc.	7127
BSN Telecom Co.	6938
Bahr, Joseph	4488
Baker Communications Company	4444
Baldwin, Bruce W.	2571
BankAmerica Corporation	2588
Banner Broadcasting Corporation	1900
Barger, John W.	2261
Baton Rouge MSA Limited Partnership	5948
Bay, Susan H.	326
Beach Broadcasting Limited Partnership	885
Beach Broadcasting Limited Partnership	4485
Beauchamp, Susan	490
Beaver Springs Broadcasting Limited	3359
Bee Broadcasting Associates, A Limited Partnership	3347
Bell Atlantic	1559
Bell Atlantic Operating Companies	2542
Bell Atlantic Telephone Companies	46
Bell Atlantic Telephone Companies	971
Bell Atlantic Telephone Companies	1436
Bell Atlantic Telephone Companies	1595
Bell Atlantic Telephone Companies	1813
Bell Atlantic Telephone Companies	2907
Bell Atlantic Telephone Companies	2908
Bell Atlantic Telephone Companies	4462
Bell Atlantic Telephone Companies	4617
Bell Atlantic Telephone Companies	4891
Bell Atlantic Telephone Companies	4794
Bell Atlantic Telephone Companies	6141
Bell Atlantic Telephone Companies	7241
Bell Atlantic and NYNEX	4792
Bell Atlantic's Waiver to Offer Coin Message Delivery Service	3400
Bell Operating Companies	6933
BellSouth	47
BellSouth Corporation	3336
BellSouth Corporation	4196
BellSouth Corporation	4405

Case Name	Page
BellSouth Services	3743
BellSouth Telephone Companies	43
BellSouth Telephone Companies	373
BellSouth Telephone Companies	447
BellSouth Telephone Companies	1592
BellSouth Telephone Companies	2106
BellSouth Telephone Companies	3686
BellSouth Telephone Companies	5591
BellSouth's Petition for Waiver of Computer II	1807
BellSouth's Petition for Waiver of Computer II	6544
Benns, Michael J.	2182
Benns, Robert A.	902
Benns, William E., IV	2322
Benns, William E., IV	6997
Benton Ridge Telephone Company	1615
Berkman, David	[illegible]
Bernstein, Edwin A.	6840
Bernstein, Edwin A.	6841
Bible Broadcasting Network, Inc.	3576
Bible Broadcasting Network, Inc.	5760
Big Country Communications	1247
Big Island Broadcasting Company, Ltd.	422
Black Hills Christian Communications, Inc.	500
Black Television Workshop of Los Angeles, Inc.	381
Black Television Workshop of Los Angeles, Inc.	4431
Black Television Workshop of Los Angeles, Inc.	6525
Boedker, Rebecca L.	2557
Bomberger, John D.	880
Bowen, Carol Sue	10
Bowman, Carol Sue	869
Bowman, Carol Sue	4723
Branstine Flying Service, Inc.	2787
Branton, Peter	610
Briarwood Presbyterian Church	536
Broadcast Auxiliary Services and Cable TV Relay Service	5658
Broadcast Character Requirements	4787
Broadcast Character Requirements (ERRATUM)	5017
Brown, Susan D.	4407
Brown, Susan D.	7210
Bryant, Joseph F.	6121
Bundling of Cellular Equipment and Cellular Service	3374
Busch, Kelly Vaughan	59
Butler, Robert J.	5414
Butte Cellular Group	6745
C&W Communications, Inc.	3431
C,C&S Telco, Inc.	349

Case Name	Page
C-Band Satellite Orbital Spacing Policies	1844
C-TEC Cable Systems of Michigan, Inc.	5549
CICI, Inc.	4270
CICI, Inc.	4984
CICI, Inc.	5568
CICI, Inc.	5789
COM Systems, Inc. v. Pacific Bell	2949
COMSAT General Corporation	347
COMSAT General Corporation	1576
CPS Operator Services, Inc.	242
CPS Operator Services, Inc.	6720
CR Broadcasting	1384
CR Broadcasting	4180
CRB of Florida, Inc.	2303
Cable & Wireless Communications, Inc.	33
Cable & Wireless Communications, Inc.	236
Cable & Wireless Communications, Inc.	697
Cable & Wireless Communications, Inc.	5674
Cable Television Basic Service Rates	208
Cable Television Basic Service Rates	617
Cable Television Basic Service Rates	4545
Cable Television Technical and Operational Requirements	3673
Cable Television Technical and Operational Requirements	6588
Cable and Wireless Communications, Inc.	613
Cable and Wireless Communications, Inc.	2235
Caddo Broadcasting Company	2007
Cagal Cellular Communications Corporation	285
Cagal Cellular Communications Corporation	401
Caggiano, Christian R.	904
California Broadcasting Corporation	283
California State University, Long Beach Foundation (KLON-FM)	5752
Call America Inc.	699
Call America, Inc.	4319
Call West	6941
Caller Number Identification Service	6752
CanXus Broadcasting Corporation	5399
Cannon Communications Corporation	570
Cannon Communications Corporation	3310
Capital Cities Cable, Inc.	6651
Capital Network Systems, Inc.	5609
Capital Network Systems, Inc.	6707
Capital Telecommunications, Inc.	4318
Capitol City Broadcasting Company	5525
Capitol City Broadcasting Company	5621
Capobianchi, Rita A.	4631
Cardwell Broadcasting	5109

Case Name	Page
Cardwell Broadcasting	6561
Carey, Julie J.	1366
Caribbean Americas Telecommunications Corp.	5275
Carmel Broadcasting Limited Partnership	3287
Carmel Broadcasting Limited Partnership	4633
Carriers File Revisions to Cost Allocation Manuals	2152
Catalina Radio, A California Limited Partnership	687
Cellular Bundling Policies	1732
Cellular Bundling Policies	3332
Cellular Electronics, Inc.	7483
Cellular Resale Policies	1719
Cellular Resale Policies	4827
Cellular of Northwest Ohio, Inc.	1217
Cellutech	736
Cencom of Kentucky	7558
Centel Telephone Companies	1001
Centel Telephone Companies	5144
Centel Telephone Companies	5271
Center for Study and Application of Black Economic Development	4622
Central Atlantic Payphone Association	3546
Central Florida Communications Group, Inc.	522
Central Radio Telegraph Co.	7188
Centrapage of Vermont, Inc.	273
Century Cellunet of Jackson MSA Limited Partnership	6150
Century Chicago Broadcasting, Ltd.	7246
Cereus Broadcasting Company	4158
Certain Broadcast Stations - Alabama and Georgia	5968
Certain Broadcast Stations - Indiana and Tennessee	5637
Certain Broadcast Stations Serving the State of Arkansas	4938
Certain Commercial Television Stations - Philadelphia, PA	4191
Champion Industries, Inc.	7124
Changing Video Marketplace	4961
Channel 32 Broadcasting Company	872
Channel 32 Broadcasting Company	5188
Channel 41, Inc.	4109
Channels for Industrial Cranes	1712
Character Qualifications in Broadcast Licensing	3448
Charisma Broadcasting Corporation	3411
Charter Network Company	292
Charter Network Company	1404
Charter Network Company, L.P.	643
Charter Network Company, L.P.	7292
Chartways Technologies, Inc. v. AT&T Communications	2952
Chase, Arnold L.	7387
Cherokee Broadcasting Corporation	1706
Cherokee Broadcasting Corporation	3624

Case Name	Page
Cherokee Communications, Inc.	3683
Cherokee Communications, Inc.	6700
Cherokee Communications, Inc.	7526
Chesapeake and Potomac Telephone Company	6542
Chicago MDS Company	5367
Chickasaw Telephone Company	4990
Children's Television Programming	2111
Children's Television Programming	3535
Children's Television Programming	5093
Children's Television Programming	5529
Chronicle Cellular	4449
Chronicle Publishing Company	7497
Cincinnati Bell Telephone Company	970
Cincinnati Bell Telephone Company	1309
Cincinnati Bell Telephone Company	1598
Cincinnati Bell Telephone Company	3501
Cincinnati Bell Telephone Company	4284
Cincinnati Bell Telephone Company	7538
Cincinnati Bell's Cost Allocation Manual	713
Cincinnati SMSA Limited Partnership	605
Cincinnati TV 64 Ltd.	7522
Clarksville Radio	2505
Classes A,B and S Emergency Position Indicating Radiobeacons	1462
Classic Radio, Inc.	1835
Cle Broadcasting Limited Partnership	865
Clover Communications, Inc.	324
Coastal Broadcasting Partners	4242
Codification of Political Programming Policies	4499
Codification of Political Programming Policies	5707
Collins, Jerry J.	4382
Colonial Communications, Inc.	2296
Columbia Bible College Broadcasting Co.	516
Columbia Cellular Telephone Company	1408
Columbus Telephone Company, Inc.	6943
Com Systems, Inc.	293
Com Systems, Inc.	648
Com Systems, Inc.	5732
Com Systems, Inc.	6727
Com Systems, Inc.	7294
ComEx, Inc.	3370
Common Carrier Paging Frequencies(ERRATUM)	356
Common Carrier Public Mobile Services Information	4261
Commonwealth Long Distance Company	1410
Communications Professionals v. Southwestern Bell Corporation	5173
Communications Satellite Corp.	1412
Communications Satellite Corporation	379

Case Name	Page
Communications Satellite Corporation	1269
Communications Satellite Corporation	2348
Communications Satellite Corporation	2891
Communications Satellite Corporation	3713
Communications Satellite Corporation	3715
Communications Satellite Corporation	4292
Communications Satellite Corporation	4654
Communications Satellite Corporation	4822
Communications Satellite Corporation	4979
Communications Satellite Corporation	5765
Communications Satellite Corporation	5862
Communications Satellite Corporation	7187
Communications Satellite Corporation	7353
Communications Satellite Corporation (ERRATUM)	4845
Community Service Telecasters, Inc.	6026
Community Television of Southern California (KCET-TV)	4995
Comparative Hearing Process	157
Comparative Hearing Process to Expedite the Resolution of Cases	3472
Compass Rose Communications Corp.	1518
Compass Rose Communications Corp.	4959
Competition in the Interstate Interexchange Marketplace	5880
Competition in the Interstate Interexchange Marketplace	7255
Competition in the Interstate Interexchange Marketplace	7569
Competitive Telecommunications Association	639
Competitive Telecommunications Association, Inc.	399
Competitive Telecommunications Association, et al	7288
Composition NECA's Board	3391
CompuPlex, Inc.	987
Computer II Remand Proceedings	983
Computer III Remand	174
Computer III Remand Proceedings	7571
Comsat General Corporation	3345
Conestoga Telephone & Telegraph Company	894
Conquest Telecommunications, Inc.	6713
Constellation Communications, Inc.	5212
Consumer Alert Toll Fraud	2327
Contel Cellular, Inc.	2080
Contel Corporation	1003
Contel Federal Systems	2944
Contel Federal Systems	7263
Contel Telephone Companies	1590
Contel Telephone Companies	3468
Contel Telephone Companies	6157
Contel Telephone Operating Companies	1880
Continental Cablevision of Jacksonville, Inc.	951
Continental Cellular	6834

Case Name	**Page**
Continental Cellular (ERRATUM)	7205
Continental Illinois Venture Corporation	1944
Continental Intercell, Inc.	1958
Coosa Radio Partnership	3617
Corporate Telecom Services, Inc.	5814
Correction of Parts 73 and 76	5681
Cost Allocation Manual - Format and Filing Procedures	7536
Cost Support Material for 1991 Annual Access Tariffs	1641
Cox Cable Humboldt, Inc.	6845
Cross Country Telecommunications, Inc.	4614
Cybertel Cellular Telephone Company	4403
DLB Broadcasting, Partnership	2164
Dailey and Reich	4672
Dalton Group, Inc.	646
Dana Communications, Ltd.	5382
Danbury Cellular Telephone Company, Inc.	4186
Dann Comm Paging	3550
Data Investments, Inc.	4496
Davis, James T.	5044
Dean F. Aubol and Keith W. Horton	4117
Deferral of Rate of Return Represcription	5863
Depreciation Rate Changes	1610
Depreciation Rate Prescriptions	5015
Detariffing of Customer Premises Equipment and Enhanced Services	6006
Devlin, Peter Joseph and Patricia Eve	5850
Dial Page, L.P.	4702
Dial-- Net, Inc.	2490
Diaz, Carmen	4712
Digesu, Frank, Sr.	4683
Digital Devices	600
Digital Devices (ERRATUM)	1605
Digital Paging	4646
Digitran Corporation	262
Direct Broadcast Satellite Service	2581
Discount Discs	5960
Discrimination in the Network Station Programming	3312
Display Standards for Television Closed-Captioning Decorders	3685
Diversified of Tennessee, Inc.	701
Dobronski, Mark W.	7561
Dontron, Inc.	2560
Dorothy O. Schulze and Deborah Brigham	4218
Dorothy O. Schulze and Deborah Brigham	6981
Dorothy O. Schulze and Deborah Brigham	7419
Downtown Copy Center	4325
Duffy II Corporation	1812
Duffy II Corporation	1876

Case Name	Page
ELBA Development Corporation (KQTV-TV)	1564
Earlimart Education Foundation Inc.	528
Earth Station Environmental Evaluation	1558
Eastern Carolina Broadcasting Company, Inc.	6154
Eastern Microwave, Inc.	5518
Edens Broadcasting, Inc. (WRBQ-FM)	4327
Editorial Amendment of Part 95, Subpart A (ERRATUM)	1601
Editorial Amendment of Part 97 - Amateur Radio Service	2333
Edmisson/Eubank Communications Incorporated	253
Educational Information Corporation	2207
Ellipsat Corporation	4507
Emergency Broadcasting System	4264
Emision De Radio Balmeseda, Inc.	5239
Emision De Radio Balmeseda, Inc.	6830
Emmis Broadcasting Corp. of St. Louis	2289
Empire State Broadcasting Corporation (WWKB)	418
Empire State Broadcasting Corporation (WWKB)(ERRATUM)	616
Equal Access Requirements for Independent Telephone Companies	1575
Escriva, Margaret	955
Escriva, Margaret	4455
Escriva, Margaret	5391
Evan Doss, Jr., Corporation	494
Evansville Skywave, Inc.	1356
Evansville Skywave, Inc.	5373
Evergreen Broadcasting Company	1606
Evergreen Broadcasting Company	5599
Evergreen Media Corporation (WLUP-AM)	5950
Evergreen Media Corporation of Chicago AM	502
Evergreen Media Corporation of Chicago AM (WLUP-AM)	3708
Ex Parte Contacts in AT&T's Tariff No. 12	2086
Execuline of Sacramento, Inc.	700
Execuline of Sacramento, Inc.	5964
Expanded Interconnection with Local Telephone Company	7151
Expanded Interconnection with Local Telephone Company Facilities	3259
Expanded Interconnection with Local Telephone Company Facilities	5809
F.E.M. Ray, Inc.	573
F.E.M. Ray, Inc.	4238
FCVS Communications	3670
FM Table of Allotments	7346
Faber, Walter P., Jr.	3601
Faith Bible College	7370
FaxCheck Systems	7474
Federal/State Joint Conference on Open Network Architecture	2631
Federal/State Joint Conference on Open Network Architecture	7149
Fee Collection Program	5919
Fee Decisions of Managing Director	7317

Case Name	Page
Fee Decisions of the Managing Director	1435
Fee Decisions of the Managing Director	2008
Fee Decisions of the Managing Director	2553
Fee Decisions of the Managing Director	3469
Fee Decisions of the Managing Director	4810
Fee Decisions of the Managing Director	5325
Fee Decisions of the Managing Director	5646
Fee Decisions of the Managing Director	7057
Fenwick Island Broadcast Limited Partnership I	1608
Fiberline Network Communications, Limited Partnership	1887
Filing Requirements for Pioneer's Preference	3720
Fire Radio Service Call Box Operations	5626
First Media of Monterey, Inc.	7385
First Phone of New England, Inc.	661
Fleet Call, Inc.	1533
Fleet Call, Inc.	6989
Florida 10 RSA Limited Partnership	4469
Florida Cellular Mobil Communications Corporation	6910
Florida Cellular Mobile Communication Corporation	354
Florida Public Safety Plan	5614
Florida Public Safety Plan	7180
Florida Region Public Safety Plan	2607
Florida's Regional Public Safety Plan	1563
Fort Mojave Indian Tribe	3402
Fort Mojave Indian Tribe	6852
Fox Broadcasting Company	2622
Fox Communications Corporation	244
Fox Communications Corporation	5233
Fox Television Stations, Inc.	7120
Frederick & Warinner	2483
Frequency Changes for Mobile Stations Between 4000 and 27500 kHz	824
Fresno FM Limited Partnership	1570
Fresno FM Limited Partnership	6998
Friends of WFMT, Inc.	3536
GE American Communications, Inc.	31
GENCOM, Inc.	245
GTE Airfone Incorporated	4435
GTE Hawaiian Telephone Co., Inc.	2205
GTE Hawaiian Telephone Co., Inc.	5289
GTE Hawaiian Telephone Co., Inc.	5755
GTE Hawaiian Telephone Co., Inc.	6535
GTE Hawaiian Telephone Company, Inc.	6922
GTE Mobilnet of Indiana Limited Partnership	1521
GTE Mobilnet of Indiana Limited Partnership	7488
GTE Service Corporation	4874
GTE Southwest	638

Case Name	Page
GTE Spacenet Corp.	6032
GTE Spacenet Corporation	2233
GTE Spacenet Corporation	6926
GTE Telephone Operating Companies	1894
Galesburg Broadcasting Company	2210
Galiano, Juan	895
Garden State Broadcasting Limited Partnership	4762
Gary, Albert E.	4334
General Services Administration	5873
General Telephone Operating Companies	6109
Georgia Public Telecommunications Commission	2841
Geostar Positioning Corporation	2276
Geostar Positioning Corporation (ERRATUM)	2882
Gifford Orion Broadcasting, Ltd.	6494
Gila River Telecommunications, Inc.	5145
Gillet Broadcasting of Maryland, Inc.	81
Givens, Roxanne	873
Givens, Roxanne	2961
Givens, Roxanne	6909
Global Communications, Inc.	4887
Global Information Technologies, Inc.	6912
Godwin, Annette B.	899
Golden Eagle Communications, Inc.	5127
Gomez, Jhonny V.	6004
Goodlettsville Broadcasting Company, Inc.	5651
Goodlettsville Broadcasting Company, Inc.	6139
Goodrich Broadcasting, Inc.	2178
Goodrich Broadcasting, Inc.	7484
Granite State Educational Fellowship, Inc.	540
Grants Pass Broadcasting, Corp.	263
Graphnet, Inc.	1444
Graphnet, Inc.	1767
Great American Media, Limited I	2172
Great American Television (WFBQ-FM)	3692
Great Lakes Broadcasting, Inc.	4331
Great Scott Broadcasting	2168
Great Scott Broadcasting	5087
Guy Gannett Publishing Company (WZTA-FM)	3702
HS Communications, Inc.	3452
HS Communications, Inc.	3609
HVS Partners	5397
Haefner, Jeanne T.	5292
Haley, Sharron Annette	1567
Haley, Sharron Annette	4630
Halpert and Company, Inc.	2548
Hara Broadcasting, Inc.	7208

Case Name	**Page**
Harbor Islands Broadcasting, Inc.	63
Harrison County Broadcasting Co.	1386
Harrison County Broadcasting Co.	5819
Hearing Aid Compatibility Requirements	4799
Hearing Process to Expedite the Resolution of Cases	3403
Heart of Georgia Broadcasting	3518
Heart of the Lakes Broadcasting	495
Heart of the Lakes Broadcasting	5879
Heartline Communications, Inc.	5953
Helen Broadcasters, Inc.	6064
Henderson, Joyce H.	947
Hendren, Gayla Joy	576
Heritage Cablevision Associates of Dallas, L.P.	7099
Hier, Nancy C.	4442
Hodges, James Eugene	1842
Home Satellite Earth Station Receivers	725
Homewood Superior Broadcasters, Ltd.	2167
Houston Area Public Safety Plan	5751
Houston Area Regional Public Safety Plan	4263
Hubbard Broadcasting, Inc.	2045
Hughes Communications Galaxy Corporation	297
Hughes Communications Galaxy, Inc.	72
Hughes Communications Galaxy, Inc.	5257
Hughes-Moore Associates, Inc.	889
Hughes-Moore Associates, Inc.	1984
Hughes-Moore Associates, Inc.	2093
Hye Crest Management, Inc.	332
ICON Communications Corp.	1745
IDB Aero-Nautical Communications, Inc.	5962
IDB Aeronautical Communications, Inc.	2485
IDB Communications Group, Inc.	314
IDB Communications Group, Inc.	2932
IDB Communications Group, Inc.	4652
IDB Communications, Inc.	4404
IDB International	2866
IDB International	4289
IT&E Overseas, Inc.	7186
ITT Communications Services, Inc.	2915
Illinois Consolidated Telephone Company	6648
Illinois Public Safety Plan	5764
Illinois Regional Public Safety Plan	4711
Imagists	2963
Imagists	7440
In-Flight Phone L.P. v. GTE Airfone Incorporated	6081
Independent Group Limited Partnership (WWWE-AM)	3711
Independent Telephone Companies	3714

Case Name	Page
Indian Cellular Telephone Company/NY#4	6856
Industrial Communications, Inc.	264
Information Meeting - Tariff Division Public Reference Room	5611
Integration of Rates and Services	2630
Intellicall Vending, Inc.	5276
Intelligent Networks	7256
Interconnection with Local Telephone Company Facilities (ERRATUM)	4818
Interfaith Christian Union, Inc.	7362
International Access Ltd.	1888
International Common Carrier Services	290
International Pacific, Inc.	6733
International Standards for ISM Equipment	6501
International Telecom, Inc.	1964
Interstate 900 Telecommunications Services	1857
Interstate 900 Telecommunications Services	2589
Interstate 900 Telecommunications Services	6166
Interstate Cellular, Inc.	402
Investigation of Advanced Intelligent Network	443
Investigation of Advanced Intelligent Network	598
Investigation of Telecaribe Corporation	5268
Iowa RSA #12 Limited Partnership	5306
Iowa RSA No. 4 Limited Partnership	2919
J.W. Miller Aviation, Inc.	2151
Jacksonville Educators Broadcasting, Inc.	1617
Jean-Pierre Scioville v. AT&T Co.	5647
Jo-Al Broadcasting, Inc.	1703
Johnson, Andrea L.	7367
Johnson, James W.	717
Jones Eastern of the Outer Banks, Inc. (WRSF-FM)	3615
Josie FM Limited Partnership	891
Joyce Communications, Inc.	5338
KCLE Radio	4682
KDFW-TV, Inc.	7491
KFBB Corporation	4637
KFI, Inc. (KFI-AM)	3699
KFRM(AM)	952
KGO Television, Inc.	7507
KKTV, Inc.	3621
KOZN FM Stereo 99 Ltd.	257
KQED, Inc.	625
KQED, Inc.	4384
KROQ-FM	5956
KWEL, Inc.	4170
KXTX, Inc.	68
Kansas Public Safety Plan	3592
Kansas Public Safety Plan	4886

Case Name	Page
Kearsarge Telephone Company	5036
Kelley, Oliver and Mary Ann	2513
Kelley, Oliver and Mary Ann	6079
Kelley, Oliver and Mary Ann	7377
Kelly Broadcasting Company	5510
Kennedy Broadcasting, Inc.	858
Kennedy Broadcasting, Inc.	4446
Kennedy Broadcasting, Inc.	6489
Kennelwood Broadcasting Company, Inc.	1350
Kennelwood Broadcasting Company, Inc.	2894
Ketelsen, Lynn	4463
Kext Broadcasters, Inc.	2324
King Broadcasting Company	4998
King Videocable Company	2218
Kralowec, Arthur C.	5265
Kuiper, William E., Jr.	3375
Kuiper, William E., Jr.	4453
Kuiper, William E., Jr.	4636
Kuiper, William E., Jr. (CORRECTED)	4381
Kulisky, Linda U.	6128
Kumra, Raveesh K.	3352
Kumra, Raveesh K.	4837
Kupris, Mary R.	6567
LDDS Communications, Inc.	659
LDDS Communications, Inc.	2910
LDDS of Indiana, Inc.	5849
La Star Cellular Telephone Company	1245
La Star Cellular Telephone Company	6860
Lakeshore Communications, Inc.	359
Lamar Communications, Inc.	7022
Larsen-Readfield Telephone Company	1379
Las Americas Communications, Inc.	1507
Lato, George A.	5840
Laughlin Broadcasting, Limited Partnership	1901
Lawhorne, Thomas W.	1864
Lawhorne, Thomas W.	4183
Lee Brothers Partnership	2263
Legacy Broadcasting of Detroit, Inc. (WLLZ-FM)	3698
Leibensperger FM, Inc.	708
Levin, Edward F. and Pamela J.	4679
Levine, Michael D.	855
Lewis, Barbara E.	7109
License Renewal Announcement Requirements for Low Power TV	1738
Licensing of Large Networks of Small Antenna Earth Stations	7372
Lion's Share Broadcasting	4465
Litel Telecommunications Corp.	294

Case Name	Page
Litel Telecommunications Corporation	1403
Litel Telecommunications, Corp.	662
Local Exchange Carriers - Cost Allocation Manuals	4389
Local Exchange Carriers Continued Use of STARS	989
Local Exchange Carriers Dark Fiber	1821
Local Exchange Carriers' Case Basis DS3 Service Offerings	4776
Local Exchange Carriers' Cost Allocation Manual	6603
Local Exchange Carriers' January 1, 1991 Access Tariff Revisions	92
Local Exchange Carriers' Special Access Tariffs	36
Local Exchange Carriers' Special Access Tariffs	76
Local Girls and Boys Broadcasting Corp.	1385
Local Zoning of Satellite Earth Stations	2600
Long Distance Service of Washington, Inc.	400
Long Distance Service of Washington, Inc.	702
Louisiana Region Public Safety Plan	1
Low Earth Orbit Satellite Applications	2202
Low Power Enforcement Devices	3392
Low Power Transmissions in the 14.0 to 14.5 GHz Band	1560
Lowest Unit Charge Requirements	7511
Lowndes County Broadcasting	4347
Lowndes County Broadcasting	4635
Lowry, Teresa B.	61
Lt/Colonel Cyrus V. Edwards	7453
Lynn Broadcasting	2108
MCC Communications Limited Partnership	2868
MCI Communications Corporation	696
MCI Telecommunications Corp.	3606
MCI Telecommunications Corp.	4877
MCI Telecommunications Corp.	5756
MCI Telecommunications Corporation	75
MCI Telecommunications Corporation	320
MCI Telecommunications Corporation	321
MCI Telecommunications Corporation	859
MCI Telecommunications Corporation	1582
MCI Telecommunications Corporation	1883
MCI Telecommunications Corporation	1886
MCI Telecommunications Corporation	1965
MCI Telecommunications Corporation	4817
MCI Telecommunications Corporation	4826
MCI Telecommunications Corporation	4825
MCI Telecommunications Corporation	5572
MCI Telecommunications Corporation	6924
MCI Telecommunications Corporations	2181
MTD, Inc.(KWMW(FM))	34
MTS and WATS Market Structure	594
MTS and WATS Market Structure	5341

Case Name	Page
MTS and WATS Market Structure: Average Schedule Companies	6608
Mableton Broadcasting Company, Inc.	396
Mableton Broadcasting Company, Inc.	2148
Macon Radio Associates Limited Partnership	1349
Madalina Broadcasting, Inc.	2508
Madalina Broadcasting, Inc.	3471
Madden, Brian M., Esquire	1871
Magdalene Gunden Partnership	5976
Maiers, Barbara	577
Major League Baseball	5573
Maricopa County Community College District	953
Maricopa County Community College District	4241
Marnu, Inc.	2265
Marti Electronics, Inc.	4577
Martinsville Community Workshop, Inc.	361
Martinsville Community Workshop, Inc.	3596
Matrix Telecom	5571
Mavritte, Donna M.	1838
Max Marcott v. Continental Telephone Company	5645
Mayhugh, William Roy	3395
McClenahan Broadcasting, Inc.	2347
Media Access Project	4508
Memphis Dispatch, Inc.	1220
Metromedia Long Distance, Inc.	2916
Metromedia Paging Services, Inc.	4704
Metronet Communications	4649
Metropolitan Broadcasting Corporation	7524
Mettler Communications, Inc.	7130
Miami Telephone & Telegraph Co.	2236
Mickelson, Walter K. and Hazel C.	6486
Micronesia Broadcasting Corporation	984
Micronesian Telecommunications Corp.	1769
Micronesian Telecommunications Corp.	6923
Micronesian Telecommunications Corporation	238
Micronesian Telecommunications Corporation	243
Mid Atlantic Telecom, Inc.	652
Mid-American Long Distance Co.	2911
Mid-Atlantic Telecom, Inc.	2914
Mid-Missouri Cellular	7185
MidAmerican Communications Corporation	4176
MidAmerican Long Distance Company	642
MidAmerican Long Distance Company	1401
MidAmerican Long Distance Company	7296
Midco Communications v. Northwestern Bell Telephone Co.	2909
Midyear 1986 Access Tariff Filings	4844
Miho-Finley, Mary	4120

Case Name	Page
Miralite Communications, Inc.	5040
Miscellaneous Amendments to Part 80 - Maritime Radio Services	2478
Mobile Radio New England	7110
Mobile Satellite Service	2087
Mobile Satellite Service	2306
Mobile Telecommunications Technologies Corporation	1938
Mobilecomm of New Mexico, Inc.	861
Mobilfone Service, Inc.	2551
Modifications and Improvements to the Tariff Review Plan	7463
Monahan, J. Dominic, Esquire	1867
Moncure, Peyton L. - Discrimination Complaint	5386
Montrose Mutual Telephone Company	296
Moody Bible Institute	391
Moran, Mary	1899
Morgan County Industries, Incorporated	1365
Morning Star Academy	487
Morris, Audrey R.	282
Motorola Satellite Communications, Inc.	2083
Mountain Media, Inc. (REISSUED)	410
Mountain Signals, Inc. (WETB(AM))	2874
Mountain-High Broadcasters, Inc.	3
Mulkey, Susan S.	1814
Multimedia Entertainment, Inc.	1798
Murphy, Riley M.	3358
Murray Communications	4509
Murray, Charles F.	5805
NECA Audit Letter	3328
NOS Communications, Inc.	5757
NTC, Inc.	2237
NTS Communications, Inc.	2956
NTS Communications, Inc.	3635
NYNEX Mobile Services	2036
NYNEX Mobile Services Company	5555
NYNEX Telephone Companies	1600
NYNEX Telephone Companies	3742
NYNEX Telephone Companies	4283
NYNEX Telephone Companies	4841
NYNEX Telephone Companies	6500
Naguabo Broadcasting Company	912
Naguabo Broadcasting Company	4879
Nail, Dawson B.	7014
Nalbone, Mark R.	7529
Naleszkiewicz, Nancy	4829
National Association of Regulatory Utility Commissioners	6070
National Broadcasting Co., Inc.	5200
National Broadcasting Company, Inc.	4882

Case Name	Page
National Communications Industries	1978
National Exchange Carrier	6105
National Exchange Carrier Association	6974
National Exchange Carrier Association, Inc.	743
National Exchange Carrier Association, Inc.	719
National Exchange Carrier Association, Inc.	937
National Exchange Carrier Association, Inc.	1000
National Exchange Carrier Association, Inc.	1596
National Exchange Carrier Association, Inc.	2082
National Exchange Carrier Association, Inc.	3589
National Exchange Carrier Association, Inc.	4195
National Exchange Carrier Association, Inc.	4789
National Exchange Carrier Association, Inc.	5209
National Exchange Carrier Association, Inc.	5403
National Exchange Carrier Association, Inc.	6590
National Rual Telecommunications Cooperative	6939
National Rural Telecommunications Cooperative	2418
National Rural Telecommunications Cooperative	1999
National Rural Telecommunications Cooperative	4461
National Tele-Sav, Inc.	6947
National Telecommunications of Austin	6991
National Telephone Cooperative Association	5169
National Telephone Exchange, Inc.	4177
National Telephone Services, Inc.	4182
Nationwide Communications, Inc. (KLUC-FM)	3695
Nationwide Communications, Inc.(KITN)	52
Nebraska Public Safety Plan	6140
Nelson Broadcasting Corporation (WIOI-FM)	1765
Nevada Bell	48
Nevada Bell	2495
New England Telephone and Telegraph Co.	1586
New England Telephone and Telegraph Co.	1996
New England Telephone and Telegraph Company	414
New England Telephone and Telegraph Company	749
New England Telephone and Telegraph Company	2257
New England Telephone and Telegraph Company	5088
New Personal Communications Services	6601
New Personal Communications Services	7471
New Rules for Part 25 - Satellite Communications	3738
New Satellite Earth Station Application Form 493	5768
New York Telephone Co.	3303
New York Telephone Company	1588
New York Telephone Company	1561
New York Telephone Company	3586
New York Telephone Company	6973
NewSouth Broadcasting, Inc.(WFXL-TV)	5047

Case Name	Page
Newman, Dorsey Eugene	330
North Carolina Central University	6092
North Shore Communications, Inc.	57
Northeast Phone Systems, Inc.	6945
Northern States Power Company	1222
Northfield, William E.	1583
Northland Cable Properties Six Limited Partnership	6543
Northport Broadcasting, Inc.	421
Northwestern Bell Telephone Company	1911
Notice of Intention to Issue Declaratory Ruling	5954
Nu Page of Winder	5184
Nu-Page of Winder	7565
Nugget Broadcasting Company	2013
O'Connell, Peter D., Esquire	1869
O'Neill, Brian L.	2572
OPP Working Paper - Broadcast Television	3996
OTI Corporation	1611
Oasis Radio Affiliates, Inc.	508
Offshore Telephone Company	2286
Ohio Public Safety Plan	5340
Olive, Charlotte L.	4993
Olivett International, Inc.	1224
On The Beach Broadcasting	5221
One Call Communications, Inc.	654
One Call Communications, Inc.	1402
One Call Communications, Inc.	2917
One Call Communications, Inc.	5848
Open Network Architecture Access Tariffs	5682
Open Network Architecture Access Tariffs	6131
Open Network Architecture Access Tariffs	6589
Open Network Architecture Access Tariffs	6593
Open Network Architecture Access Tariffs (ERRATUM)	6592
Open Network Architecture Plans	893
Open Network Architecture Plans	2310
Open Network Architecture Plans	4169
Open Network Architecture Plans	5053
Open Network Architecture Plans	7355
Open Network Architecture Plans	7646
Operator Service Access and Pay Telephone Compensation	1448
Operator Service Access and Pay Telephone Compensation	1910
Operator Service Access and Pay Telephone Compensation	1995
Operator Service Access and Pay Telephone Compensation	4736
Operator Service Providers	120
Operator Service Providers	2314
Operator Service Providers	2744
Operator Service Providers	5058

Case Name	Page
Operator Service Providers Filing Requirements	5593
Operator Services Providers of America	4475
Opportunity Broadcasting of Shreveport	1499
Opportunity Broadcasting of Shreveport	5018
Opportunity Broadcasting of Shreveport	6826
Orion Satellite Corporation	4201
Orion Telecom	1840
OrionNet, Inc.	2547
Orkus, Judith O. and Larry R.	4676
Oro Spanish Broadcasting, Inc.	4411
Osborne, Kenneth	4512
Outreach Communications Corporation	526
Ozark Beepers, Inc.	2939
PZ Entertainment Partnership, L.P.	1240
PacTel Paging, Inc.	5054
Pacific Bell	51
Pacific Bell	372
Pacific Bell	688
Pacific Bell	2950
Pacific Bell	4619
Pacific Bell	5196
Pacific Bell	6108
Pacific Bell	6069
Pacific Bell	7467
Pacific Bell Telephone Company	5617
Pacific Bell's Cost Allocation Manual	637
Pacific Bell's Cost Allocation Manual	636
Pacific Mutual Insurance Company	1545
Pacific Telecom Transmission Services, Inc.	230
Pacific Telecom, Inc.	7384
Pacific and Southern Company, Inc. (KSD-FM)	3689
Page Express Paging Service	2189
Page-Com Hawaii, Inc.	2885
PagePrompt USA	5339
Palm Bay Public Radio, Inc.	1772
Palmetto Communications Company	4409
Palmetto Communications Company	5057
Palmetto Communications Company	5023
Palmetto Communications Company (WDIX)	2193
Palmetto Communications Company (WDIX-AM)	1527
Pan American Satellite	4610
Pan American Satellite	5132
Panavideo Broadcasting, Inc. (WVUW-TV)	5259
Part 36-Letter of Interpretation	5068
Payline Systems, Inc.	6949
Payphone Systems	6951

Case Name	Page
Pearce Broadcasting Partnership	5775
Pearlman, Sandra H.	897
Pearman, Virgil L.	1891
Peel, Barbara Key	2833
Peel, William F., Jr.	2501
Peel, William F., Jr.	5301
Peel, William F., Jr.	5388
Peel, William F., Jr.	6831
People's Telephone Company, Inc.	6658
Perkin-Elmer Corporation	4190
Person, Carl E., Esq.	7477
Petition for Investigation of Advanced Intelligent Network	2311
Petterson, Leon F.	1392
Phalen, Shawn	990
Phalen, Shawn	2789
Phelps, Plenn H.	579
Phoenix Network, Inc.	1746
Phone America of Carolina, Inc.	644
Phone America of Carolina, Inc.	986
Phone America of Carolina, Inc.	2012
Phone America of Carolina, Inc.	2912
Phone America of Carolina, Inc.	6993
Phone America of Carolina, Inc.	6994
Phonelink, Inc.	4385
Phonelink, Inc. (ERRATUM)	4618
Phonetel Technologies, Inc.	2301
Pierce, Mark	1776
Pike Family Broadcasting, Inc.	5552
Pine-Aire Broadcasting Corporation, Inc. (WRLS-FM)	5305
Pittsburgh International Teleport	3684
Pittsburgh International Teleport	4175
Pleasant Hope Broadcasting Co., L.P.	1785
Pleasant Hope Broadcasting Co., L.P.	6553
Pleasure Island Broadcasting, Inc.	4163
Policy Implications of the Changing Video Marketplace	6023
Pontchartrain Broadcasting Company, Inc.	5025
Port St. Lucie Broadcasting Limited Partnership	2063
Portland Cellular Partnership	2283
Potter, Kevin	5252
Potter, Kevin	7278
Poughkeepsie Broadcasting Limited	2497
Preemption Satellite Zoning	860
Prescription Percentages of Rate Depreciation	750
Press Television Corporation	6563
Price Cap Service Quality	1621
Price Cap Service Quality and Infrastructure Monitoring	2107

Case Name	Page
Price Cap Service Quality and Infrastructure Monitoring	2332
Price, David R.	2585
Price, David R.	5734
Price, John, Esq.	7122
Private Land Mobile Radio Bands - Prior to 1968	4126
Procedures to Provide a Perference to Applicants on Allocations	3488
Procom Towers	7438
Progressive Cellular III B-3	596
Progressive Cellular III B-3	7178
Progressive Communications, Inc.	1383
Provision of Access for 800 Service	5421
Pruitt, Inc.	2475
Public Service Commission of The District of Columbia	6541
Public Service Commission of the District of Columbia	1418
Public Service Commission of the District of Columbia	4390
Public Utility Regulation on Enchanced Services Providers	1363
Pueblo Radio Broadcasting Service	1416
Puerto Rico Telephone Company	6990
Q 3 Corporation	3573
Qualcomm, Inc.	735
Quests, Inc.	3385
Quinto Broadcasting Corporation	5550
Qwest Microwave VII, Inc.	2011
RDH Communications, Limited Partnership	4764
REM Malloy Broadcasting	6497
RKO General, Inc. (KFRC)	1808
RKO General, Inc. (KFRC)	1983
RKO General, Inc. (KHJ-TV)	1816
Radio Associates, Inc.	2094
Radio Associates, Inc.	3460
Radio Associates, Inc.	3575
Radio Call Company, Inc.	351
Radio Ingstad Minnesota, Inc.	4115
Radio Lake Geneva Corporation	4627
Radio Lumpkin, Inc.	3382
Radio Lumpkin, Inc.	4454
Radio Representatives, Inc.	2015
Radio Representatives, Inc.	6995
Rancho Mirage Radio, A General Partnership	2523
Rate Deregulation and Policies for Cable TV Service	2
Rates for Dominant Carriers	665
Rates for Dominant Carriers	2637
Rates for Dominant Carriers	2974
Rates for Dominant Carriers	3473
Rates for Dominant Carriers	4198
Rates for Dominant Carriers	4199

Case Name	Page
Rates for Dominant Carriers	4819
Rates for Dominant Carriers	5051
Rates for Dominant Carriers	6104
Rates for Dominant Carriers	6692
Rates for Dominant Carriers	7231
Rates for Dominant Carriers	7482
Rates for Dominant Carriers (ERRATUM)	4200
Raystay Company	7559
Real Life Educational Foundation of Baton Rouge, Inc.	259
Real Life Educational Foundation of Baton Rouge, Inc.	2577
Reeb, Lyle	7262
Regulation of International Accounting Rates	3552
Regulation of International Accounting Rates	3434
Reir Broadcasting Company, Inc.	5762
Religious Broadcasting Network	25
Rem Malloy Broadcasting	2247
Rem Malloy Broadcasting	3625
Rem Malloy Broadcasting	5843
Reorganization and Deregulation of Part 97-Amateur Radio Service	2959
Reporting Requirements of Annual Reports Forms O and R	50
Represcribing the Authorized Rate of Return	7193
Represcribing the Authorized Rate of Return (ERRATUM)	80
Republic Broadcasting Company	1956
Requirements for Cost Support Material	1339
Requirements for Independent Telephone Companies	599
Resale/Shared Use - International Communications Services	7386
Resolution of Interference Between Channels	5860
Resolution of Interference Between UHF Channels 14 and 69	5148
Reversionary and Security Interests	2150
Revision of ARMIS USOA Report	5434
Revision of Part 15 - Radio Frequency Devices	1683
Revision of Part 15 - Radio Frequency Devices	5405
Revision of Parts 15 and 68 - Cordless Telephones	427
Revision of Parts 15 and 68 - Cordless Telephones	6062
Revision of Radio Rules and Policies	3275
Revisions of Parts 0, 1, 80 and 87 - Filing Procedures	7153
Richardson, Michael D.	5585
Richmond Cellular Telephone Company	607
Rio Grande Broadcasting Co.	5529
Rio Grande Broadcasting Co.	5519
Rio Grande Broadcasting Co.	7464
Rish, Benito, M.D.	2628
Rochester Tel Telecommunications Corp.	4418
Rochester Telephone Corporation	7037
Root, Thomas L., Esquire	2491
Round Rock Ventures	277

Case Name	Page
Royce International Broadcasting	2601
Royse Radio, Inc.	1364
Rural Service Area Cellular Applications	5378
Rusk, Thomas A.	328
S.I./C-T Coin Telephone, Inc.	6953
S/G Communications	4422
SBM Communications, Inc.	5021
SBM Communications, Inc.	5522
SBM Communications, Inc.	6484
SM Long Distance	5274
SPH Associates	4307
Sacred Heart University, Inc.	3571
Sacred Heart University, Inc.	4606
Safe Broadcasting Corporation	5227
Safe Broadcasting Corporation	6548
Saga Communications of Illinois, Inc.	3515
Saga Communications of Illinois, Inc.	3515
Salem Broadcasting, Inc. (WOBG-FM)	4172
Salvatoriello, Mary Ann	4705
Sam Widge Advertising Limited Partnership	882
Sam Widge Advertising Limited Partnership	5290
Sarasota - Charlotte Broadcasting Corporation	1665
Sarkes Tarzian, Inc.	2465
Satellite Applications Acceptable for Filing	6002
Scandinavia Telephone Company	2059
Scioto Broadcasters, Limited Partnership	1893
Scioto Broadcasters, Limited Partnership	4626
Scottsdale Talking Machine Wireless Co., Inc.	4185
Scottsdale Talking Machine and Wireless Co., Inc.	1668
Scottsdale Talking Machine and Wireless Co., Inc.	7539
Section 214 Applications to Discontinue Dark Fiber Facilities	5238
Segal, Angela M.	255
Separate Satellite Systems	5
Short, Gary W.	404
Showem, Inc.	7364
Sierra Telephone Company, Inc.	4406
Signal Media of Arkansas, Inc.	5623
Silver King Broadcasting of New Jersey, Inc.	704
Silver Star Communications-Albany, Inc.	6905
Skidelsky, Barry	2221
Sonicraft, Inc.	4505
Sorenson, Ronald	1952
Sorenson, Ronald	6901
Sound Broadcasting Co.	3626
Sound Broadcasting Co.	6903
Sound Broadcasting Corporation	2174

Case Name	Page
Sound Broadcasting Corporation (KCNA-FM)	5961
South Carolina Metronet, Inc.	968
South Carolina Radio Fellowship	340
South Carolina Radio Fellowship	4823
South Central Bell	6523
South Central Bell Phone Company	7136
South Georgia Communications, Inc.	655
South Tel, Inc.	657
South Texas Phone, Inc.	6664
South Texas Phone, Inc. (ERRATUM)	7181
Southeast Mississippi Telephone Company, Inc.	5515
Southern Arkansas Radio Company (KKOL-FM)	5130
Southern California Broadcasting Company (KIEV-AM)	4387
Southern California Rapid Transit District	5643
Southern Pacific Telecommunications Co.	2957
Southern Satellite Systems, Inc.	3542
Southern Satellite Systems, Inc.(ERRATUM)	4262
Southern Virginia Broadcasting Corporation	4437
Southwestern Bell	7560
Southwestern Bell Corporation	2302
Southwestern Bell Telephone Co.	6545
Southwestern Bell Telephone Company	42
Southwestern Bell Telephone Company	413
Southwestern Bell Telephone Company	448
Southwestern Bell Telephone Company	1445
Southwestern Bell Telephone Company	2089
Southwestern Bell Telephone Company	2569
Southwestern Bell Telephone Company	3330
Southwestern Bell Telephone Company	3760
Southwestern Bell Telephone Company	4280
Southwestern Bell Telephone Company	5237
Southwestern Bell Telephone Company	6095
Southwestern Bell Telephone Company	6101
Southwestern Bell Telephone Company	6689
Southwestern Bell Telephone Company	6851
Spain, Frank K.	6143
Spain, Frank K. (REISSUED)	6892
Spann, Darrell	2596
Spann, Darrell	5944
Spectrum Broadcasting Corp.	5183
Spectrum Efficiency - Private Land Mobile Radio Bands	5513
Sponsorship Identification Requirements	5861
Spousal Attribution	2492
Spousal Attribution (ERRATUM)	6828
Springtown Educational Broadcasting Foundation	2009
Sprint International Communications Company	6107

Case Name	Page
St. Thomas & San Juan Telephone Co., Inc.	1963
Standard Broadcasting, Inc.	7220
Standard Telecom, Inc.	2299
Standards for Assessing Forfeitures	4695
Standards for Assessing Forfeitures	7016
Standards for Basic Cable Rate Regulation	5842
Steelville Telephone Exchange, Inc.	5308
Strelitz, John	497
Strelitz, John	5107
Strong, Raymond J. and Jean-Marie	553
Strong, Raymond J. and Jean-Marie	5321
Student Media Center of the University of Mississippi	949
Submissions Required of 220 MHz Nationwide Applicants	4495
Sugar Land Telephone Company	5123
Sumter Radio Partners	5997
Sun Communications, Inc.	5966
Sunbelt Limited Partnership	5742
Sunbelt, Limited Partnership	6833
Sunshine Broadcasting, Inc.	2613
Sunshine Broadcasting, Inc.	5981
Susquehanna Radio Corp.	6547
Susquehanna Radio Corp.	7528
Swan Broadcasting Limited	17
Swann, Jean	4112
Syndication and Financial Interest Rule	1657
Syndication and Financial Interest Rules	3094
Syndication and Financial Interest Rules	5705
Syndication and Financial Interest Rules	5706
TCI Cablevision of Maryland, Inc.	6487
TCOM, L.P.	4414
TCS Network Services v. Pacific Bell Telephone Co.	2918
TFN Corp.	658
TOPP Broadcasting Limited Partnership	483
TRT International, Inc.	426
TRT/FTC Communications, Inc.	592
TRT/FTC Communications, Inc.	2313
TRT/FTC Communications, Inc.	2888
TRT/FTC International, Inc.	5038
TRT/FTC International, Inc.	5570
TS Infosystems, Inc.	8
TV 14, Inc.	7234
TVX Broadcast Group, Inc.	7494
Table of Allotments, FM, Abilene and Colorado City, TX	1279
Table of Allotments, FM, Adams, WI	2038
Table of Allotments, FM, Aguila, AZ	4278
Table of Allotments, FM, Altamont, OR	6986

Case Name	Page
Table of Allotments, FM, Altoona, WI	7212
Table of Allotments, FM, Altus, OK	2158
Table of Allotments, FM, Amarillo, Claude and Dimmitt, TX	4729
Table of Allotments, FM, Americus, Fort Valley and Smithville, GA	942
Table of Allotments, FM, Americus, GA	4732
Table of Allotments, FM, Americus, GA	7116
Table of Allotments, FM, Angola, Berne, Decatur and Lagrange, IN	1230
Table of Allotments, FM, Antigo, WI	4925
Table of Allotments, FM, Apalachicola and Carrabelle, FL	7147
Table of Allotments, FM, Appomattox, VA	589
Table of Allotments, FM, Appomattox, VA	2623
Table of Allotments, FM, Arkansas City and Winfield, KS	2161
Table of Allotments, FM, Arlington, McKinney and Celina, TX	142
Table of Allotments, FM, Armijo, NM	4806
Table of Allotments, FM, Arnold and Dorrington, CA	4860
Table of Allotments, FM, Asbury, MO	417
Table of Allotments, FM, Ashland, OR	5330
Table of Allotments, FM, Atlantic and Atlantic Beach, NC	7273
Table of Allotments, FM, Augusta, KS	155
Table of Allotments, FM, Augusta, KS	2043
Table of Allotments, FM, Ava, Branson and Mountain Grove, MO	7214
Table of Allotments, FM, Baker, CA	5785
Table of Allotments, FM, Bald Knob and Clarendon, AR	267
Table of Allotments, FM, Bald Knob and Clarendon, AR	7435
Table of Allotments, FM, Baldwyn, MS	906
Table of Allotments, FM, Ballston Spa and Saratoga Springs, NY	1434
Table of Allotments, FM, Banks, OR	2462
Table of Allotments, FM, Barbourville, KY	1397
Table of Allotments, FM, Bartonville, IL	5157
Table of Allotments, FM, Bay City, TX	5005
Table of Allotments, FM, Bay City, TX	6985
Table of Allotments, FM, Bay Minette, AL	4973
Table of Allotments, FM, Bay Minette, AL	6984
Table of Allotments, FM, Bay Minette, Butler and Evergreen, AL	6012
Table of Allotments, FM, Bay St. Louis and Poplarville, MS	4400
Table of Allotments, FM, Bayboro, NC	4850
Table of Allotments, FM, Beaumont, CA	2049
Table of Allotments, FM, Beeville, TX	6051
Table of Allotments, FM, Belen and Grants, NM	6606
Table of Allotments, FM, Belfry and Harold, KY	6019
Table of Allotments, FM, Belle Plaine, KS	5619
Table of Allotments, FM, Belle Plaine, KS	7432
Table of Allotments, FM, Belton, TX	5564
Table of Allotments, FM, Belvidere, NJ and Scranton, PA	1333
Table of Allotments, FM, Benton, TN	3481
Table of Allotments, FM, Bentonville, AR	2215

Case Name	Page
Table of Allotments, FM, Bentonville, AR	6498
Table of Allotments, FM, Bethlehem, WV	2001
Table of Allotments, FM, Billings and Lewistown, MT	3632
Table of Allotments, FM, Bisbee and Green Valley, AZ	1330
Table of Allotments, FM, Bishop, TX	4517
Table of Allotments, FM, Bismarck, ND	2133
Table of Allotments, FM, Bismarck, ND	5328
Table of Allotments, FM, Bixby, OK	3662
Table of Allotments, FM, Blackville, Branchville and Estill, SC	2243
Table of Allotments, FM, Blakely, GA	6517
Table of Allotments, FM, Bloomer, WI	534
Table of Allotments, FM, Boalsburg and Clearfield, PA	4296
Table of Allotments, FM, Bolingbroke and Unadilla, GA	6578
Table of Allotments, FM, Bolivar and Nixa, MO	3648
Table of Allotments, FM, Bon Air, Chester and Mechanicsville, VA	4917
Table of Allotments, FM, Bonita Springs and Cape Coral, FL	6966
Table of Allotments, FM, Boonville and Columbia, MO	2535
Table of Allotments, FM, Bostwick and Good Hope, GA	5796
Table of Allotments, FM, Bourbon and Columbia, MO	250
Table of Allotments, FM, Bowdon, Griffin and Hogansville, GA	4863
Table of Allotments, FM, Bowling Green, KY	1532
Table of Allotments, FM, Bowling Green, KY	3326
Table of Allotments, FM, Boyne City, MI	2039
Table of Allotments, FM, Brainerd, MN	4394
Table of Allotments, FM, Brainerd, MN	6115
Table of Allotments, FM, Brawley and El Centro, CA	3480
Table of Allotments, FM, Brillion, WI	4500
Table of Allotments, FM, Britt, IA	4224
Table of Allotments, FM, Bronson, MI	1483
Table of Allotments, FM, Bronson, MI	4226
Table of Allotments, FM, Brookston and Monticello, IN	1505
Table of Allotments, FM, Brownstown, Cannelton and Edinburgh, IN	5534
Table of Allotments, FM, Brunswick, GA	6519
Table of Allotments, FM, Brusly, LA and Woodville, MS	1554
Table of Allotments, FM, Buckhannon, WV	2217
Table of Allotments, FM, Buffalo and Vine Grove, KY	2160
Table of Allotments, FM, Burlington, IA and Hamilton, IL	2458
Table of Allotments, FM, Burnet and Mason, TX	6829
Table of Allotments, FM, Cadillac, MI	3759
Table of Allotments, FM, Caldwell, TX	1551
Table of Allotments, FM, California and Rolla, MO	3727
Table of Allotments, FM, Callahan, FL and St. Marys, GA	5319
Table of Allotments, FM, Callahan, FL and St. Marys, GA	7564
Table of Allotments, FM, Camas, WA	4392
Table of Allotments, FM, Camas, WA	6045
Table of Allotments, FM, Campbell, MO	618

Case Name	**Page**
Table of Allotments, FM, Campbell, NY	6959
Table of Allotments, FM, Canovanas, Mayaguez and Quebradillas, PR	5310
Table of Allotments, FM, Canton, SD	533
Table of Allotments, FM, Canton, SD	938
Table of Allotments, FM, Canton, SD	4428
Table of Allotments, FM, Castle Rock, WA	1237
Table of Allotments, FM, Castle Rock, WA	3366
Table of Allotments, FM, Castle Rock, WA	4793
Table of Allotments, FM, Cave City, KY	387
Table of Allotments, FM, Cedar Key, FL	2200
Table of Allotments, FM, Cedar Key, FL	5136
Table of Allotments, FM, Centerville, UT	909
Table of Allotments, FM, Central Valley, CA	1394
Table of Allotments, FM, Charleston, MO	4396
Table of Allotments, FM, Chester and Shingletown, CA	4204
Table of Allotments, FM, Chester, Kingstree and Wedgefield, SC	5077
Table of Allotments, FM, Chetek, WI	1253
Table of Allotments, FM, Chetek, WI	4273
Table of Allotments, FM, Chico, CA	4294
Table of Allotments, FM, Chippewa Falls, WI	1429
Table of Allotments, FM, Christiansted, VI	5215
Table of Allotments, FM, Christiansted, VI	5781
Table of Allotments, FM, Churchville and Luray, VA	1313
Table of Allotments, FM, Churubusco, IN	4969
Table of Allotments, FM, Churubusco, IN	7012
Table of Allotments, FM, Clarendon, PA	6053
Table of Allotments, FM, Clarksburg, WV	3323
Table of Allotments, FM, Clarksdale and Water Valley, MS	1906
Table of Allotments, FM, Clarksville, VA	6644
Table of Allotments, FM, Claude and Dimmitt, TX	5539
Table of Allotments, FM, Claude and Dimmitt, TX	6961
Table of Allotments, FM, Claxton, Waynesboro, GA and Bluffton, SC	3587
Table of Allotments, FM, Clayton, LA	4975
Table of Allotments, FM, Clayton, LA	7013
Table of Allotments, FM, Clearwater, KS	384
Table of Allotments, FM, Cleveland and Rosedale, MS	5583
Table of Allotments, FM, Clinton and Saint Pauls, NC	4377
Table of Allotments, FM, Clinton and Saint Pauls, NC	5866
Table of Allotments, FM, Clinton, AR	1553
Table of Allotments, FM, Clintonville and New Holstein, WI	5783
Table of Allotments, FM, Clovis and Madera, CA	5071
Table of Allotments, FM, Clovis, NM	366
Table of Allotments, FM, Coahoma, TX	6083
Table of Allotments, FM, Cold Spring and Litchfield, MN	3664
Table of Allotments, FM, Coleraine, MN	1255
Table of Allotments, FM, Colfax, WA	4923

Case Name	Page
Table of Allotments, FM, Colfax, WA	7277
Table of Allotments, FM, Columbia, CA	3292
Table of Allotments, FM, Columbia, IL	103
Table of Allotments, FM, Columbia, IL	2141
Table of Allotments, FM, Columbus, KS	1597
Table of Allotments, FM, Conway and Myrtle Beach, SC	1829
Table of Allotments, FM, Corpus Christi, TX	4274
Table of Allotments, FM, Corrales, NM	6492
Table of Allotments, FM, Cottage Grove and Bend, OR	4208
Table of Allotments, FM, Cottonwood, AZ	2187
Table of Allotments, FM, Crane, TX	4725
Table of Allotments, FM, Crane, TX	6982
Table of Allotments, FM, Crawford, GA	630
Table of Allotments, FM, Creswell, OR	2055
Table of Allotments, FM, Crosby, MN	4734
Table of Allotments, FM, Crosby, MN	6091
Table of Allotments, FM, Crossville and Hilham, TN	6636
Table of Allotments, FM, Crozet and Dillwyn, VA	5159
Table of Allotments, FM, Crozet, VA	105
Table of Allotments, FM, Culebra and Vieques, PR	5161
Table of Allotments, FM, Cushing, TX	3630
Table of Allotments, FM, Cusseta, GA	7437
Table of Allotments, FM, Dade City, FL	7117
Table of Allotments, FM, Danville, AR	5073
Table of Allotments, FM, Danville, AR	6965
Table of Allotments, FM, Davis and Winters, CA	1556
Table of Allotments, FM, Dayton, WA	2128
Table of Allotments, FM, De Ridder, LA	7250
Table of Allotments, FM, Decorah, IA	4803
Table of Allotments, FM, Deer River , MN	1257
Table of Allotments, FM, Derby Center, VT	1849
Table of Allotments, FM, Derby Center, VT	6988
Table of Allotments, FM, Detroit Lakes, MN	7217
Table of Allotments, FM, Dexter, ME	591
Table of Allotments, FM, Dock Junction, GA	532
Table of Allotments, FM, Dublin, GA and Abbeville, SC	7145
Table of Allotments, FM, Eagle Grove, IA	370
Table of Allotments, FM, Eagle Grove, IA	4430
Table of Allotments, FM, Eagle, ID	1328
Table of Allotments, FM, Eatonton and Sandy Springs, GA	6580
Table of Allotments, FM, Edenton and Scotland Neck, NC	388
Table of Allotments, FM, Edgewater, FL	2198
Table of Allotments, FM, Edgewater, FL	4523
Table of Allotments, FM, Edisto Beach, SC	3290
Table of Allotments, FM, Edisto Beach, SC	3719
Table of Allotments, FM, El Dorado, AR	1329

Case Name	Page
Table of Allotments, FM, El Rio and Ojai, CA	5547
Table of Allotments, FM, Eldon, IA	1323
Table of Allotments, FM, Eldon, IA	4516
Table of Allotments, FM, Electra, TX	7563
Table of Allotments, FM, Elkins, WV and Mountain Lake Park, MD	5830
Table of Allotments, FM, Erath, LA	2212
Table of Allotments, FM, Fairfield, IL	1337
Table of Allotments, FM, Fairmont, NC and Andrews, SC	4285
Table of Allotments, FM, Fayetteville, AR	1950
Table of Allotments, FM, Felton, CA	6119
Table of Allotments, FM, Florence, OR	1905
Table of Allotments, FM, Fort Ann, NY	907
Table of Allotments, FM, Fort Bragg, CA	5817
Table of Allotments, FM, Fort Bragg, CA	6117
Table of Allotments, FM, Fort Bragg, Monte Rio and Oroville, CA	4852
Table of Allotments, FM, Fort Kent, ME	5371
Table of Allotments, FM, Fortuna and Rohnerville, CA	3650
Table of Allotments, FM, Fortuna and Rohnerville, CA	6480
Table of Allotments, FM, Fountain, CO	6017
Table of Allotments, FM, Fox Farm, WY and Gering, NE	3464
Table of Allotments, FM, Franklin, TX	5562
Table of Allotments, FM, Garapan, Saipan	4758
Table of Allotments, FM, Garberville and Yuba City, CA	149
Table of Allotments, FM, Garden City, IN	3747
Table of Allotments, FM, Gardnerville-Minden, NV	386
Table of Allotments, FM, Garrison, KY	1428
Table of Allotments, FM, Geneva, OH	2241
Table of Allotments, FM, George West, TX	5627
Table of Allotments, FM, Georgetown and Myrtle Beach, SC	385
Table of Allotments, FM, Georgetown, KY	1399
Table of Allotments, FM, Gilchrist and Crystal Beach, TX	7434
Table of Allotments, FM, Gilman, IL	28
Table of Allotments, FM, Gilman, IL	2197
Table of Allotments, FM, Gilmer, TX	5075
Table of Allotments, FM, Glasgow, KY	2173
Table of Allotments, FM, Glen Arbor and Scottsville, MI	147
Table of Allotments, FM, Gluckstadt, Collins and Shubuta, MS	5545
Table of Allotments, FM, Goleta and Santa Ynez, CA	4804
Table of Allotments, FM, Goliad, TX	3658
Table of Allotments, FM, Gordonsville and Orange, VA	151
Table of Allotments, FM, Gosnell and Osceola, AR	4579
Table of Allotments, FM, Graham, WA	4754
Table of Allotments, FM, Grand Rapids, MI	621
Table of Allotments, FM, Greenfield and Del Rey Oaks, CA	631
Table of Allotments, FM, Greenup, KY and Athens, OH	1493
Table of Allotments, FM, Greenup, KY and Athens, OH (ERRATUM)	1841

Case Name	Page
Table of Allotments, FM, Greenville, TX	6048
Table of Allotments, FM, Gretna, Marianna and Quincy, FL	633
Table of Allotments, FM, Grove City, PA and Hubbard, OH	7114
Table of Allotments, FM, Gualala, CA	3612
Table of Allotments, FM, Hallie and Ladysmith, WI	111
Table of Allotments, FM, Hamilton and Glen Rose, TX	3756
Table of Allotments, FM, Hamilton and Glen Rose, TX	6015
Table of Allotments, FM, Hannahs Mill and Milledgeville, GA	3753
Table of Allotments, FM, Hannibal, OH	2144
Table of Allotments, FM, Harbeck-Fruitdale, OR	6963
Table of Allotments, FM, Hartselle, AL	7140
Table of Allotments, FM, Hastings and Milford, NE	2053
Table of Allotments, FM, Hastings, NE	4808
Table of Allotments, FM, Hawesville and Hardinsburg, KY	5138
Table of Allotments, FM, Hawesville and Hardinsburg, KY	6473
Table of Allotments, FM, Hayden, ID	5176
Table of Allotments, FM, Hayden, ID	7251
Table of Allotments, FM, Hayward, WI	5007
Table of Allotments, FM, Headland, AL and Chattahooche, FL	940
Table of Allotments, FM, Headland, AL and Chattahoochee, FL	2329
Table of Allotments, FM, Hempstead, TX	1235
Table of Allotments, FM, Hempstead, TX	3726
Table of Allotments, FM, Herington, KS	1485
Table of Allotments, FM, Herington, KS	4225
Table of Allotments, FM, Hinesville, GA	7275
Table of Allotments, FM, Hobbs, NM	2134
Table of Allotments, FM, Holbrook, AZ	2454
Table of Allotments, FM, Holly Springs and Byhalia, MS	2003
Table of Allotments, FM, Holly Springs and Byhalia, MS	4305
Table of Allotments, FM, Homerville and Lakeland, GA	5802
Table of Allotments, FM, Honolulu, HI	5634
Table of Allotments, FM, Houston and Thayer, MO	4519
Table of Allotments, FM, Howe, TX and Durant, OK	2050
Table of Allotments, FM, Howland, ME	946
Table of Allotments, FM, Huntingdon and Atwood, TN	2076
Table of Allotments, FM, Huntingdon and Atwood, TN	6475
Table of Allotments, FM, Huntingdon, TN	4977
Table of Allotments, FM, Huntington, TX	3735
Table of Allotments, FM, Ilwaco, WA	2460
Table of Allotments, FM, Independence, CA	5632
Table of Allotments, FM, Ingram, TX	2057
Table of Allotments, FM, Jackpot, NV	4207
Table of Allotments, FM, Jackson, WY	3633
Table of Allotments, FM, Jackson, WY	5334
Table of Allotments, FM, Jasper, TX	3527
Table of Allotments, FM, Jasper, TX	5834

Case Name	Page
Table of Allotments, FM, Jesup and Midway, GA	107
Table of Allotments, FM, Jesup and Midway, GA	2196
Table of Allotments, FM, Jesup and Midway, GA (ERRATUM)	4922
Table of Allotments, FM, Johannesburg, CA	1681
Table of Allotments, FM, Joshua Tree, CA	4968
Table of Allotments, FM, Kalispell, MT	1281
Table of Allotments, FM, Kalispell, MT	4310
Table of Allotments, FM, Karnes City, TX	1489
Table of Allotments, FM, Kaukauna and Cleveland, WI	7142
Table of Allotments, FM, Keokuk and Washington, IA	364
Table of Allotments, FM, Keokuk, IA	3384
Table of Allotments, FM, Kershaw, SC and Waxhaw, NC	1286
Table of Allotments, FM, Key Largo, FL	1502
Table of Allotments, FM, Kings Beach, CA and Fallon, NV	4375
Table of Allotments, FM, Kings, MS	2471
Table of Allotments, FM, Knob Noster, Moberly and Wheeling, MO	4920
Table of Allotments, FM, Kurten, TX	4373
Table of Allotments, FM, La Crescent, MN	1908
Table of Allotments, FM, La Crescent, MN	6089
Table of Allotments, FM, LaFayette, GA	7427
Table of Allotments, FM, Ladysmith, WI	1947
Table of Allotments, FM, Ladysmith, WI	4206
Table of Allotments, FM, Lafayette, TN and Campbellsville, KY	3289
Table of Allotments, FM, Lake City and Wabasha, MN	4122
Table of Allotments, FM, Lake George, NY	5800
Table of Allotments, FM, Lake Havasu City, AZ	2456
Table of Allotments, FM, Lanai City, HI	1317
Table of Allotments, FM, Lanai City, HI	4272
Table of Allotments, FM, Lancaster, WI and Clinton, IA	6113
Table of Allotments, FM, Laramie, WY	2056
Table of Allotments, FM, Laurel, MT	619
Table of Allotments, FM, Leesburg and Unadilla, GA	6646
Table of Allotments, FM, Lemoore and Tipton, CA	2593
Table of Allotments, FM, Lenwood, CA	5631
Table of Allotments, FM, Levelland, TX	2058
Table of Allotments, FM, Lexington and Pickens, MS	3736
Table of Allotments, FM, Lexington and Pickens, MS	5559
Table of Allotments, FM, Liberty Hill, SC	4227
Table of Allotments, FM, Liberty, KY	3730
Table of Allotments, FM, Liberty, KY	5630
Table of Allotments, FM, Littlefield, TX	1503
Table of Allotments, FM, Live Oak, FL	1398
Table of Allotments, FM, Livingston, TN	1949
Table of Allotments, FM, Lometa, TX	5002
Table of Allotments, FM, Lonoke, AR and Clarksdale, MS	4861
Table of Allotments, FM, Los Alamos, NM	5326

Case Name	Page
Table of Allotments, FM, Los Lunas, NM	2159
Table of Allotments, FM, Lovington, NM	6046
Table of Allotments, FM, Lynchburg, VA	944
Table of Allotments, FM, Macclenny and Williston, FL	1480
Table of Allotments, FM, Macclenny and Williston, FL	6632
Table of Allotments, FM, Marathon and Stevens Point, WI	3649
Table of Allotments, FM, Marina, Salinas and Seaside, CA	1491
Table of Allotments, FM, Marion and Orrville, AL	3482
Table of Allotments, FM, Marlette, MI	2042
Table of Allotments, FM, Maroa, IL	7112
Table of Allotments, FM, Marquette, MI	1258
Table of Allotments, FM, Marshall, MN	6513
Table of Allotments, FM, McComb, MS and Kentwood, LA	3367
Table of Allotments, FM, McLain, MS	1256
Table of Allotments, FM, Medical Lake and Davenport, WA	3520
Table of Allotments, FM, Medicine Lodge, KS	3523
Table of Allotments, FM, Medicine Lodge, KS	5561
Table of Allotments, FM, Miami Beach, FL	3654
Table of Allotments, FM, Miami Beach, FL	5629
Table of Allotments, FM, Midland and Big Spring, TX	6086
Table of Allotments, FM, Milan, Metter and Swainsboro, GA	5793
Table of Allotments, FM, Milford, IA	1432
Table of Allotments, FM, Milford, IA	4427
Table of Allotments, FM, Minneapolis, KS	5580
Table of Allotments, FM, Minneapolis, KS	7433
Table of Allotments, FM, Miramar Beach, FL	5778
Table of Allotments, FM, Missoula, MT	1487
Table of Allotments, FM, Missoula, MT	4223
Table of Allotments, FM, Morris and Pontiac, IL	26
Table of Allotments, FM, Morro Bay and Paso Robles, CA	4759
Table of Allotments, FM, Mount Sterling, IL	1315
Table of Allotments, FM, Mount Sterling, IL	4279
Table of Allotments, FM, Mountain Home, AR	2002
Table of Allotments, FM, Muskegon Heights, MI	6634
Table of Allotments, FM, Muskegon and Manistee, MI	6638
Table of Allotments, FM, Natchitoches, LA	2040
Table of Allotments, FM, Natchitoches, LA	5137
Table of Allotments, FM, Needles, CA	3294
Table of Allotments, FM, Needles, CA	5788
Table of Allotments, FM, Neenah-Menasha, WI	2473
Table of Allotments, FM, Nephi, UT	2537
Table of Allotments, FM, New Albany, IN	5139
Table of Allotments, FM, New Bern and Oriental, NC	1824
Table of Allotments, FM, New Bern and Oriental, NC	5309
Table of Allotments, FM, New Iberia and Ville Platte, LA	1548
Table of Allotments, FM, New Iberia and Ville Platte, LA	5543

Case Name	Page
Table of Allotments, FM, New Madrid and Portageville, MO	1321
Table of Allotments, FM, New Sharon and Albia, IA	5213
Table of Allotments, FM, New Sharon and Albia, IA	7429
Table of Allotments, FM, Newton, IL	2213
Table of Allotments, FM, Newton, IL	4521
Table of Allotments, FM, Nome, AK	390
Table of Allotments, FM, North East, PA and Olean, NY	5871
Table of Allotments, FM, North Fort Riley and St. Marys, KS	3751
Table of Allotments, FM, Norwalk and Los Angeles, CA	2136
Table of Allotments, FM, Nowata and Collinsville, OK	5178
Table of Allotments, FM, Oakland, MD	363
Table of Allotments, FM, Ocracoke, NC	2074
Table of Allotments, FM, Ocracoke, NC	6050
Table of Allotments, FM, Odem, TX	1239
Table of Allotments, FM, Odessa, TX	4756
Table of Allotments, FM, Odessa, TX	7011
Table of Allotments, FM, Ogelsby, IL	3293
Table of Allotments, FM, Oildale, CA	5858
Table of Allotments, FM, Opelousas and Berwick, LA	5080
Table of Allotments, FM, Orland, CA	3652
Table of Allotments, FM, Orland, CA	6055
Table of Allotments, FM, Osceola, AR and Millington, TN	1845
Table of Allotments, FM, Osceola, AR and Millington, TN	6630
Table of Allotments, FM, Othello, East Wenatchee and Cashmere, WA	2138
Table of Allotments, FM, Othello, East Wenatchee and Cashmere, WA	6476
Table of Allotments, FM, Otterville, MO (ERRATUM)	252
Table of Allotments, FM, Oxford, MS	585
Table of Allotments, FM, Oxford, MS	3466
Table of Allotments, FM, Oxford, MS	5566
Table of Allotments, FM, Pamplico, SC	2157
Table of Allotments, FM, Panama City Beach, FL	1430
Table of Allotments, FM, Paragould and Lake City, AR	3325
Table of Allotments, FM, Pasco, WA	1547
Table of Allotments, FM, Pearl and Magee, MS	246
Table of Allotments, FM, Pentwater, MI	1833
Table of Allotments, FM, Pentwater, MI	4372
Table of Allotments, FM, Perham, MN	6490
Table of Allotments, FM, Peshtigo, WI	4927
Table of Allotments, FM, Pickford, MI	152
Table of Allotments, FM, Piedmont, MO	5557
Table of Allotments, FM, Pierce and Bloomington, TX	1847
Table of Allotments, FM, Pikeville, KY and Clinchco, VA	3732
Table of Allotments, FM, Pine Bluff and Maumelle, AR	5119
Table of Allotments, FM, Pontotoc, Winona and Coffeeville, MS	3474
Table of Allotments, FM, Port Henry, NY and Middlebury, VT	4727
Table of Allotments, FM, Port St. Joe, FL	6521

Case Name	Page
Table of Allotments, FM, Portageville and New Madrid, MO	4398
Table of Allotments, FM, Potosi and Waynesville, MO	4752
Table of Allotments, FM, Prairie Grove, AR	4971
Table of Allotments, FM, Prairie Grove, AR	6983
Table of Allotments, FM, Prescott Valley, AZ	2037
Table of Allotments, FM, Princeton, IL	5142
Table of Allotments, FM, Pullman, WA	1504
Table of Allotments, FM, Randolph and Brandon, VT	1760
Table of Allotments, FM, Rapid City, SD	4471
Table of Allotments, FM, Ravenswood and Williamstown, WV	3660
Table of Allotments, FM, Redmond, OR	5332
Table of Allotments, FM, Reedsport, OR	368
Table of Allotments, FM, Reedsport, OR	4429
Table of Allotments, FM, Reserve, LA	1831
Table of Allotments, FM, Reserve, LA	5069
Table of Allotments, FM, Richwood, LA	583
Table of Allotments, FM, Richwood, LA	3465
Table of Allotments, FM, Ridgeland and Lady's Island, SC	1325
Table of Allotments, FM, Ridgeland and Lady's Island, SC	7253
Table of Allotments, FM, Ripley, OH	2132
Table of Allotments, FM, Rochester, MN and Clear Lake, IA	2060
Table of Allotments, FM, Rock Island, Moses Lake and Warden, WA	2879
Table of Allotments, FM, Rock Valley and Sibley, IA	5867
Table of Allotments, FM, Rockledge, FL	249
Table of Allotments, FM, Rocky Mount, NC	2153
Table of Allotments, FM, Royal City, WA	4220
Table of Allotments, FM, Royal City, WA	6082
Table of Allotments, FM, Royston, GA	7272
Table of Allotments, FM, Rozel, KS	4730
Table of Allotments, FM, Rozel, KS	6116
Table of Allotments, FM, Rusk, TX	3008
Table of Allotments, FM, Safford, AZ	6056
Table of Allotments, FM, Salem and Sioux Falls, SD	5798
Table of Allotments, FM, Saltville, VA and Jefferson, NC	2594
Table of Allotments, FM, San Angelo, TX	4276
Table of Allotments, FM, San Angelo, TX	6011
Table of Allotments, FM, Santa Rosa and Tucumcari, NM	2592
Table of Allotments, FM, Santa Rosa and Tucumcari, NM	5052
Table of Allotments, FM, Saranac Lake, NY	5121
Table of Allotments, FM, Saugerties, NY	908
Table of Allotments, FM, Scottsboro, AL and Trenton, GA	6111
Table of Allotments, FM, Seabrook, TX	3665
Table of Allotments, FM, Searsport, ME	945
Table of Allotments, FM, Sheboygan Falls, WI	1395
Table of Allotments, FM, Sikeston, MO	531
Table of Allotments, FM, Skowhegan and Bar Harbor, ME	4124

Case Name	Page
Table of Allotments, FM, Socastee, SC	2071
Table of Allotments, FM, Socastee, SC	6022
Table of Allotments, FM, Socorro, NM	587
Table of Allotments, FM, Socorro, NM	4402
Table of Allotments, FM, Sonora, CA	6042
Table of Allotments, FM, South Bend, WA	3463
Table of Allotments, FM, South Burlington, VT	1282
Table of Allotments, FM, South Burlington, VT	7111
Table of Allotments, FM, South Waverly, PA	2135
Table of Allotments, FM, Spokane, WA	2005
Table of Allotments, FM, Steeleville, IL	1478
Table of Allotments, FM, Stephenson, MI	2142
Table of Allotments, FM, Sterling, KS	3525
Table of Allotments, FM, Sterling, KS	5368
Table of Allotments, FM, Stuart and Boone, IA	6036
Table of Allotments, FM, Sulphur, OK	7009
Table of Allotments, FM, Summerville, SC (ERRATUM)	535
Table of Allotments, FM, Sun Prairie and Mauston, WI	2068
Table of Allotments, FM, Superior, NE	2129
Table of Allotments, FM, Superior, NE	6643
Table of Allotments, FM, Tallulah, LA	4370
Table of Allotments, FM, Tallulah, LA	6483
Table of Allotments, FM, Taos, NM	2052
Table of Allotments, FM, Taos, NM	3647
Table of Allotments, FM, Three Lakes, WI	6515
Table of Allotments, FM, Tioga, PA	5167
Table of Allotments, FM, Tishomingo, OK	620
Table of Allotments, FM, Tomah, WI	1259
Table of Allotments, FM, Topsail Beach, NC	5003
Table of Allotments, FM, Trade, TN and Beech Mountain, NC	5835
Table of Allotments, FM, Trinity, TX	5541
Table of Allotments, FM, Tuscaloosa, AL	1400
Table of Allotments, FM, Tusculum, TN	6482
Table of Allotments, FM, Union City, TN	2878
Table of Allotments, FM, Vacaville and Middletown, CA	143
Table of Allotments, FM, Vacaville and Middletown, CA	5786
Table of Allotments, FM, Van Buren, AR	416
Table of Allotments, FM, Various Locations	2006
Table of Allotments, FM, Various Locations	5217
Table of Allotments, FM, Various Locations (ERRATUM)	2073
Table of Allotments, FM, Various Locations (ERRATUM)	4522
Table of Allotments, FM, Venice, FL	5219
Table of Allotments, FM, Venice, FL	7219
Table of Allotments, FM, Vergennes, VT and Hague, NY	3364
Table of Allotments, FM, Victoria and New Braunfels, TX	3368
Table of Allotments, FM, Victoria and New Braunfels, TX	4943

Case Name	Page
Table of Allotments, FM, Volga, SD	2131
Table of Allotments, FM, Wailuku, HI	5232
Table of Allotments, FM, Waldron, AR	2590
Table of Allotments, FM, Walterboro, SC	5315
Table of Allotments, FM, Warrenton, GA	5174
Table of Allotments, FM, Warrenton, MO	1319
Table of Allotments, FM, Warrenton, MO	4210
Table of Allotments, FM, Waseca, MN and Menomonie, WI	4848
Table of Allotments, FM, Waterbury and Royalton, VT	5163
Table of Allotments, FM, Waupun and Omro, WI	3656
Table of Allotments, FM, Waynesboro, TN	1851
Table of Allotments, FM, Weiser, ID	113
Table of Allotments, FM, Weiser, ID	2186
Table of Allotments, FM, West Liberty and Richwood, OH	6084
Table of Allotments, FM, West Palm Beach, FL	1827
Table of Allotments, FM, West Palm Beach, FL	4502
Table of Allotments, FM, West Palm Beach, FL	6975
Table of Allotments, FM, Whiting, DePere, Crandon and Algoma, WI	2624
Table of Allotments, FM, Wickenburg and Lake Havasu City, AZ	5140
Table of Allotments, FM, Wickenburg, AZ	2540
Table of Allotments, FM, Wickenburg, AZ	5636
Table of Allotments, FM, Wiggins and D'Iberville, MS	3478
Table of Allotments, FM, Wiggins and D'Iberville, MS	3479
Table of Allotments, FM, Wilburton and Antlers, OK	4760
Table of Allotments, FM, Willmar, Princeton and Olivia, MN	3361
Table of Allotments, FM, Winchester Bay and Sutherlin, OR	5181
Table of Allotments, FM, Windsor and Calistoga, CA	5115
Table of Allotments, FM, Winslow and Kachina Village, AZ	5117
Table of Allotments, FM, Winterset, IA	367
Table of Allotments, FM, Wisconsin Dells, WI	910
Table of Allotments, FM, Woodsville, NH	609
Table of Allotments, FM, Yreka, CA	109
Table of Allotments, FM, Yreka, CA	5582
Table of Allotments, FM, Zolfo Springs, FL	911
Table of Allotments, TV, Alamosa, CO	4293
Table of Allotments, TV, Albion, Lincoln and Columbus, NE	6038
Table of Allotments, TV, Anniston, AL	1992
Table of Allotments, TV, Ardmore, OK and Sherman, TX	7006
Table of Allotments, TV, Casper and Sheridan, WY	2880
Table of Allotments, TV, Ceres and Modesto, CA	3613
Table of Allotments, TV, Eureka Springs, AR	5313
Table of Allotments, TV, Jasper and Tuscaloosa, AL	1546
Table of Allotments, TV, Kennett, MO	5369
Table of Allotments, TV, Kennett, MO	7119
Table of Allotments, TV, Los Angeles and Norwalk, CA	5317
Table of Allotments, TV, Roseburg, OR	153

Case Name	Page
Table of Allotments, TV, Roseburg, OR	4369
Table of Allotments, TV, Snyder, TX	5791
Table of Allotments, TV, Tamuning, Guam	5838
Table of Allotments, TV, Tuscaloosa, AL	1826
Table of Allotments, TV, Vanderbilt, MI	1284
Table of Allotments, TV, Vanderbilt, MI	4222
Table of Allotments, TV, Various Locations	30
Table of Allotments, TV, Wailuku, HI	2538
Table of Allotments, TV, Wilmington, Burgaw and Hamlet, NC	6969
Taconic Long Distance Service Corp.	1744
Taft Broadcasting Company	3744
Tarkenton, Stephen D.	3619
Tarkenton, Stephen D.	4161
Technical Assignment Criteria for the AM Broadcast Service	6273
Technical Flexibility in the Mobile Communications Services	5808
Technical Improvement in Emergency Broadcast System	7545
TelTrust, Inc.	6670
Telecable Associates, Incorporated	6850
Telecom*USA	4269
Telecom*USA, Inc.	664
Telecom*USA, Inc.	1405
Telecommunications Relay Services	4657
Telecommunications Service Priority	4888
Telecommunications Services, Inc.	232
Teleconnect Company	5202
Teledial America, Inc.	650
Teledial America, Inc.	7293
Teledial America, Inc. v. Pacific Bell	6080
Telefonica Larga Distancia de Puerto Rico	4987
Telefonica Larga Distancia de Puerto Rico	6955
Telemarketing Investments, LTD.	7018
Telemundo Group, Inc.	2897
Telephone Calls From the Persian Gulf	1278
Telephone Utilities Exchange Carrier Association	6641
Telephone and Data Systems, Inc.	270
Telesphere Network, Inc.	653
Telesphere Network, Inc.	703
Telesphere Network, Inc.	981
Telesphere Network, Inc.	2913
Telesphere Network, Inc.	7535
Television Satellite Stations	4212
Television Satellite Stations	5010
Termination of 1986 Average Schedule Transition Plan	3668
Texas Communications Limited Partnership	1260
Texas Communications Limited Partnership	5191
Texas Educational Broadcasting Co-operative, Incorporated	628

Case Name	Page
Texoma Recreational Marine Association	4846
The Cedarville College	538
The Dunlin Group	4642
The Dunlin Group	6980
The Florida Teleport Limited	6536
The Hinton Telephone Company of Hinton, Oklahoma	7002
The Hogan Company	4821
The Island Telephone Company	5516
The Mirkwood Group	511
The Offshore Telephone Company	7481
The Tellesis Partners	2883
Three Star Telecast, Inc.	4410
Transgulf Communications Ltd., Inc.	2335
Transport Rate Structure and Pricing	6126
Transport Rate Structure and Pricing	7546
Trentadue, Scott M.	4438
Trentadue, Scott M.	6540
Tri-J Enterprises, Inc.	3605
Tri-State Broadcasting	6058
Tri-State Broadcasting Company, Inc. (KUKQ(AM))	2604
Tri-State Radio Company	2254
TwinLakes Communications	3517
Tyree, James W.	2034
U.S. Electrodynamics, Incorporated	2889
U.S. Fiberline Communications	6676
U.S. Long Distance, Inc.	6683
U.S. Satellite Corporation	2940
U.S. Sprint Communications Company Limited Partnership	4648
U.S. West Paging, Inc.	2255
U.S. West Paging, Inc. (ERRATUM)	3429
UPS Telecommunications, Inc.	4774
US Sprint Communications Company	5577
US Sprint Communications Company Limited Partnership	239
US Sprint Communications Company Limited Partnership	734
US Sprint Communications Company Limited Partnership	1770
US Sprint Communications Company Limited Partnership	2234
US Sprint Communications Company Limited Partnership	2300
US Sprint Communications Company Limited Partnership	2546
US Sprint Communications Company Limited Partnership	2869
US Sprint Communications Company Limited Partnership	3607
US Sprint Communications Company Limited Partnership	4386
US Sprint Communications Company Limited Partnership	4504
US Sprint Communications Company Limited Partnership	4651
US Sprint Communications Company Limited Partnership	5171
US Sprint Communications Company Limited Partnership	5172
US Sprint Communications Company Limited Partnership	5210

Case Name	Page
US Sprint Communications Company Limited Partnership	5211
US Sprint Communications Company Limited Partnership	5578
US Sprint Communications Company Limited Partnership	5579
US Sprint Communications Company Limited Partnership	6925
US Sprint Communications Company, L.P.	640
US Sprint Communications Company, L.P.	7295
US Sprint Communications Company, Limited Partnership	1889
US WATS, Inc.	5758
US West	6600
US West Communications	1407
US West Communications	1853
US West Communications	6546
US West Communications, Inc.	3398
US West Communications, Inc.	4873
US West Communications, Inc.	4869
US West Communications, Inc.	5067
United Artists Cable Mississippi Gulf Coast	6847
United States Army Corps of Engineers, Seattle District	982
United States Information Agency	1714
United States Telephone Association	1873
United Telecommunications, Inc.	7108
United Telephone Company of Indiana	295
United Telephone Company of Indiana	1796
United Telephone System Companies	2312
United Telephone System Companies	3334
United Telephone System Companies	5235
United Telephone System Companies	5812
Utah Public Safety Plan	5679
Utah Public Safety Plan	7139
Valarie Woodson and Henry Cornell	4420
Validation and Billing Information for Joint Use Calling Cards	3506
Validation and Billing Information for Joint Use Calling Cards	3718
Value Radio Corporation	867
Vaughan, Sandra M. Adair	1780
Vaughan, Sandra M. Adair	3608
Vicksburg Video, Incorporated	6849
Victoria Cellular Corporation	4506
Victorson Group, Inc.	1697
Vidcom Marketing, Inc.	1945
Video-44	4948
Video/Multipoint, Inc.	5125
Villcom Broadcasting, Inc.	6510
Virgin Islands Telephone Corporation	3537
Virgin Islands Telephone Corporation	7350
Virginia Public Safety Plan	6025
Virginia Public Safety Plan	7475

Case Name	**Page**
Virginia RSA 6 Cellular Limited Partnership	405
Vista-United Telecommunications	7004
Vradenburg, George, III	5066
WAPA(AM)	78
WATS/800, Inc.	4503
WCCR Broadcasting Limited Partnership	2554
WCVQ, Inc.	7209
WDAX, Incorporated	1987
WHDH-AM, Inc.	4329
WIOD, Inc. (WIOD-AM)	3704
WJG Maritel Corporation	486
WKLX, Inc.	225
WLBE 790, Inc. (WLBE-AM)	3540
WLIK, Inc.	4514
WORLDVIEW, INC.	4609
WPIX, Inc.	706
WPOM Radio Partners, Ltd.	1413
WROV Broadcasters, Inc.	1421
WTG - Central, Inc.	2339
WTG-Central, Inc., and WTG-West, Inc.	4460
WWOR-TV, Inc.	1524
WWOR-TV, Inc.	193
WWOR-TV, Inc.	4350
WWOR-TV, Inc.	4878
WWOR-TV, Inc.	6569
WWOR-TV, Inc.(ERRATUM)	5106
WWOR-TV, Inc.	131
WXBM-FM, Inc.	4782
WXBM-FM, Inc.	7356
Wallace Communications Consultants, and Drew Metal Corporation	1618
Walter Communications, Inc.	7019
Walter, A. P., Jr.	875
Walton, Eugene	1288
Walton, Eugene	4168
Walton, Eugene	4236
Walton, Eugene	6071
Warner, Vivian E.	6033
Warren Price Communications, Inc.	575
Warren Price Communications, Inc.	992
Warren Price Communications, Inc.	4424
Warren Telephone Company	5286
Washington Interstate Broadcasting Company, Inc.	514
Washington Public Safety Plan	5514
Washington Public Safety Plan	7017
Weiner Broadcasting Company	4337
West Coast Telecommunications, Inc.	5759

Case Name	Page
West Texas Rural Telephone Cooperative, Inc.	7264
Western Cities Broadcasting, Inc.	2325
Western Cities Broadcasting, Inc.	3599
Western Florida Cellular Telephone Corp.	2032
Western Radio Services Company, Inc.	2463
Western Union Corporation	83
Western Union Corporation	6992
Western Union International, Inc.	2570
Westinghouse Communication Services, Inc.	1771
Weyburn Broadcasting Limited Partnership	1262
Weyburn Broadcasting Limited Partnership	4474
Whale Communications of Colorado, Inc.	7548
White Broadcasting Partnership	863
White Construction Co., Inc.	322
White Stone Broadcasting Company	2500
Williams Telecommunications Group, Inc.	641
Williams Telecommunications Group, Inc.	7290
Willis Broadcasting Corporation	2598
Window for Point-To-Multipoint Channel 900 MHz Band	7242
Wionona Ear Leasing Associates, Inc.	3513
Woodhull Community Telephone Company	3396
Woods Communications Group, Inc.	3529
Working Assets Funding Service	2887
Worland Services	5337
World Administrative Radio Conference	3900
World Administrative Radio Conference -1992	1914
World Communications, Inc.	2206
World Communications, Inc.	2958
World Communications, Inc.	4650
World Communications, Inc.	6957
World Direct, Ltd.	4986
Wyoco, Inc.	1912
Wyoming Public Safety Plan	2938
Wyoming Regional Public Safety Plan	1585
Zaragoza, Richard R., Esquire	4655
Zozaya, Julia S.	4416

Federal Communications Commission Record

Table of Cases by Delegated Authority and FCC Number
Volume 6
Issue 1 - 26

Delegated Authority or FCC Number	Page
DA 88 - 351	410
DA 90 -1489	3689
DA 90 -1502	3692
DA 90 -1510	3695
DA 90 -1595	55
DA 90 -1596	57
DA 90 -1597	59
DA 90 -1598	61
DA 90 -1599	255
DA 90 -1601	322
DA 90 -1602	253
DA 90 -1603	324
DA 90 -1604	3
DA 90 -1606	326
DA 90 -1610	63
DA 90 -1643	3698
DA 90 -1644	3699
DA 90 -1645	3702
DA 90 -1646	3704
DA 90 -1647	3708
DA 90 -1648	3711
DA 90 -1700	263
DA 90 -1701	277
DA 90 -1702	328
DA 90 -1703	330
DA 90 -1704	359
DA 90 -1705	516
DA 90 -1706	361
DA 90 -1707	391
DA 90 -1774	706
DA 90 -1783	494
DA 90 -1785	495
DA 90 -1786	497
DA 90 -1787	500
DA 90 -1813	704
DA 90 -1827	347
DA 90 -1836	577
DA 90 -1838	579
DA 90 -1840	33
DA 90 -1854	79
DA 90 -1856	1
DA 90 -1857	51
DA 90 -1858	43
DA 90 -1859	46
DA 90 -1860	80
DA 90 -1861	44
DA 90 -1862	48
DA 90 -1864	92
DA 90 -1865	76
DA 90 -1866	47
DA 90 -1867	5
DA 90 -1868	6
DA 90 -1869	26
DA 90 -1870	28
DA 90 -1871	30
DA 90 -1872	50
DA 90 -1873	115
DA 90 -1874	83
DA 90 -1875	357
DA 90 -1876	42
DA 90 -1877	41
DA 90 -1878	36
DA 90 -1879	31
DA 90 -1880	628
DA 90 -1881	536
DA 90 -1882	538
DA 90 -1883	540
DA 90 -1884	252
DA 90 -1885	103
DA 90 -1886	147
DA 90 -1887	105
DA 90 -1888	107
DA 90 -1889	109
DA 90 -1890	111
DA 90 -1891	149
DA 90 -1892	151
DA 90 -1893	152
DA 90 -1894	113
DA 90 -1895	153
DA 90 -1896	155
DA 90 -1897	246
DA 90 -1898	142

Delegated Authority or FCC Number	Page	Delegated Authority or FCC Number	Page
DA 90 -1899	250	DA 91 - 14	414
DA 90 -1900	249	DA 91 - 16	320
DA 90 -1901	264	DA 91 - 17	321
DA 90 -1902	143	DA 91 - 18	415
DA 90 -1903	230	DA 91 - 19	373
DA 90 -1904	241	DA 91 - 20	375
DA 90 -1905	242	DA 91 - 21	363
DA 90 -1906	232	DA 91 - 22	364
DA 90 -1907	262	DA 91 - 23	366
DA 90 -1908	244	DA 91 - 24	367
DA 90 -1909	243	DA 91 - 25	384
DA 90 -1910	245	DA 91 - 26	385
DA 90 -1911	238	DA 91 - 27	368
DA 90 -1912	239	DA 91 - 28	386
DA 90 -1913	234	DA 91 - 29	370
DA 90 -1914	236	DA 91 - 30	413
DA 90 -1915	297	DA 91 - 31	349
DA 90 -1916	273	DA 91 - 32	377
DA 90 -1917	270	DA 91 - 33	351
DA 90 -1918	267	DA 91 - 34	354
DA 90 -1919	314	DA 91 - 35	356
DA 90 -1920	522	DA 91 - 36	448
DA 90 -1921	508	DA 91 - 37	594
DA 90 -1922	511	DA 91 - 38	387
DA 90 -1923	487	DA 91 - 39	416
DA 90 -1924	708	DA 91 - 40	388
DA 90 -1925	514	DA 91 - 41	390
DA 90 -1926	526	DA 91 - 42	417
DA 90 -1927	528	DA 91 - 43	399
DA 90 -1928	483	DA 91 - 44	400
DA 90 -1929	490	DA 91 - 45	447
DA 90 -1940	379	DA 91 - 46	401
DA 91 - 2	75	DA 91 - 47	402
DA 91 - 3	65	DA 91 - 48	425
DA 91 - 4	291	DA 91 - 49	426
DA 91 - 5	290	DA 91 - 50	444
DA 91 - 6	292	DA 91 - 51	445
DA 91 - 7	293	DA 91 - 52	446
DA 91 - 8	294	DA 91 - 53	486
DA 91 - 9	276	DA 91 - 54	599
DA 91 - 10	443	DA 91 - 55	502
DA 91 - 10	598	DA 91 - 56	583
DA 91 - 11	295	DA 91 - 57	585
DA 91 - 12	296	DA 91 - 58	587
DA 91 - 13	372	DA 91 - 59	609

Delegated Authority or FCC Number	Page
DA 91 - 60	589
DA 91 - 61	591
DA 91 - 62	531
DA 91 - 63	532
DA 91 - 64	533
DA 91 - 65	534
DA 91 - 66	592
DA 91 - 67	535
DA 91 - 68	596
DA 91 - 69	617
DA 91 - 70	637
DA 91 - 71	605
DA 91 - 72	607
DA 91 - 73	638
DA 91 - 74	613
DA 91 - 75	615
DA 91 - 76	694
DA 91 - 77	618
DA 91 - 78	619
DA 91 - 79	620
DA 91 - 80	621
DA 91 - 81	645
DA 91 - 82	644
DA 91 - 83	640
DA 91 - 84	639
DA 91 - 85	641
DA 91 - 86	642
DA 91 - 87	643
DA 91 - 88	648
DA 91 - 89	649
DA 91 - 90	650
DA 91 - 91	653
DA 91 - 92	651
DA 91 - 93	652
DA 91 - 94	654
DA 91 - 95	658
DA 91 - 96	659
DA 91 - 97	661
DA 91 - 98	662
DA 91 - 99	664
DA 91 - 100	656
DA 91 - 101	657
DA 91 - 102	696
DA 91 - 103	697
DA 91 - 104	698
DA 91 - 105	699
DA 91 - 106	700
DA 91 - 107	701
DA 91 - 108	702
DA 91 - 109	703
DA 91 - 110	616
DA 91 - 111	630
DA 91 - 112	631
DA 91 - 113	633
DA 91 - 114	636
DA 91 - 115	824
DA 91 - 116	719
DA 91 - 117	937
DA 91 - 118	655
DA 91 - 119	749
DA 91 - 120	746
DA 91 - 121	897
DA 91 - 122	863
DA 91 - 123	858
DA 91 - 124	717
DA 91 - 125	865
DA 91 - 126	867
DA 91 - 127	880
DA 91 - 128	882
DA 91 - 129	899
DA 91 - 130	947
DA 91 - 131	949
DA 91 - 132	902
DA 91 - 133	904
DA 91 - 134	745
DA 91 - 135	713
DA 91 - 137	735
DA 91 - 138	743
DA 91 - 139	742
DA 91 - 140	734
DA 91 - 141	732
DA 91 - 142	736
DA 91 - 143	1008
DA 91 - 144	859
DA 91 - 145	860
DA 91 - 146	861
DA 91 - 147	1339
DA 91 - 148	1348
DA 91 - 149	905
DA 91 - 151	906

Delegated Authority or FCC Number	Page	Delegated Authority or FCC Number	Page
DA 91 - 152	907	DA 91 - 201	1364
DA 91 - 153	908	DA 91 - 202	1392
DA 91 - 154	909	DA 91 - 203	1365
DA 91 - 155	910	DA 91 - 204	1366
DA 91 - 156	911	DA 91 - 205	1220
DA 91 - 157	938	DA 91 - 206	1222
DA 91 - 158	940	DA 91 - 207	1224
DA 91 - 159	942	DA 91 - 209	1251
DA 91 - 160	1328	DA 91 - 210	1329
DA 91 - 161	944	DA 91 - 211	1330
DA 91 - 162	945	DA 91 - 212	1333
DA 91 - 163	946	DA 91 - 213	1337
DA 91 - 164	894	DA 91 - 214	1315
DA 91 - 165	951	DA 91 - 215	1317
DA 91 - 166	980	DA 91 - 216	1319
DA 91 - 167	981	DA 91 - 217	1321
DA 91 - 168	968	DA 91 - 218	1323
DA 91 - 169	971	DA 91 - 219	1325
DA 91 - 170	970	DA 91 - 220	1313
DA 91 - 171	1269	DA 91 - 223	1363
DA 91 - 172	982	DA 91 - 224	1379
DA 91 - 175	979	DA 91 - 225	1381
DA 91 - 176	998	DA 91 - 226	1278
DA 91 - 177	983	DA 91 - 227	1362
DA 91 - 178	1000	DA 91 - 228	1436
DA 91 - 179	1001	DA 91 - 229	1506
DA 91 - 180	1230	DA 91 - 230	1559
DA 91 - 181	1235	DA 91 - 231	1428
DA 91 - 182	1237	DA 91 - 232	1429
DA 91 - 183	1239	DA 91 - 233	1430
DA 91 - 184	1279	DA 91 - 234	1432
DA 91 - 185	1281	DA 91 - 235	1434
DA 91 - 186	1282	DA 91 - 236	1491
DA 91 - 187	1284	DA 91 - 237	1398
DA 91 - 188	1286	DA 91 - 238	1399
DA 91 - 189	1253	DA 91 - 239	1397
DA 91 - 190	1255	DA 91 - 240	1395
DA 91 - 191	1256	DA 91 - 241	1394
DA 91 - 192	1257	DA 91 - 242	1400
DA 91 - 193	1258	DA 91 - 243	1444
DA 91 - 194	1259	DA 91 - 244	1899
DA 91 - 195	989	DA 91 - 245	1445
DA 91 - 196	986	DA 91 - 246	1406
DA 91 - 198	987	DA 91 - 247	1435
DA 91 - 200	1250	DA 91 - 248	1407

Delegated Authority or FCC Number	Page
DA 91 - 249	1408
DA 91 - 250	1478
DA 91 - 251	1480
DA 91 - 252	1483
DA 91 - 253	1485
DA 91 - 254	1487
DA 91 - 255	1489
DA 91 - 256	1413
DA 91 - 257	1401
DA 91 - 258	1402
DA 91 - 259	1403
DA 91 - 260	1404
DA 91 - 261	1405
DA 91 - 262	1410
DA 91 - 263	1412
DA 91 - 264	1446
DA 91 - 265	1523
DA 91 - 266	1502
DA 91 - 267	1503
DA 91 - 268	1504
DA 91 - 269	1505
DA 91 - 270	1563
DA 91 - 271	1515
DA 91 - 272	1516
DA 91 - 273	1517
DA 91 - 274	1541
DA 91 - 275	1588
DA 91 - 276	1595
DA 91 - 277	1565
DA 91 - 278	1956
DA 91 - 280	1532
DA 91 - 281	1590
DA 91 - 282	1592
DA 91 - 283	1594
DA 91 - 284	1545
DA 91 - 285	1575
DA 91 - 286	1566
DA 91 - 287	1562
DA 91 - 288	1521
DA 91 - 289	1561
DA 91 - 290	1546
DA 91 - 291	1547
DA 91 - 292	1548
DA 91 - 293	1551
DA 91 - 294	1553
DA 91 - 295	1554
DA 91 - 296	1556
DA 91 - 297	1560
DA 91 - 298	1558
DA 91 - 299	1621
DA 91 - 300	1585
DA 91 - 301	1598
DA 91 - 302	1900
DA 91 - 303	1576
DA 91 - 304	1580
DA 91 - 305	1581
DA 91 - 306	1582
DA 91 - 307	1610
DA 91 - 308	1611
DA 91 - 309	1596
DA 91 - 310	1641
DA 91 - 311	1615
DA 91 - 312	1586
DA 91 - 313	1583
DA 91 - 314	1600
DA 91 - 315	1597
DA 91 - 316	1901
DA 91 - 317	1838
DA 91 - 318	1835
DA 91 - 319	1842
DA 91 - 320	1601
DA 91 - 321	1741
DA 91 - 323	1854
DA 91 - 324	1605
DA 91 - 325	1742
DA 91 - 326	1681
DA 91 - 327	1798
DA 91 - 328	1796
DA 91 - 329	1712
DA 91 - 330	1813
DA 91 - 331	1821
DA 91 - 332	1744
DA 91 - 333	1745
DA 91 - 334	1746
DA 91 - 335	1747
DA 91 - 336	1760
DA 91 - 337	1811
DA 91 - 338	1795
DA 91 - 339	1867
DA 91 - 340	1869

Delegated Authority or FCC Number	Page	Delegated Authority or FCC Number	Page
DA 91 - 341	1871	DA 91 - 387	2501
DA 91 - 342	1820	DA 91 - 388	2505
DA 91 - 343	1807	DA 91 - 389	2508
DA 91 - 344	1767	DA 91 - 390	1894
DA 91 - 345	1768	DA 91 - 391	1895
DA 91 - 346	1769	DA 91 - 392	1897
DA 91 - 347	1770	DA 91 - 393	1890
DA 91 - 348	1771	DA 91 - 394	1883
DA 91 - 349	2418	DA 91 - 395	1885
DA 91 - 350	2006	DA 91 - 396	1886
DA 91 - 351	1824	DA 91 - 397	1887
DA 91 - 352	1826	DA 91 - 398	1888
DA 91 - 353	1827	DA 91 - 399	1889
DA 91 - 354	1829	DA 91 - 400	2085
DA 91 - 355	1831	DA 91 - 401	2151
DA 91 - 356	1833	DA 91 - 402	2554
DA 91 - 357	1845	DA 91 - 403	2008
DA 91 - 358	1847	DA 91 - 404	1911
DA 91 - 359	1849	DA 91 - 405	1938
DA 91 - 360	1851	DA 91 - 406	1912
DA 91 - 361	1844	DA 91 - 407	2083
DA 91 - 362	1840	DA 91 - 408	2001
DA 91 - 363	1853	DA 91 - 409	2002
DA 91 - 364	1841	DA 91 - 410	2003
DA 91 - 365	1910	DA 91 - 411	2005
DA 91 - 366	2261	DA 91 - 412	2060
DA 91 - 367	2263	DA 91 - 413	2068
DA 91 - 368	2265	DA 91 - 414	2086
DA 91 - 369	2182	DA 91 - 415	1995
DA 91 - 370	2164	DA 91 - 416	1942
DA 91 - 371	2167	DA 91 - 417	1944
DA 91 - 372	2168	DA 91 - 418	1997
DA 91 - 374	2045	DA 91 - 419	1996
DA 91 - 375	2007	DA 91 - 421	2071
DA 91 - 376	2063	DA 91 - 422	2073
DA 91 - 377	2108	DA 91 - 423	2074
DA 91 - 378	1852	DA 91 - 424	2076
DA 91 - 379	1905	DA 91 - 425	2128
DA 91 - 380	1906	DA 91 - 426	2129
DA 91 - 381	1908	DA 91 - 427	2131
DA 91 - 382	1947	DA 91 - 428	2132
DA 91 - 383	1949	DA 91 - 429	1945
DA 91 - 384	1950	DA 91 - 430	2059
DA 91 - 385	2475	DA 91 - 431	1958
DA 91 - 386	2500	DA 91 - 432	1962

Delegated Authority or FCC Number	Page	Delegated Authority or FCC Number	Page
DA 91 - 433	1963	DA 91 - 479	2159
DA 91 - 434	1964	DA 91 - 480	2160
DA 91 - 435	1965	DA 91 - 481	2161
DA 91 - 436	2082	DA 91 - 482	2307
DA 91 - 437	2087	DA 91 - 483	2152
DA 91 - 439	1987	DA 91 - 484	2078
DA 91 - 440	1999	DA 91 - 485	2080
DA 91 - 441	2009	DA 91 - 486	2312
DA 91 - 442	2049	DA 91 - 487	2348
DA 91 - 443	2037	DA 91 - 488	2186
DA 91 - 444	2038	DA 91 - 489	2187
DA 91 - 445	2039	DA 91 - 490	2196
DA 91 - 446	2043	DA 91 - 491	2197
DA 91 - 447	2040	DA 91 - 492	2198
DA 91 - 448	2052	DA 91 - 493	2200
DA 91 - 449	2053	DA 91 - 494	2171
DA 91 - 450	2055	DA 91 - 495	2220
DA 91 - 451	2042	DA 91 - 496	2212
DA 91 - 452	2088	DA 91 - 497	2213
DA 91 - 453	2011	DA 91 - 498	2215
DA 91 - 454	2012	DA 91 - 499	2202
DA 91 - 455	2163	DA 91 - 500	2306
DA 91 - 456	2056	DA 91 - 501	2233
DA 91 - 457	2057	DA 91 - 502	2234
DA 91 - 458	2058	DA 91 - 503	2235
DA 91 - 459	2133	DA 91 - 504	2236
DA 91 - 460	2134	DA 91 - 505	2237
DA 91 - 461	2135	DA 91 - 506	2181
DA 91 - 462	2598	DA 91 - 507	2217
DA 91 - 463	2032	DA 91 - 508	2310
DA 91 - 464	2034	DA 91 - 509	2311
DA 91 - 465	2136	DA 91 - 510	2173
DA 91 - 466	2138	DA 91 - 511	2632
DA 91 - 467	2141	DA 91 - 512	2174
DA 91 - 468	2142	DA 91 - 513	2178
DA 91 - 469	2144	DA 91 - 514	2313
DA 91 - 470	2089	DA 91 - 515	2205
DA 91 - 471	2036	DA 91 - 516	2206
DA 91 - 472	2150	DA 91 - 517	2327
DA 91 - 473	2596	DA 91 - 518	2257
DA 91 - 474	2106	DA 91 - 519	2321
DA 91 - 475	2107	DA 91 - 520	2241
DA 91 - 476	2153	DA 91 - 521	2243
DA 91 - 477	2157	DA 91 - 522	2254
DA 91 - 478	2158	DA 91 - 523	2314

Delegated Authority or FCC Number	Page
DA 91 - 524	2255
DA 91 - 525	2329
DA 91 - 527	2334
DA 91 - 528	2276
DA 91 - 529	2302
DA 91 - 530	2330
DA 91 - 531	2454
DA 91 - 532	2456
DA 91 - 533	2458
DA 91 - 534	2460
DA 91 - 535	2462
DA 91 - 536	2299
DA 91 - 537	2300
DA 91 - 538	2301
DA 91 - 540	2332
DA 91 - 541	2571
DA 91 - 542	2483
DA 91 - 543	2333
DA 91 - 545	2569
DA 91 - 546	2335
DA 91 - 547	2338
DA 91 - 548	2339
DA 91 - 549	2470
DA 91 - 550	2540
DA 91 - 551	2538
DA 91 - 552	2537
DA 91 - 553	2535
DA 91 - 554	2471
DA 91 - 555	2473
DA 91 - 556	2463
DA 91 - 557	2560
DA 91 - 558	2485
DA 91 - 559	2490
DA 91 - 560	2542
DA 91 - 561	2567
DA 91 - 562	2546
DA 91 - 563	2547
DA 91 - 564	2495
DA 91 - 565	2548
DA 91 - 566	2553
DA 91 - 567	2551
DA 91 - 568	2552
DA 91 - 569	2570
DA 91 - 570	2588
DA 91 - 571	2589
DA 91 - 572	2590
DA 91 - 573	2592
DA 91 - 574	2593
DA 91 - 575	2594
DA 91 - 576	2607
DA 91 - 577	2600
DA 91 - 578	2787
DA 91 - 579	2631
DA 91 - 580	2623
DA 91 - 582	3359
DA 91 - 583	3395
DA 91 - 584	3358
DA 91 - 585	3382
DA 91 - 586	2624
DA 91 - 587	2803
DA 91 - 588	2870
DA 91 - 589	2921
DA 91 - 590	2833
DA 91 - 591	2906
DA 91 - 592	2882
DA 91 - 593	2874
DA 91 - 594	2907
DA 91 - 595	2908
DA 91 - 596	2866
DA 91 - 597	2868
DA 91 - 598	2869
DA 91 - 599	2909
DA 91 - 600	2910
DA 91 - 601	2911
DA 91 - 602	2912
DA 91 - 603	2913
DA 91 - 604	2914
DA 91 - 605	2915
DA 91 - 606	2916
DA 91 - 607	2917
DA 91 - 608	2918
DA 91 - 609	2883
DA 91 - 610	2878
DA 91 - 611	2879
DA 91 - 612	2880
DA 91 - 613	2885
DA 91 - 614	2887
DA 91 - 615	2888
DA 91 - 616	2889
DA 91 - 617	2891

Delegated Authority or FCC Number	Page	Delegated Authority or FCC Number	Page
DA 91 - 618	2919	DA 91 - 664	3336
DA 91 - 619	2974	DA 91 - 665	3385
DA 91 - 620	2959	DA 91 - 666	3345
DA 91 - 621	2932	DA 91 - 667	3467
DA 91 - 622	2938	DA 91 - 668	3398
DA 91 - 623	2969	DA 91 - 669	3396
DA 91 - 624	2949	DA 91 - 670	3513
DA 91 - 625	2939	DA 91 - 671	3515
DA 91 - 626	2940	DA 91 - 672	3518
DA 91 - 627	2944	DA 91 - 673	3517
DA 91 - 628	3994	DA 91 - 674	3571
DA 91 - 629	2950	DA 91 - 675	3573
DA 91 - 630	2952	DA 91 - 676	3468
DA 91 - 631	2956	DA 91 - 677	3387
DA 91 - 632	2957	DA 91 - 678	3397
DA 91 - 633	2958	DA 91 - 679	3384
DA 91 - 634	3289	DA 91 - 680	3473
DA 91 - 635	3323	DA 91 - 681	3400
DA 91 - 636	3325	DA 91 - 682	3402
DA 91 - 637	3290	DA 91 - 683	3391
DA 91 - 638	3292	DA 91 - 684	3392
DA 91 - 639	3326	DA 91 - 685	3469
DA 91 - 640	3293	DA 91 - 686	3535
DA 91 - 641	3294	DA 91 - 687	3544
DA 91 - 642	3328	DA 91 - 688	3474
DA 91 - 643	3429	DA 91 - 689	3478
DA 91 - 644	3329	DA 91 - 690	3479
DA 91 - 645	3330	DA 91 - 691	3480
DA 91 - 646	3332	DA 91 - 692	3481
DA 91 - 647	3333	DA 91 - 693	3482
DA 91 - 648	3471	DA 91 - 694	3520
DA 91 - 649	3430	DA 91 - 695	3523
DA 91 - 650	3334	DA 91 - 696	3525
DA 91 - 651	3431	DA 91 - 697	3527
DA 91 - 652	3374	DA 91 - 698	3586
DA 91 - 654	3472	DA 91 - 699	3536
DA 91 - 655	3361	DA 91 - 700	3546
DA 91 - 656	3364	DA 91 - 701	3549
DA 91 - 657	3366	DA 91 - 702	3542
DA 91 - 658	3463	DA 91 - 703	3617
DA 91 - 659	3464	DA 91 - 704	3619
DA 91 - 660	3465	DA 91 - 705	4112
DA 91 - 661	3466	DA 91 - 706	4115
DA 91 - 662	3367	DA 91 - 707	3537
DA 91 - 663	3368	DA 91 - 708	3587

Delegated Authority or FCC Number	Page
DA 91 - 709	3589
DA 91 - 710	3592
DA 91 - 711	3550
DA 91 - 712	3686
DA 91 - 713	3720
DA 91 - 714	3685
DA 91 - 715	3713
DA 91 - 716	3687
DA 91 - 717	3612
DA 91 - 718	3613
DA 91 - 719	4403
DA 91 - 721	3605
DA 91 - 722	3606
DA 91 - 723	3607
DA 91 - 724	3670
DA 91 - 725	3714
DA 91 - 726	3715
DA 91 - 727	3747
DA 91 - 728	3630
DA 91 - 729	3632
DA 91 - 730	3633
DA 91 - 731	3716
DA 91 - 732	3635
DA 91 - 733	4117
DA 91 - 734	4120
DA 91 - 735	4161
DA 91 - 736	3656
DA 91 - 737	3658
DA 91 - 738	3660
DA 91 - 739	3647
DA 91 - 740	3648
DA 91 - 741	3649
DA 91 - 742	3650
DA 91 - 743	3652
DA 91 - 744	3654
DA 91 - 745	3662
DA 91 - 746	3664
DA 91 - 747	3665
DA 91 - 748	3726
DA 91 - 749	3727
DA 91 - 750	3730
DA 91 - 751	3732
DA 91 - 752	3735
DA 91 - 753	3736
DA 91 - 754	3751
DA 91 - 755	3753
DA 91 - 756	3718
DA 91 - 757	4196
DA 91 - 758	3719
DA 91 - 759	4509
DA 91 - 760	4676
DA 91 - 761	4158
DA 91 - 762	3645
DA 91 - 763	3738
DA 91 - 764	3756
DA 91 - 765	3759
DA 91 - 766	3683
DA 91 - 767	3684
DA 91 - 768	3792
DA 91 - 769	3739
DA 91 - 770	3742
DA 91 - 771	3743
DA 91 - 772	4197
DA 91 - 773	4122
DA 91 - 774	4124
DA 91 - 775	4679
DA 91 - 776	4440
DA 91 - 777	4512
DA 91 - 778	4514
DA 91 - 779	4227
DA 91 - 780	4204
DA 91 - 781	4206
DA 91 - 782	4207
DA 91 - 783	4208
DA 91 - 784	4210
DA 91 - 785	4220
DA 91 - 786	4222
DA 91 - 787	4223
DA 91 - 788	4224
DA 91 - 789	4225
DA 91 - 790	4226
DA 91 - 791	4272
DA 91 - 792	4279
DA 91 - 793	4273
DA 91 - 794	4274
DA 91 - 795	4276
DA 91 - 796	4278
DA 91 - 797	4285
DA 91 - 798	4200
DA 91 - 799	4198

Delegated Authority or FCC Number	Page
DA 91 - 800	4199
DA 91 - 801	4175
DA 91 - 802	4179
DA 91 - 803	4170
DA 91 - 804	4172
DA 91 - 805	4438
DA 91 - 806	4446
DA 91 - 807	4444
DA 91 - 808	4442
DA 91 - 809	4406
DA 91 - 810	4176
DA 91 - 811	4177
DA 91 - 812	4182
DA 91 - 813	4195
DA 91 - 814	4263
DA 91 - 815	4186
DA 91 - 816	4280
DA 91 - 817	3996
DA 91 - 818	4190
DA 91 - 819	4211
DA 91 - 820	4232
DA 91 - 831	4319
DA 91 - 832	4283
DA 91 - 833	4627
DA 91 - 834	4606
DA 91 - 835	4712
DA 91 - 836	4463
DA 91 - 837	4465
DA 91 - 838	4716
DA 91 - 839	4269
DA 91 - 840	4270
DA 91 - 841	4229
DA 91 - 842	4311
DA 91 - 843	4309
DA 91 - 844	4375
DA 91 - 845	4377
DA 91 - 846	4370
DA 91 - 847	4369
DA 91 - 848	4372
DA 91 - 849	4373
DA 91 - 850	4305
DA 91 - 851	4293
DA 91 - 852	4294
DA 91 - 853	4296
DA 91 - 854	4310
DA 91 - 855	4284
DA 91 - 856	4315
DA 91 - 857	4316
DA 91 - 858	4313
DA 91 - 859	4262
DA 91 - 860	4261
DA 91 - 861	4289
DA 91 - 862	4318
DA 91 - 864	4292
DA 91 - 865	4404
DA 91 - 866	4802
DA 91 - 867	4450
DA 91 - 868	4389
DA 91 - 869	4385
DA 91 - 870	4386
DA 91 - 871	4392
DA 91 - 872	4394
DA 91 - 873	4396
DA 91 - 874	4398
DA 91 - 875	4400
DA 91 - 876	4402
DA 91 - 877	4427
DA 91 - 878	4428
DA 91 - 879	4516
DA 91 - 880	4500
DA 91 - 881	4517
DA 91 - 882	4429
DA 91 - 883	4430
DA 91 - 884	4405
DA 91 - 885	4462
DA 91 - 886	4471
DA 91 - 887	4426
DA 91 - 888	4415
DA 91 - 889	4481
DA 91 - 890	4794
DA 91 - 892	4414
DA 91 - 893	4418
DA 91 - 895	4495
DA 91 - 896	4433
DA 91 - 897	4449
DA 91 - 898	4507
DA 91 - 899	4508
DA 91 - 900	4435
DA 91 - 901	4460
DA 91 - 902	5353

Delegated Authority or FCC Number	Page
DA 91 - 903	4790
DA 91 - 904	4461
DA 91 - 905	4578
DA 91 - 906	4469
DA 91 - 907	4499
DA 91 - 908	5044
DA 91 - 909	4619
DA 91 - 910	4946
DA 91 - 911	4503
DA 91 - 912	4504
DA 91 - 913	4505
DA 91 - 914	4502
DA 91 - 915	4519
DA 91 - 916	4521
DA 91 - 917	4522
DA 91 - 918	4523
DA 91 - 919	4577
DA 91 - 920	4579
DA 91 - 921	4617
DA 91 - 922	4614
DA 91 - 923	4792
DA 91 - 924	4725
DA 91 - 925	4727
DA 91 - 926	4730
DA 91 - 927	4729
DA 91 - 928	4732
DA 91 - 929	4734
DA 91 - 930	4609
DA 91 - 931	4610
DA 91 - 932	4618
DA 91 - 934	4682
DA 91 - 935	4789
DA 91 - 936	4839
DA 91 - 937	4646
DA 91 - 938	4648
DA 91 - 939	4649
DA 91 - 940	4650
DA 91 - 941	4651
DA 91 - 942	4652
DA 91 - 943	4654
DA 91 - 944	4810
DA 91 - 945	4711
DA 91 - 946	4811
DA 91 - 947	4752
DA 91 - 948	4754
DA 91 - 949	4756
DA 91 - 950	4758
DA 91 - 951	4759
DA 91 - 952	4760
DA 91 - 953	4803
DA 91 - 954	4804
DA 91 - 955	4806
DA 91 - 956	4808
DA 91 - 957	4702
DA 91 - 958	4703
DA 91 - 959	4704
DA 91 - 960	4793
DA 91 - 961	4774
DA 91 - 962	4766
DA 91 - 963	4819
DA 91 - 964	4841
DA 91 - 965	5013
DA 91 - 966	5014
DA 91 - 968	4844
DA 91 - 969	4845
DA 91 - 970	4818
DA 91 - 971	4944
DA 91 - 972	4817
DA 91 - 973	4866
DA 91 - 974	4869
DA 91 - 975	4870
DA 91 - 976	4872
DA 91 - 977	4846
DA 91 - 978	4822
DA 91 - 979	4873
DA 91 - 980	4827
DA 91 - 981	4821
DA 91 - 982	4874
DA 91 - 983	4852
DA 91 - 985	4850
DA 91 - 986	4848
DA 91 - 987	4863
DA 91 - 988	4860
DA 91 - 989	4861
DA 91 - 990	4825
DA 91 - 991	4826
DA 91 - 993	4884
DA 91 - 994	4875
DA 91 - 995	4877
DA 91 - 996	4888

Delegated Authority or FCC Number	Page
DA 91 - 997	5237
DA 91 -1000	5036
DA 91 -1001	4886
DA 91 -1002	4943
DA 91 -1003	4887
DA 91 -1004	4979
DA 91 -1005	5593
DA 91 -1006	4917
DA 91 -1007	4920
DA 91 -1008	4922
DA 91 -1009	4923
DA 91 -1010	4925
DA 91 -1011	4927
DA 91 -1012	5002
DA 91 -1013	5003
DA 91 -1014	5005
DA 91 -1015	5007
DA 91 -1016	5008
DA 91 -1017	4968
DA 91 -1018	4969
DA 91 -1019	4971
DA 91 -1020	4973
DA 91 -1021	4975
DA 91 -1022	4977
DA 91 -1023	4981
DA 91 -1024	5058
DA 91 -1025	5066
DA 91 -1026	4982
DA 91 -1027	4983
DA 91 -1028	4984
DA 91 -1029	5069
DA 91 -1030	5071
DA 91 -1031	5073
DA 91 -1032	5075
DA 91 -1033	5077
DA 91 -1034	5080
DA 91 -1035	5115
DA 91 -1036	5117
DA 91 -1037	5119
DA 91 -1038	5121
DA 91 -1039	5015
DA 91 -1040	5087
DA 91 -1041	5017
DA 91 -1042	4986
DA 91 -1043	4987

Delegated Authority or FCC Number	Page
DA 91 -1044	4988
DA 91 -1045	4989
DA 91 -1046	4990
DA 91 -1047	5051
DA 91 -1048	5265
DA 91 -1049	5052
DA 91 -1050	5067
DA 91 -1051	5186
DA 91 -1052	5088
DA 91 -1053	5054
DA 91 -1055	5038
DA 91 -1056	5039
DA 91 -1057	5040
DA 91 -1058	5144
DA 91 -1059	5068
DA 91 -1060	5130
DA 91 -1061	5106
DA 91 -1062	5145
DA 91 -1064	5146
DA 91 -1065	5123
DA 91 -1066	5136
DA 91 -1067	5137
DA 91 -1068	5138
DA 91 -1069	5139
DA 91 -1070	5140
DA 91 -1071	5142
DA 91 -1072	5157
DA 91 -1073	5159
DA 91 -1074	5213
DA 91 -1075	5161
DA 91 -1076	5163
DA 91 -1077	5167
DA 91 -1078	5125
DA 91 -1079	5147
DA 91 -1080	5169
DA 91 -1081	5184
DA 91 -1082	5170
DA 91 -1083	5201
DA 91 -1084	5172
DA 91 -1085	5210
DA 91 -1086	5209
DA 91 -1087	5173
DA 91 -1088	5171
DA 91 -1089	5174
DA 91 -1090	5176

Delegated Authority or FCC Number	Page	Delegated Authority or FCC Number	Page
DA 91 -1091	5178	DA 91 -1137	5368
DA 91 -1092	5181	DA 91 -1138	5308
DA 91 -1093	5235	DA 91 -1139	5335
DA 91 -1094	5200	DA 91 -1140	5371
DA 91 -1095	5198	DA 91 -1141	5534
DA 91 -1096	5233	DA 91 -1142	5336
DA 91 -1097	5196	DA 91 -1143	5337
DA 91 -1098	5271	DA 91 -1144	5338
DA 91 -1099	5238	DA 91 -1145	5339
DA 91 -1100	5212	DA 91 -1146	5539
DA 91 -1101	5215	DA 91 -1148	5367
DA 91 -1102	5217	DA 91 -1149	5591
DA 91 -1103	5232	DA 91 -1150	5609
DA 91 -1104	5219	DA 91 -1151	5541
DA 91 -1105	5187	DA 91 -1152	5514
DA 91 -1106	5340	DA 91 -1154	5543
DA 91 -1107	5211	DA 91 -1155	5545
DA 91 -1108	5202	DA 91 -1156	5403
DA 91 -1109	5309	DA 91 -1157	5547
DA 91 -1110	5310	DA 91 -1158	5397
DA 91 -1111	5313	DA 91 -1159	5611
DA 91 -1112	5257	DA 91 -1160	5399
DA 91 -1113	5434	DA 91 -1161	5612
DA 91 -1114	5261	DA 91 -1162	5661
DA 91 -1115	5263	DA 91 -1164	5513
DA 91 -1116	5286	DA 91 -1165	5515
DA 91 -1117	5272	DA 91 -1166	5516
DA 91 -1118	5268	DA 91 -1168	5557
DA 91 -1119	5304	DA 91 -1169	5682
DA 91 -1120	5326	DA 91 -1170	5518
DA 91 -1121	5328	DA 91 -1171	5517
DA 91 -1122	5330	DA 91 -1172	5589
DA 91 -1123	5315	DA 91 -1173	5559
DA 91 -1124	5332	DA 91 -1174	5561
DA 91 -1125	5334	DA 91 -1175	5562
DA 91 -1126	5317	DA 91 -1176	5564
DA 91 -1127	5319	DA 91 -1177	5566
DA 91 -1128	5274	DA 91 -1178	5580
DA 91 -1129	5275	DA 91 -1179	5619
DA 91 -1130	5276	DA 91 -1180	5582
DA 91 -1131	5289	DA 91 -1181	5614
DA 91 -1132	5369	DA 91 -1182	5627
DA 91 -1134	5305	DA 91 -1183	5629
DA 91 -1135	5306	DA 91 -1184	5630
DA 91 -1136	5325	DA 91 -1185	5631

Delegated Authority or FCC Number	Page	Delegated Authority or FCC Number	Page
DA 91 -1186	5549	DA 91 -1231	5674
DA 91 -1187	5679	DA 91 -1232	6092
DA 91 -1188	5555	DA 91 -1234	5755
DA 91 -1189	5583	DA 91 -1235	5756
DA 91 -1190	5615	DA 91 -1236	5757
DA 91 -1191	5572	DA 91 -1237	5758
DA 91 -1192	5571	DA 91 -1238	5759
DA 91 -1193	5570	DA 91 -1239	5789
DA 91 -1194	5568	DA 91 -1240	5800
DA 91 -1195	5752	DA 91 -1241	5802
DA 91 -1196	5617	DA 91 -1242	5798
DA 91 -1197	5577	DA 91 -1243	5796
DA 91 -1198	5632	DA 91 -1244	5793
DA 91 -1199	5634	DA 91 -1245	5830
DA 91 -1200	5636	DA 91 -1246	5834
DA 91 -1201	5958	DA 91 -1247	5860
DA 91 -1202	5768	DA 91 -1248	5835
DA 91 -1203	5681	DA 91 -1249	5811
DA 91 -1204	5775	DA 91 -1250	5842
DA 91 -1205	6004	DA 91 -1251	5765
DA 91 -1206	5760	DA 91 -1252	5812
DA 91 -1207	5762	DA 91 -1253	5838
DA 91 -1208	5578	DA 91 -1254	5813
DA 91 -1209	5579	DA 91 -1256	5840
DA 91 -1210	5751	DA 91 -1257	6024
DA 91 -1211	5626	DA 91 -1258	6095
DA 91 -1212	5677	DA 91 -1259	6109
DA 91 -1213	5764	DA 91 -1260	5867
DA 91 -1214	5646	DA 91 -1261	5817
DA 91 -1215	5777	DA 91 -1262	5871
DA 91 -1216	5675	DA 91 -1263	6025
DA 91 -1217	5645	DA 91 -1264	5814
DA 91 -1218	5732	DA 91 -1265	6104
DA 91 -1219	5848	DA 91 -1266	5863
DA 91 -1220	5849	DA 91 -1267	6141
DA 91 -1221	5647	DA 91 -1268	6101
DA 91 -1222	5778	DA 91 -1269	6103
DA 91 -1223	5781	DA 91 -1270	6157
DA 91 -1224	5783	DA 91 -1271	5865
DA 91 -1225	5785	DA 91 -1272	6011
DA 91 -1226	5786	DA 91 -1273	5948
DA 91 -1227	5858	DA 91 -1274	5862
DA 91 -1228	5788	DA 91 -1275	6022
DA 91 -1229	5791	DA 91 -1276	5873
DA 91 -1230	5866	DA 91 -1277	6023

Delegated Authority or FCC Number	Page	Delegated Authority or FCC Number	Page
DA 91 -1278	6069	DA 91 -1322	6117
DA 91 -1279	5950	DA 91 -1323	6119
DA 91 -1280	5953	DA 91 -1324	6081
DA 91 -1281	6105	DA 91 -1325	6121
DA 91 -1282	6107	DA 91 -1326	6149
DA 91 -1283	5961	DA 91 -1327	6080
DA 91 -1284	6050	DA 91 -1328	6589
DA 91 -1285	6051	DA 91 -1329	6140
DA 91 -1286	6012	DA 91 -1330	6126
DA 91 -1287	6038	DA 91 -1331	6490
DA 91 -1288	6036	DA 91 -1332	6498
DA 91 -1289	6042	DA 91 -1333	6480
DA 91 -1290	6045	DA 91 -1334	6475
DA 91 -1291	6046	DA 91 -1335	6482
DA 91 -1292	6015	DA 91 -1336	6476
DA 91 -1293	6017	DA 91 -1337	6483
DA 91 -1294	6019	DA 91 -1338	6473
DA 91 -1295	6048	DA 91 -1339	6492
DA 91 -1296	5962	DA 91 -1340	6653
DA 91 -1297	5964	DA 91 -1341	6588
DA 91 -1298	6053	DA 91 -1342	6580
DA 91 -1299	6055	DA 91 -1343	6590
DA 91 -1300	6056	DA 91 -1344	6591
DA 91 -1301	6108	DA 91 -1345	6592
DA 91 -1302	5987	DA 91 -1346	6593
DA 91 -1303	6143	DA 91 -1347	6486
DA 91 -1303	6892	DA 91 -1348	6544
DA 91 -1304	6128	DA 91 -1349	6513
DA 91 -1305	6058	DA 91 -1350	6515
DA 91 -1306	6094	DA 91 -1351	6517
DA 91 -1307	6070	DA 91 -1352	6519
DA 91 -1308	6002	DA 91 -1353	6521
DA 91 -1309	6131	DA 91 -1354	6537
DA 91 -1310	6082	DA 91 -1355	7057
DA 91 -1311	6083	DA 91 -1356	6656
DA 91 -1312	6084	DA 91 -1357	6500
DA 91 -1313	6086	DA 91 -1358	6600
DA 91 -1314	6031	DA 91 -1359	6535
DA 91 -1315	6032	DA 91 -1360	6536
DA 91 -1316	6111	DA 91 -1361	6541
DA 91 -1317	6113	DA 91 -1362	6542
DA 91 -1318	6089	DA 91 -1363	6643
DA 91 -1319	6091	DA 91 -1364	6644
DA 91 -1320	6115	DA 91 -1366	6523
DA 91 -1321	6116	DA 91 -1367	6606

Delegated Authority or FCC Number	Page
DA 91 -1368	6630
DA 91 -1369	6632
DA 91 -1370	6634
DA 91 -1371	6636
DA 91 -1372	6578
DA 91 -1373	6646
DA 91 -1374	6638
DA 91 -1375	6529
DA 91 -1376	6538
DA 91 -1377	6545
DA 91 -1378	6546
DA 91 -1379	6693
DA 91 -1380	6700
DA 91 -1381	6707
DA 91 -1382	6713
DA 91 -1383	6720
DA 91 -1384	6727
DA 91 -1385	6733
DA 91 -1386	6658
DA 91 -1387	6664
DA 91 -1388	6670
DA 91 -1389	6676
DA 91 -1390	6683
DA 91 -1391	6689
DA 91 -1392	6543
DA 91 -1393	6690
DA 91 -1394	6603
DA 91 -1395	6641
DA 91 -1396	6648
DA 91 -1397	6692
DA 91 -1398	6652
DA 91 -1399	6654
DA 91 -1400	6650
DA 91 -1401	6640
DA 91 -1402	6959
DA 91 -1403	6961
DA 91 -1404	6972
DA 91 -1405	6973
DA 91 -1406	6651
DA 91 -1407	6825
DA 91 -1408	6827
DA 91 -1409	6982
DA 91 -1410	6983
DA 91 -1411	6984
DA 91 -1412	6985
DA 91 -1413	6986
DA 91 -1414	6988
DA 91 -1415	6963
DA 91 -1416	6965
DA 91 -1417	6829
DA 91 -1418	6828
DA 91 -1419	7238
DA 91 -1420	6966
DA 91 -1421	6975
DA 91 -1422	7242
DA 91 -1423	6969
DA 91 -1424	6933
DA 91 -1425	6934
DA 91 -1426	6847
DA 91 -1427	6849
DA 91 -1428	6850
DA 91 -1429	6851
DA 91 -1430	6845
DA 91 -1431	7037
DA 91 -1432	7006
DA 91 -1433	7011
DA 91 -1434	7012
DA 91 -1435	7009
DA 91 -1436	7013
DA 91 -1437	7017
DA 91 -1438	7236
DA 91 -1439	6939
DA 91 -1440	7111
DA 91 -1441	7112
DA 91 -1442	6922
DA 91 -1443	6923
DA 91 -1444	6924
DA 91 -1445	6925
DA 91 -1446	6938
DA 91 -1447	6974
DA 91 -1448	7004
DA 91 -1449	7108
DA 91 -1450	6926
DA 91 -1451	7109
DA 91 -1452	7149
DA 91 -1453	7384
DA 91 -1454	7110
DA 91 -1455	7114
DA 91 -1456	6991
DA 91 -1457	6990

Delegated Authority or FCC Number	Page
DA 91 -1458	6992
DA 91 -1459	6993
DA 91 -1460	6994
DA 91 -1461	7018
DA 91 -1462	7117
DA 91 -1463	7116
DA 91 -1464	7002
DA 91 -1465	7140
DA 91 -1466	7119
DA 91 -1467	7255
DA 91 -1468	7019
DA 91 -1469	7151
DA 91 -1470	7142
DA 91 -1471	7145
DA 91 -1472	7181
DA 91 -1473	7152
DA 91 -1474	7147
DA 91 -1475	7038
DA 91 -1476	7187
DA 91 -1477	7370
DA 91 -1478	7362
DA 91 -1479	7364
DA 91 -1480	7367
DA 91 -1481	7182
DA 91 -1482	7153
DA 91 -1483	7122
DA 91 -1484	7120
DA 91 -1485	7124
DA 91 -1486	7127
DA 91 -1487	7130
DA 91 -1488	7180
DA 91 -1489	7241
DA 91 -1490	7139
DA 91 -1491	7185
DA 91 -1492	7186
DA 91 -1493	7136
DA 91 -1495	7212
DA 91 -1496	7214
DA 91 -1497	7217
DA 91 -1498	7219
DA 91 -1500	7188
DA 91 -1501	7189
DA 91 -1502	7191
DA 91 -1503	7192
DA 91 -1504	7231
DA 91 -1505	7317
DA 91 -1506	7250
DA 91 -1507	7251
DA 91 -1508	7205
DA 91 -1509	7253
DA 91 -1510	7230
DA 91 -1511	7232
DA 91 -1512	7263
DA 91 -1513	7275
DA 91 -1514	7273
DA 91 -1515	7272
DA 91 -1516	7277
DA 91 -1517	7461
DA 91 -1518	7264
DA 91 -1519	7471
DA 91 -1520	7462
DA 91 -1521	7290
DA 91 -1522	7293
DA 91 -1523	7288
DA 91 -1524	7294
DA 91 -1525	7291
DA 91 -1526	7289
DA 91 -1527	7292
DA 91 -1528	7296
DA 91 -1529	7295
DA 91 -1530	7463
DA 91 -1531	7427
DA 91 -1532	7385
DA 91 -1533	7474
DA 91 -1534	7472
DA 91 -1535	7475
DA 91 -1536	7429
DA 91 -1537	7432
DA 91 -1538	7433
DA 91 -1539	7386
DA 91 -1540	7529
DA 91 -1541	7466
DA 91 -1542	7473
DA 91 -1543	7434
DA 91 -1544	7435
DA 91 -1545	7437
DA 91 -1546	7488
DA 91 -1547	7526
DA 91 -1548	7527
DA 91 -1549	7476

Delegated Authority or FCC Number	Page
DA 91 -1559	7563
DA 91 -1560	7477
DA 91 -1561	7528
DA 91 -1562	7483
DA 91 -1563	7481
DA 91 -1564	7538
DA 91 -1565	7564
DA 91 -1566	7484
DA 91 -1567	7545
DA 91 -1568	7546
DA 91 -1569	7535
DA 91 -1570	7536
DA 91 -1571	7558
DA 91 -1572	7559
DA 91 -1573	7548
DA 91 -1582	7560
FCC 90 - 410	157
FCC 90 - 411	85
FCC 90 - 412	208
FCC 90 - 416	174
FCC 90 - 417	120
FCC 90 - 418	2
FCC 90 - 419	81
FCC 90 - 420	8
FCC 90 - 421	285
FCC 90 - 422	547
FCC 90 - 423	622
FCC 90 - 424	193
FCC 90 - 425	283
FCC 90 - 426	422
FCC 90 - 427	34
FCC 90 - 428	275
FCC 90 - 429	72
FCC 90 - 430	381
FCC 90 - 431	725
FCC 90 - 432	68
FCC 90 - 433	52
FCC 90I - 124	1606
FCC 90R - 118	925
FCC 90R - 120	10
FCC 90R - 121	13
FCC 90R - 122	17
FCC 90R - 123	25
FCC 91 - 1	310
FCC 91 - 2	600

Delegated Authority or FCC Number	Page
FCC 91 - 3	225
FCC 91 - 4	78
FCC 91 - 5	449
FCC 91 - 6	332
FCC 91 - 7	337
FCC 91 - 8	257
FCC 91 - 9	259
FCC 91 - 10	625
FCC 91 - 11	405
FCC 91 - 12	427
FCC 91 - 13	434
FCC 91 - 14	383
FCC 91 - 15	665
FCC 91 - 16	1368
FCC 91 - 17	786
FCC 91 - 18	437
FCC 91 - 19	418
FCC 91 - 20	404
FCC 91 - 21	506
FCC 91 - 22	542
FCC 91 - 23	570
FCC 91 - 24	688
FCC 91 - 25	714
FCC 91 - 26	646
FCC 91 - 27	610
FCC 91 - 28	721
FCC 91 - 29	740
FCC 91 - 30	893
FCC 91 - 31	750
FCC 91 - 32	855
FCC 91 - 33	478
FCC 91 - 34	1309
FCC 91 - 35	1217
FCC 91 - 36	972
FCC 91 - 37	1424
FCC 91 - 38	984
FCC 91 - 39	952
FCC 91 - 40	975
FCC 91 - 41	1456
FCC 91 - 42	895
FCC 91 - 43	1462
FCC 91 - 44	1716
FCC 91 - 45	992
FCC 91 - 46	990
FCC 91 - 47	1240

Delegated Authority or FCC Number	Page	Delegated Authority or FCC Number	Page
FCC 91 - 48	5703	FCC 91 - 93	1952
FCC 91 - 49	1003	FCC 91 - 94	1985
FCC 91 - 50	1245	FCC 91 - 95	1969
FCC 91 - 51	1719	FCC 91 - 96	1913
FCC 91 - 52	1732	FCC 91 - 97	1989
FCC 91 - 53	1448	FCC 91 - 98	1891
FCC 91 - 54	1305	FCC 91 - 99	1893
FCC 91 - 55	1270	FCC 91 - 100	2608
FCC 91 - 56	1533	FCC 91 - 101	1992
FCC 91 - 57	1383	FCC 91 - 102	2291
FCC 91 - 58	1416	FCC 91 - 103	1975
FCC 91 - 59	1421	FCC 91 - 104	2207
FCC 91 - 60	1384	FCC 91 - 105	2050
FCC 91 - 61	1493	FCC 91 - 106	2148
FCC 91 - 62	1507	FCC 91 - 107	2478
FCC 91 - 63	1418	FCC 91 - 108	2145
FCC 91 - 64	1618	FCC 91 - 109	2289
FCC 91 - 65	1524	FCC 91 - 110	5705
FCC 91 - 66	1617	FCC 91 - 111	5706
FCC 91 - 67	1683	FCC 91 - 112	3488
FCC 91 - 68	1602	FCC 91 - 113	2111
FCC 91 - 69	1750	FCC 91 - 114	3094
FCC 91 - 70	1966	FCC 91 - 115	2637
FCC 91 - 71	1689	FCC 91 - 116	2744
FCC 91 - 72	1857	FCC 91 - 117	3501
FCC 91 - 73	1914	FCC 91 - 118	3506
FCC 91 - 74	2356	FCC 91 - 119	2420
FCC 91 - 75	1665	FCC 91 - 120	2189
FCC 91 - 76	1800	FCC 91 - 121	2238
FCC 91 - 77	1772	FCC 91 - 122	2267
FCC 91 - 78	1765	FCC 91 - 123	2203
FCC 91 - 79	1738	FCC 91 - 124	2491
FCC 91 - 80	1714	FCC 91 - 125	2601
FCC 91 - 81	1657	FCC 91 - 126	2492
FCC 91 - 82	1808	FCC 91 - 127	2296
FCC 91 - 83	1816	FCC 91 - 128	3417
FCC 91 - 84	1863	FCC 91 - 129	2303
FCC 91 - 85	1873	FCC 91 - 130	2218
FCC 91 - 86	1776	FCC 91 - 131	2210
FCC 91 - 87	2017	FCC 91 - 132	2286
FCC 91 - 88	1748	FCC 91 - 133	2269
FCC 91 - 89	1876	FCC 91 - 134	2340
FCC 91 - 90	1812	FCC 91 - 135	2283
FCC 91 - 91	1880	FCC 91 - 136	2806
FCC 91 - 92	1817	FCC 91 - 137	2465

Delegated Authority or FCC Number	Page	Delegated Authority or FCC Number	Page
FCC 91 - 138	2585	FCC 91 - 183	3673
FCC 91 - 139	2497	FCC 91 - 184	4545
FCC 91 - 140	2581	FCC 91 - 185	4475
FCC 91 - 141	2936	FCC 91 - 186	4524
FCC 91 - 142	2347	FCC 91 - 187	4126
FCC 91 - 143	2557	FCC 91 - 188	3900
FCC 91 - 144	2572	FCC 91 - 189	4264
FCC 91 - 145	3296	FCC 91 - 190	3744
FCC 91 - 146	3448	FCC 91 - 191	4320
FCC 91 - 147	2628	FCC 91 - 192	4109
FCC 91 - 148	2603	FCC 91 - 193	4180
FCC 91 - 149	2622	FCC 91 - 194	4582
FCC 91 - 150	3426	FCC 91 - 195	4218
FCC 91 - 151	2604	FCC 91 - 196	4201
FCC 91 - 152	4156	FCC 91 - 197	4622
FCC 91 - 153	2630	FCC 91 - 198	4331
FCC 91 - 154	3403	FCC 91 - 199	4325
FCC 91 - 155	2901	FCC 91 - 200	4327
FCC 91 - 156	3275	FCC 91 - 201	4329
FCC 91 - 157	3552	FCC 91 - 202	4655
FCC 91 - 158	3434	FCC 91 - 203	4431
FCC 91 - 159	3259	FCC 91 - 204	4387
FCC 91 - 160	3312	FCC 91 - 205	4420
FCC 91 - 161	2897	FCC 91 - 206	4422
FCC 91 - 162	2961	FCC 91 - 207	4382
FCC 91 - 163	3287	FCC 91 - 208	4384
FCC 91 - 164	3303	FCC 91 - 209	4390
FCC 91 - 165	3540	FCC 91 - 210	4416
FCC 91 - 166	3457	FCC 91 - 211	4410
FCC 91 - 167	3593	FCC 91 - 212	4411
FCC 91 - 168	3484	FCC 91 - 213	4657
FCC 91 - 169	3310	FCC 91 - 214	4736
FCC 91 - 170	3380	FCC 91 - 215	4961
FCC 91 - 171	3370	FCC 91 - 216	4692
FCC 91 - 172	3668	FCC 91 - 217	4695
FCC 91 - 173	3760	FCC 91 - 218	4672
FCC 91 - 174	3621	FCC 91 - 219	4424
FCC 91 - 175	3615	FCC 91 - 220	4637
FCC 91 - 176	4191	FCC 91 - 221	4437
FCC 91 - 177	3601	FCC 91 - 222	4474
FCC 91 - 178	3721	FCC 91 - 223	4485
FCC 91 - 179	3636	FCC 91 - 224	4496
FCC 91 - 180	4169	FCC 91 - 225	5956
FCC 91 - 181	5707	FCC 91 - 226	4506
FCC 91 - 182	4212	FCC 91 - 227	4776

Delegated Authority or FCC Number	Page
FCC 91 - 228	4891
FCC 91 - 229	4929
FCC 91 - 230	4626
FCC 91 - 231	4630
FCC 91 - 232	4631
FCC 91 - 233	4764
FCC 91 - 234	4948
FCC 91 - 235	5047
FCC 91 - 236	4799
FCC 91 - 237	4723
FCC 91 - 238	4938
FCC 91 - 239	4959
FCC 91 - 240	4900
FCC 91 - 241	5148
FCC 91 - 242	4882
FCC 91 - 243	4705
FCC 91 - 244	4787
FCC 91 - 245	4813
FCC 91 - 246	4998
FCC 91 - 247	5010
FCC 91 - 248	5093
FCC 91 - 249	5421
FCC 91 - 250	5341
FCC 91 - 251	5880
FCC 91 - 252	5648
FCC 91 - 253	4762
FCC 91 - 254	4797
FCC 91 - 255	4823
FCC 91 - 256	4782
FCC 91 - 257	4878
FCC 91 - 258	4879
FCC 91 - 259	5053
FCC 91 - 260	5083
FCC 91 - 261	5960
FCC 91 - 262	4993
FCC 91 - 263	4995
FCC 91 - 264	5127
FCC 91 - 265	5132
FCC 91 - 266	5183
FCC 91 - 267	5599
FCC 91 - 268	5968
FCC 91 - 269	5259
FCC 91 - 270	5191
FCC 91 - 271	5188
FCC 91 - 272	5637
FCC 91 - 273	5356
FCC 91 - 274	5510
FCC 91 - 275	5808
FCC 91 - 276	5378
FCC 91 - 277	5405
FCC 91 - 278	5409
FCC 91 - 279	5413
FCC 91 - 280	5393
FCC 91 - 281	5386
FCC 91 - 282	5623
FCC 91 - 283	5382
FCC 91 - 284	5414
FCC 91 - 285	5531
FCC 91 - 286	5663
FCC 91 - 287	5573
FCC 91 - 288	5522
FCC 91 - 289	5861
FCC 91 - 290	5585
FCC 91 - 291	6487
FCC 91 - 292	5529
FCC 91 - 293	5658
FCC 91 - 294	5550
FCC 91 - 295	5552
FCC 91 - 296	5643
FCC 91 - 297	5805
FCC 91 - 298	5919
FCC 91 - 299	6166
FCC 91 - 300	6752
FCC 91 - 301	6764
FCC 91 - 302	6792
FCC 91 - 303	6273
FCC 91 - 304	5669
FCC 91 - 305	5932
FCC 91 - 306	6185
FCC 91 - 307	5985
FCC 91 - 308	6062
FCC 91 - 309	5809
FCC 91 - 310	5680
FCC 91 - 311	6158
FCC 91 - 312	5989
FCC 91 - 313	5994
FCC 91 - 314	5991
FCC 91 - 316	5978
FCC 91 - 317	6060
FCC 91 - 318	6739

Delegated Authority or FCC Number	Page	Delegated Authority or FCC Number	Page
FCC 91 - 319	5976	FCC 91 - 367	6981
FCC 91 - 320	6006	FCC 91 - 368	6995
FCC 91 - 321	5966	FCC 91 - 369	7133
FCC 91 - 322	7005	FCC 91 - 370	6977
FCC 91 - 323	6033	FCC 91 - 371	6901
FCC 91 - 325	6026	FCC 91 - 372	6903
FCC 91 - 326	5954	FCC 91 - 373	6905
FCC 91 - 327	6608	FCC 91 - 374	6997
FCC 91 - 328	6154	FCC 91 - 375	6998
FCC 91 - 329	6501	FCC 91 - 376	7014
FCC 91 - 330	6150	FCC 91 - 377	7178
FCC 91 - 331	6139	FCC 91 - 378	7284
FCC 91 - 332	6898	FCC 91 - 379	7099
FCC 91 - 333	7039	FCC 91 - 380	7016
FCC 91 - 335	6935	FCC 91 - 381	7571
FCC 91 - 337	7024	FCC 91 - 382	7646
FCC 91 - 338	6601	FCC 91 - 383	7256
FCC 91 - 339	7297	FCC 91 - 384	7265
FCC 91 - 340	6547	FCC 91 - 385	7346
FCC 91 - 341	6525	FCC 91 - 388	7372
FCC 91 - 342	6510	FCC 91 - 389	7193
FCC 91 - 343	7438	FCC 91 - 390	7569
FCC 91 - 344	7482	FCC 91 - 391	7246
FCC 91 - 345	6745	FCC 91 - 392	7262
FCC 91 - 346	6989	FCC 91 - 393	7234
FCC 91 - 347	6569	FCC 91 - 394	7355
FCC 91 - 348	6563	FCC 91 - 395	7479
FCC 91 - 349	6567	FCC 91 - 396	7467
FCC 91 - 350	7353	FCC 91 - 397	7551
FCC 91 - 351	7350	FCC 91 - 404	7511
FCC 91 - 352	6980	FCC 91 - 406	7491
FCC 91 - 353	6852	FCC 91 - 407	7494
FCC 91 - 354	6856	FCC 91 - 408	7522
FCC 91 - 355	6834	FCC 91 - 409	7497
FCC 91 - 356	6941	FCC 91 - 410	7507
FCC 91 - 357	6943	FCC 91 - 411	7524
FCC 91 - 358	6945	FCC 91 - 412	7565
FCC 91 - 359	6947	FCC 91 - 414	7561
FCC 91 - 360	6949	FCC 91D - 1	131
FCC 91 - 361	6951	FCC 91D - 2	340
FCC 91 - 362	6953	FCC 91D - 3	553
FCC 91 - 363	6955	FCC 91D - 4	573
FCC 91 - 364	6957	FCC 91D - 5	869
FCC 91 - 365	6910	FCC 91D - 6	955
FCC 91 - 366	6909	FCC 91D - 7	1247

Delegated Authority or FCC Number	Page
FCC 91D - 8	1288
FCC 91D - 9	1356
FCC 91D - 10	1386
FCC 91D - 11	1668
FCC 91D - 12	1706
FCC 91D - 13	1703
FCC 91D - 14	1777
FCC 91D - 15	1780
FCC 91D - 16	1785
FCC 91D - 17	2247
FCC 91D - 18	2098
FCC 91D - 19	2172
FCC 91D - 20	2469
FCC 91D - 21	2221
FCC 91D - 22	2513
FCC 91D - 23	2523
FCC 91D - 24	2841
FCC 91D - 25	2613
FCC 91D - 26	2789
FCC 91D - 27	2963
FCC 91D - 28	3352
FCC 91D - 29	3347
FCC 91D - 30	3375
FCC 91D - 31	3576
FCC 91D - 32	3596
FCC 91D - 33	4183
FCC 91D - 34	4350
FCC 91D - 35	4307
FCC 91D - 36	4334
FCC 91D - 37	4337
FCC 91D - 38	4347
FCC 91D - 39	4407
FCC 91D - 40	4488
FCC 91D - 41	4683
FCC 91D - 42	5025
FCC 91D - 43	5107
FCC 91D - 44	5109
FCC 91D - 45	5221
FCC 91D - 46	5227
FCC 91D - 47	5239
FCC 91D - 48	5252
FCC 91D - 49	5277
FCC 91D - 50	5292
FCC 91D - 51	5734
FCC 91D - 52	5850

Delegated Authority or FCC Number	Page
FCC 91D - 53	5742
FCC 91D - 54	5879
FCC 91D - 55	5997
FCC 91D - 56	6064
FCC 91D - 57	6826
FCC 91D - 58	6860
FCC 91D - 59	6912
FCC 91D - 60	7160
FCC 91D - 61	7220
FCC 91D - 62	7387
FCC 91D - 63	7356
FCC 91D - 64	7453
FCC 91D - 65	7419
FCC 91I - 7	1564
FCC 91I - 13	1814
FCC 91I - 15	1608
FCC 91I - 75	7022
FCC 91R - 1	282
FCC 91R - 2	885
FCC 91R - 3	396
FCC 91R - 4	421
FCC 91R - 5	575
FCC 91R - 6	576
FCC 91R - 7	687
FCC 91R - 8	889
FCC 91R - 9	891
FCC 91R - 10	912
FCC 91R - 11	872
FCC 91R - 12	873
FCC 91R - 13	875
FCC 91R - 14	953
FCC 91R - 15	994
FCC 91R - 16	1260
FCC 91R - 17	1262
FCC 91R - 18	1349
FCC 91R - 19	1350
FCC 91R - 20	1385
FCC 91R - 21	1518
FCC 91R - 22	1499
FCC 91R - 23	1570
FCC 91R - 24	1527
FCC 91R - 25	1567
FCC 91R - 26	1697
FCC 91R - 27	1978
FCC 91R - 28	1983

Delegated Authority or FCC Number	Page	Delegated Authority or FCC Number	Page
FCC 91R - 29	1984	FCC 91R - 72	5057
FCC 91R - 30	1864	FCC 91R - 73	5018
FCC 91R - 31	2013	FCC 91R - 74	5021
FCC 91R - 32	2015	FCC 91R - 75	5023
FCC 91R - 33	2093	FCC 91R - 76	5290
FCC 91R - 34	2094	FCC 91R - 77	5185
FCC 91R - 35	2193	FCC 91R - 78	5299
FCC 91R - 36	2322	FCC 91R - 79	5301
FCC 91R - 37	2324	FCC 91R - 80	5321
FCC 91R - 38	2325	FCC 91R - 81	5373
FCC 91R - 39	2577	FCC 91R - 82	5388
FCC 91R - 40	2875	FCC 91R - 83	5391
FCC 91R - 41	3411	FCC 91R - 84	5651
FCC 91R - 42	2894	FCC 91R - 85	5519
FCC 91R - 43	3452	FCC 91R - 86	5525
FCC 91R - 44	3456	FCC 91R - 87	5621
FCC 91R - 45	3460	FCC 91R - 88	5586
FCC 91R - 46	3529	FCC 91R - 89	5819
FCC 91R - 47	3575	FCC 91R - 90	5843
FCC 91R - 48	3599	FCC 91R - 91	5944
FCC 91R - 49	3608	FCC 91R - 92	6071
FCC 91R - 50	3609	FCC 91R - 93	5981
FCC 91R - 51	3626	FCC 91R - 94	6548
FCC 91R - 52	3624	FCC 91R - 95	6079
FCC 91R - 53	3625	FCC 91R - 96	6484
FCC 91R - 54	4163	FCC 91R - 97	6494
FCC 91R - 55	4168	FCC 91R - 98	6489
FCC 91R - 56	4185	FCC 91R - 99	6497
FCC 91R - 57	4242	FCC 91R - 100	6553
FCC 91R - 58	4236	FCC 91R - 101	6561
FCC 91R - 59	4238	FCC 91R - 102	6540
FCC 91R - 60	4241	FCC 91R - 103	6830
FCC 91R - 61	4381	FCC 91R - 104	6831
FCC 91R - 62	4409	FCC 91R - 105	6841
FCC 91R - 63	4453	FCC 91R - 106	6833
FCC 91R - 64	4454	FCC 91R - 107	7208
FCC 91R - 65	4455	FCC 91R - 108	7209
FCC 91R - 66	4633	FCC 91R - 109	7464
FCC 91R - 67	4635	FCC 91R - 110	7377
FCC 91R - 68	4636	FCC 91R - 111	7210
FCC 91R - 69	4642	FCC 91R - 112	7440
FCC 91R - 70	4829	FCC 91R - 113	7278
FCC 91R - 71	4837	FCC 91R - 114	7539

Federal Communications Commission Record

Table of Cases by Docket Number
Volume 6
Issue 1 - 26

Docket Number	Page
BC Dkt.No.80 - 698	283
BC Dkt.No.82 - 763	1564
CC Dkt.No.78 - 72	547
CC Dkt.No.78 - 72	594
CC Dkt.No.78 - 72	5341
CC Dkt.No.78 - 72	6608
CC Dkt.No.80 - 176	7386
CC Dkt.No.80 - 286	383
CC Dkt.No.80 - 286	2936
CC Dkt.No.80 - 286	4481
CC Dkt.No.80 - 286	5680
CC Dkt.No.81 - 893	6006
CC Dkt.No.83 - 1376	2630
CC Dkt.No.85 - 166	36
CC Dkt.No.85 - 166	76
CC Dkt.No.86 - 111	7536
CC Dkt.No.86 - 496	2806
CC Dkt.No.87 - 124	4799
CC Dkt.No.87 - 313	665
CC Dkt.No.87 - 313	2637
CC Dkt.No.87 - 313	2332
CC Dkt.No.87 - 313	2974
CC Dkt.No.87 - 313	3473
CC Dkt.No.87 - 313	4198
CC Dkt.No.87 - 313	4199
CC Dkt.No.87 - 313	4200
CC Dkt.No.87 - 313	4524
CC Dkt.No.87 - 313	4819
CC Dkt.No.87 - 313	5051
CC Dkt.No.87 - 313	6104
CC Dkt.No.87 - 313	6692
CC Dkt.No.87 - 313	7231
CC Dkt.No.87 - 313	7482
CC Dkt.No.87 - 568	740
CC Dkt.No.87 - 568	7039
CC Dkt.No.87 - 579	2803
CC Dkt.No.88 - 1	4156
CC Dkt.No.88 - 1	4415
CC Dkt.No.88 - 1	6103
CC Dkt.No.88 - 2	893
CC Dkt.No.88 - 2	2310
CC Dkt.No.88 - 2	4169
CC Dkt.No.88 - 2	5053
CC Dkt.No.88 - 2	7355
CC Dkt.No.88 - 2	7646
CC Dkt.No.88 - 95	2348
CC Dkt.No.88 - 95	3715
CC Dkt.No.88 - 95	4845
CC Dkt.No.88 - 95	7353
CC Dkt.No.88 - 136	1436
CC Dkt.No.88 - 136	1813
CC Dkt.No.88 - 136	1821
CC Dkt.No.88 - 136	3330
CC Dkt.No.88 - 136	4891
CC Dkt.No.88 - 136	4776
CC Dkt.No.88 - 287	3760
CC Dkt.No.89 - 79	4524
CC Dkt.No.89 - 79	6933
CC Dkt.No.89 - 323	3501
CC Dkt.No.89 - 533	1309
CC Dkt.No.89 - 610	3352
CC Dkt.No.89 - 610	4837
CC Dkt.No.89 - 624	80
CC Dkt.No.89 - 624	7193
CC Dkt.No.90 - 6	6185
CC Dkt.No.90 - 6	6158
CC Dkt.No.90 - 11	5648
CC Dkt.No.90 - 11	7005
CC Dkt.No.90 - 124	7350
CC Dkt.No.90 - 132	5880
CC Dkt.No.90 - 132	5811
CC Dkt.No.90 - 132	7255
CC Dkt.No.90 - 132	7569
CC Dkt.No.90 - 219	7372
CC Dkt.No.90 - 257	1245
CC Dkt.No.90 - 257	6860
CC Dkt.No.90 - 313	120
CC Dkt.No.90 - 313	2314
CC Dkt.No.90 - 313	2744
CC Dkt.No.90 - 313	5058
CC Dkt.No.90 - 337	3552
CC Dkt.No.90 - 337	3434
CC Dkt.No.90 - 337	5674
CC Dkt.No.90 - 436	1247

Docket Number	Page	Docket Number	Page
CC Dkt.No.90 - 571	4657	CC Dkt.No.91 - 324	6693
CC Dkt.No.90 - 591	4829	CC Dkt.No.91 - 324	7236
CC Dkt.No.90 - 623	174	CC Dkt.No.91 - 324	7527
CC Dkt.No.90 - 623	983	CC Dkt.No.91 - 325	6700
CC Dkt.No.90 - 623	7571	CC Dkt.No.91 - 325	7526
CC Dkt.No.90 - 629	48	CC Dkt.No.91 - 326	6707
CC Dkt.No.91 - 22	1424	CC Dkt.No.91 - 327	6713
CC Dkt.No.91 - 33	1719	CC Dkt.No.91 - 328	6720
CC Dkt.No.91 - 33	4827	CC Dkt.No.91 - 329	6727
CC Dkt.No.91 - 34	1732	CC Dkt.No.91 - 330	6733
CC Dkt.No.91 - 34	3332	CC Dkt.No.91 - 331	6658
CC Dkt.No.91 - 34	3374	CC Dkt.No.91 - 332	6664
CC Dkt.No.91 - 35	1448	CC Dkt.No.91 - 332	7181
CC Dkt.No.91 - 35	1910	CC Dkt.No.91 - 333	6670
CC Dkt.No.91 - 35	1995	CC Dkt.No.91 - 334	6676
CC Dkt.No.91 - 35	4736	CC Dkt.No.91 - 335	6683
CC Dkt.No.91 - 64	1689	CC Dkt.No.91 - 336	1863
CC Dkt.No.91 - 64	1890	CC Dkt.No.91 - 346	7256
CC Dkt.No.91 - 65	1857	CC Dkt.No.91 - 628	3994
CC Dkt.No.91 - 65	2589	ET Dkt.No.91 - 150	3593
CC Dkt.No.91 - 65	6166	ET Dkt.No.91 - 269	5409
CC Dkt.No.91 - 115	3506	ET Dkt.No.91 - 280	5932
CC Dkt.No.91 - 115	3718	ET Dkt.No.91 - 313	6501
CC Dkt.No.91 - 116	2307	FO Dkt.No.91 - 171	4264
CC Dkt.No.91 - 116	3739	FO Dkt.No.91 - 171	7545
CC Dkt.No.91 - 116	4450	FO Dkt.No.91 - 301	6739
CC Dkt.No.91 - 116	5353	GC Dkt.No.91 - 119	5669
CC Dkt.No.91 - 121	2238	GEN Dkt.No.82 - 243	4320
CC Dkt.No.91 - 121	4261	GEN Dkt.No.84 - 1234	4900
CC Dkt.No.91 - 141	3259	GEN Dkt.No.85 - 171	5808
CC Dkt.No.91 - 141	4818	GEN Dkt.No.86 - 285	3469
CC Dkt.No.91 - 141	5169	GEN Dkt.No.86 - 285	5919
CC Dkt.No.91 - 141	5809	GEN Dkt.No.87 - 389	1683
CC Dkt.No.91 - 141	7151	GEN Dkt.No.87 - 389	5405
CC Dkt.No.91 - 142	2921	GEN Dkt.No.87 - 505	4888
CC Dkt.No.91 - 142	3549	GEN Dkt.No.87 - 552	1989
CC Dkt.No.91 - 142	4309	GEN Dkt.No.88 - 96	4582
CC Dkt.No.91 - 142	5299	GEN Dkt.No.88 - 372	437
CC Dkt.No.91 - 142	5185	GEN Dkt.No.88 - 372	2171
CC Dkt.No.91 - 213	6126	GEN Dkt.No.88 - 387	1716
CC Dkt.No.91 - 213	7546	GEN Dkt.No.88 - 566	622
CC Dkt.No.91 - 215	4944	GEN Dkt.No.89 - 44	600
CC Dkt.No.91 - 226	4841	GEN Dkt.No.89 - 44	1605
CC Dkt.No.91 - 273	5531	GEN Dkt.No.89 - 88	3312
CC Dkt.No.91 - 281	6752	GEN Dkt.No.89 - 89	725

Docket Number	Page
GEN Dkt.No.89 - 295	2291
GEN Dkt.No.89 - 349	3296
GEN Dkt.No.89 - 349	5958
GEN Dkt.No.89 - 554	1914
GEN Dkt.No.89 - 554	3900
GEN Dkt.No.89 - 605	427
GEN Dkt.No.89 - 605	6062
GEN Dkt.No.89 - 608	6140
GEN Dkt.No.89 - 623	1462
GEN Dkt.No.89 - 626	434
GEN Dkt.No.90 - 54	6764
GEN Dkt.No.90 - 54	6792
GEN Dkt.No.90 - 54	7232
GEN Dkt.No.90 - 119	2607
GEN Dkt.No.90 - 216	972
GEN Dkt.No.90 - 217	3488
GEN Dkt.No.90 - 217	3720
GEN Dkt.No.90 - 264	157
GEN Dkt.No.90 - 264	3403
GEN Dkt.No.90 - 264	3472
GEN Dkt.No.90 - 312	7551
GEN Dkt.No.90 - 314	6601
GEN Dkt.No.90 - 314	7471
GEN Dkt.No.90 - 394	3430
GEN Dkt.No.90 - 498	1
GEN Dkt.No.91 - 1	449
GEN Dkt.No.91 - 1	2420
GEN Dkt.No.91 - 2	1368
GEN Dkt.No.91 - 119	2267
GEN Dkt.No.91 - 120	2203
GN Dkt.No.82 - 243	7242
GN Dkt.No.90 - 119	7180
GN Dkt.No.90 - 297	2491
MM Dkt.No.83 - 575	4948
MM Dkt.No.83 - 670	5529
MM Dkt.No.83 - 911	25
MM Dkt.No.83 - 976	570
MM Dkt.No.83 - 976	3310
MM Dkt.No.84 - 115	1507
MM Dkt.No.84 - 352	1383
MM Dkt.No.84 - 397	1606
MM Dkt.No.84 - 397	5599
MM Dkt.No.84 - 1098	1808
MM Dkt.No.84 - 1098	1983
MM Dkt.No.85 - 27	7022
MM Dkt.No.85 - 234	3411
MM Dkt.No.85 - 236	1814
MM Dkt.No.85 - 269	4218
MM Dkt.No.85 - 269	6981
MM Dkt.No.85 - 269	7419
MM Dkt.No.85 - 304	4327
MM Dkt.No.85 - 328	5976
MM Dkt.No.85 - 331	2963
MM Dkt.No.85 - 331	7440
MM Dkt.No.85 - 355	2604
MM Dkt.No.85 - 396	625
MM Dkt.No.85 - 397	257
MM Dkt.No.86 - 10	5421
MM Dkt.No.86 - 29	1493
MM Dkt.No.86 - 29	1841
MM Dkt.No.86 - 101	1992
MM Dkt.No.86 - 155	6905
MM Dkt.No.86 - 173	4242
MM Dkt.No.86 - 324	6829
MM Dkt.No.86 - 440	1748
MM Dkt.No.86 - 440	5393
MM Dkt.No.87 - 8	4212
MM Dkt.No.87 - 8	5010
MM Dkt.No.87 - 28	2601
MM Dkt.No.87 - 86	872
MM Dkt.No.87 - 86	5188
MM Dkt.No.87 - 110	418
MM Dkt.No.87 - 110	616
MM Dkt.No.87 - 121	5356
MM Dkt.No.87 - 121	5777
MM Dkt.No.87 - 121	6537
MM Dkt.No.87 - 236	1608
MM Dkt.No.87 - 246	575
MM Dkt.No.87 - 246	992
MM Dkt.No.87 - 246	4424
MM Dkt.No.87 - 250	6912
MM Dkt.No.87 - 267	6273
MM Dkt.No.87 - 268	7024
MM Dkt.No.87 - 298	3747
MM Dkt.No.87 - 332	5858
MM Dkt.No.87 - 342	5025
MM Dkt.No.87 - 352	1262
MM Dkt.No.87 - 352	4474
MM Dkt.No.87 - 410	5163
MM Dkt.No.87 - 424	1602
MM Dkt.No.87 - 424	4981
MM Dkt.No.87 - 426	990

Docket Number	Page
MM Dkt.No.87 - 426	2789
MM Dkt.No.87 - 431	2187
MM Dkt.No.87 - 438	6975
MM Dkt.No.87 - 465	5148
MM Dkt.No.87 - 465	5860
MM Dkt.No.87 - 470	2042
MM Dkt.No.87 - 483	3361
MM Dkt.No.87 - 504	721
MM Dkt.No.87 - 559	1386
MM Dkt.No.87 - 559	5819
MM Dkt.No.87 - 591	6111
MM Dkt.No.87 - 619	4579
MM Dkt.No.88 - 3	2296
MM Dkt.No.88 - 21	1570
MM Dkt.No.88 - 21	6998
MM Dkt.No.88 - 38	410
MM Dkt.No.88 - 48	142
MM Dkt.No.88 - 48	2050
MM Dkt.No.88 - 86	4331
MM Dkt.No.88 - 137	1416
MM Dkt.No.88 - 140	1820
MM Dkt.No.88 - 140	2163
MM Dkt.No.88 - 140	2334
MM Dkt.No.88 - 145	535
MM Dkt.No.88 - 159	5163
MM Dkt.No.88 - 183	3529
MM Dkt.No.88 - 192	4852
MM Dkt.No.88 - 238	1952
MM Dkt.No.88 - 238	6901
MM Dkt.No.88 - 240	4334
MM Dkt.No.88 - 275	4416
MM Dkt.No.88 - 279	2497
MM Dkt.No.88 - 284	1230
MM Dkt.No.88 - 304	2557
MM Dkt.No.88 - 306	2247
MM Dkt.No.88 - 306	3625
MM Dkt.No.88 - 306	5843
MM Dkt.No.88 - 306	6497
MM Dkt.No.88 - 308	259
MM Dkt.No.88 - 308	2577
MM Dkt.No.88 - 312	246
MM Dkt.No.88 - 315	5138
MM Dkt.No.88 - 315	6473
MM Dkt.No.88 - 343	912
MM Dkt.No.88 - 343	4879
MM Dkt.No.88 - 352	7209
MM Dkt.No.88 - 357	17
MM Dkt.No.88 - 358	1260
MM Dkt.No.88 - 358	5191
MM Dkt.No.88 - 375	3417
MM Dkt.No.88 - 382	131
MM Dkt.No.88 - 382	1524
MM Dkt.No.88 - 382	4350
MM Dkt.No.88 - 382	4878
MM Dkt.No.88 - 382	5106
MM Dkt.No.88 - 400	396
MM Dkt.No.88 - 400	2148
MM Dkt.No.88 - 401	2513
MM Dkt.No.88 - 401	6079
MM Dkt.No.88 - 401	7377
MM Dkt.No.88 - 403	1356
MM Dkt.No.88 - 403	5373
MM Dkt.No.88 - 410	1668
MM Dkt.No.88 - 410	4185
MM Dkt.No.88 - 410	7539
MM Dkt.No.88 - 420	6525
MM Dkt.No.88 - 421	1893
MM Dkt.No.88 - 421	4626
MM Dkt.No.88 - 429	1288
MM Dkt.No.88 - 429	4168
MM Dkt.No.88 - 429	4236
MM Dkt.No.88 - 429	6071
MM Dkt.No.88 - 433	925
MM Dkt.No.88 - 437	6019
MM Dkt.No.88 - 440	2347
MM Dkt.No.88 - 440	5183
MM Dkt.No.88 - 442	953
MM Dkt.No.88 - 442	4241
MM Dkt.No.88 - 457	5139
MM Dkt.No.88 - 473	2037
MM Dkt.No.88 - 487	5651
MM Dkt.No.88 - 487	6139
MM Dkt.No.88 - 491	143
MM Dkt.No.88 - 491	5786
MM Dkt.No.88 - 496	4296
MM Dkt.No.88 - 512	6966
MM Dkt.No.88 - 523	1384
MM Dkt.No.88 - 523	4180
MM Dkt.No.88 - 524	1499
MM Dkt.No.88 - 524	5018
MM Dkt.No.88 - 524	6826
MM Dkt.No.88 - 536	340

Docket Number	Page
MM Dkt.No.88 - 536	4823
MM Dkt.No.88 - 538	1665
MM Dkt.No.88 - 540	4471
MM Dkt.No.88 - 558	1697
MM Dkt.No.88 - 559	875
MM Dkt.No.88 - 577	1978
MM Dkt.No.88 - 580	5227
MM Dkt.No.88 - 580	6548
MM Dkt.No.88 - 581	1518
MM Dkt.No.88 - 581	4959
MM Dkt.No.88 - 584	2875
MM Dkt.No.88 - 584	6841
MM Dkt.No.88 - 595	2880
MM Dkt.No.88 - 601	1681
MM Dkt.No.89 - 9	687
MM Dkt.No.89 - 18	4377
MM Dkt.No.89 - 18	5866
MM Dkt.No.89 - 21	7114
MM Dkt.No.89 - 53	5798
MM Dkt.No.89 - 55	6578
MM Dkt.No.89 - 66	885
MM Dkt.No.89 - 66	4485
MM Dkt.No.89 - 74	250
MM Dkt.No.89 - 80	1777
MM Dkt.No.89 - 80	5586
MM Dkt.No.89 - 82	1891
MM Dkt.No.89 - 91	3632
MM Dkt.No.89 - 95	1313
MM Dkt.No.89 - 98	1556
MM Dkt.No.89 - 108	6042
MM Dkt.No.89 - 112	994
MM Dkt.No.89 - 126	5778
MM Dkt.No.89 - 130	3520
MM Dkt.No.89 - 137	4848
MM Dkt.No.89 - 188	2592
MM Dkt.No.89 - 188	5052
MM Dkt.No.89 - 210	1239
MM Dkt.No.89 - 242	3735
MM Dkt.No.89 - 249	2590
MM Dkt.No.89 - 282	2624
MM Dkt.No.89 - 292	4163
MM Dkt.No.89 - 293	955
MM Dkt.No.89 - 293	4455
MM Dkt.No.89 - 293	5391
MM Dkt.No.89 - 307	3613
MM Dkt.No.89 - 311	13
MM Dkt.No.89 - 311	2603
MM Dkt.No.89 - 311	7160
MM Dkt.No.89 - 312	1785
MM Dkt.No.89 - 312	6553
MM Dkt.No.89 - 328	1333
MM Dkt.No.89 - 331	5157
MM Dkt.No.89 - 334	6036
MM Dkt.No.89 - 337	2841
MM Dkt.No.89 - 338	1350
MM Dkt.No.89 - 338	2894
MM Dkt.No.89 - 350	5239
MM Dkt.No.89 - 350	6830
MM Dkt.No.89 - 355	2581
MM Dkt.No.89 - 357	1527
MM Dkt.No.89 - 357	2193
MM Dkt.No.89 - 357	4409
MM Dkt.No.89 - 357	5057
MM Dkt.No.89 - 357	5023
MM Dkt.No.89 - 385	147
MM Dkt.No.89 - 387	873
MM Dkt.No.89 - 387	2961
MM Dkt.No.89 - 387	6909
MM Dkt.No.89 - 397	5142
MM Dkt.No.89 - 413	1554
MM Dkt.No.89 - 415	5583
MM Dkt.No.89 - 418	5793
MM Dkt.No.89 - 436	4204
MM Dkt.No.89 - 449	4375
MM Dkt.No.89 - 451	364
MM Dkt.No.89 - 451	3384
MM Dkt.No.89 - 454	1329
MM Dkt.No.89 - 470	573
MM Dkt.No.89 - 470	891
MM Dkt.No.89 - 470	4238
MM Dkt.No.89 - 477	2161
MM Dkt.No.89 - 486	7142
MM Dkt.No.89 - 487	1760
MM Dkt.No.89 - 495	5161
MM Dkt.No.89 - 496	385
MM Dkt.No.89 - 497	7147
MM Dkt.No.89 - 500	2142
MM Dkt.No.89 - 503	5221
MM Dkt.No.89 - 508	7434
MM Dkt.No.89 - 510	6051

Docket Number	Page
MM Dkt.No.89 - 513	7145
MM Dkt.No.89 - 517	3293
MM Dkt.No.89 - 520	2058
MM Dkt.No.89 - 521	6113
MM Dkt.No.89 - 523	7272
MM Dkt.No.89 - 532	3480
MM Dkt.No.89 - 534	2160
MM Dkt.No.89 - 541	895
MM Dkt.No.89 - 541	4488
MM Dkt.No.89 - 544	889
MM Dkt.No.89 - 544	1984
MM Dkt.No.89 - 544	2093
MM Dkt.No.89 - 546	2098
MM Dkt.No.89 - 546	3456
MM Dkt.No.89 - 547	3753
MM Dkt.No.89 - 548	5783
MM Dkt.No.89 - 549	6638
MM Dkt.No.89 - 550	4920
MM Dkt.No.89 - 551	1906
MM Dkt.No.89 - 566	5796
MM Dkt.No.89 - 567	7563
MM Dkt.No.89 - 570	3289
MM Dkt.No.89 - 571	3481
MM Dkt.No.89 - 580	5830
MM Dkt.No.89 - 585	6580
MM Dkt.No.89 - 587	1330
MM Dkt.No.89 - 591	4208
MM Dkt.No.89 - 596	533
MM Dkt.No.89 - 597	3478
MM Dkt.No.89 - 597	3479
MM Dkt.No.89 - 600	2
MM Dkt.No.89 - 602	3364
MM Dkt.No.89 - 604	151
MM Dkt.No.89 - 606	553
MM Dkt.No.89 - 606	5321
MM Dkt.No.89 - 614	1505
MM Dkt.No.89 - 616	1430
MM Dkt.No.89 - 620	5007
MM Dkt.No.89 - 625	7387
MM Dkt.No.89 - 628	5117
MM Dkt.No.89 - 629	7427
MM Dkt.No.90 - 4	208
MM Dkt.No.90 - 4	617
MM Dkt.No.90 - 4	4545
MM Dkt.No.90 - 4	5842
MM Dkt.No.90 - 8	5277
MM Dkt.No.90 - 10	2523
MM Dkt.No.90 - 13	26
MM Dkt.No.90 - 20	1491
MM Dkt.No.90 - 21	2049
MM Dkt.No.90 - 23	2217
MM Dkt.No.90 - 25	7220
MM Dkt.No.90 - 30	2879
MM Dkt.No.90 - 32	4285
MM Dkt.No.90 - 43	2613
MM Dkt.No.90 - 43	5981
MM Dkt.No.90 - 45	5071
MM Dkt.No.90 - 48	3287
MM Dkt.No.90 - 48	4633
MM Dkt.No.90 - 67	4917
MM Dkt.No.90 - 71	1706
MM Dkt.No.90 - 71	3624
MM Dkt.No.90 - 80	5850
MM Dkt.No.90 - 83	3375
MM Dkt.No.90 - 83	4381
MM Dkt.No.90 - 83	4453
MM Dkt.No.90 - 83	4636
MM Dkt.No.90 - 85	6048
MM Dkt.No.90 - 87	3649
MM Dkt.No.90 - 94	3576
MM Dkt.No.90 - 96	5742
MM Dkt.No.90 - 96	6833
MM Dkt.No.90 - 105	4861
MM Dkt.No.90 - 108	1567
MM Dkt.No.90 - 108	4630
MM Dkt.No.90 - 108	5997
MM Dkt.No.90 - 112	4347
MM Dkt.No.90 - 112	4635
MM Dkt.No.90 - 120	3647
MM Dkt.No.90 - 121	6084
MM Dkt.No.90 - 123	7250
MM Dkt.No.90 - 126	1949
MM Dkt.No.90 - 127	2212
MM Dkt.No.90 - 128	2878
MM Dkt.No.90 - 130	249
MM Dkt.No.90 - 135	5109
MM Dkt.No.90 - 135	6561
MM Dkt.No.90 - 150	4683
MM Dkt.No.90 - 153	3626
MM Dkt.No.90 - 153	6903

Docket Number	Page
MM Dkt.No.90 - 162	1657
MM Dkt.No.90 - 162	3094
MM Dkt.No.90 - 162	5705
MM Dkt.No.90 - 162	5706
MM Dkt.No.90 - 163	4400
MM Dkt.No.90 - 168	7453
MM Dkt.No.90 - 170	6494
MM Dkt.No.90 - 172	10
MM Dkt.No.90 - 172	869
MM Dkt.No.90 - 172	4723
MM Dkt.No.90 - 174	5547
MM Dkt.No.90 - 175	4804
MM Dkt.No.90 - 176	3292
MM Dkt.No.90 - 181	2221
MM Dkt.No.90 - 185	4294
MM Dkt.No.90 - 187	5115
MM Dkt.No.90 - 192	1864
MM Dkt.No.90 - 192	4183
MM Dkt.No.90 - 201	1950
MM Dkt.No.90 - 207	2015
MM Dkt.No.90 - 207	6995
MM Dkt.No.90 - 211	633
MM Dkt.No.90 - 213	3732
MM Dkt.No.90 - 214	5802
MM Dkt.No.90 - 220	2134
MM Dkt.No.90 - 231	2133
MM Dkt.No.90 - 233	149
MM Dkt.No.90 - 238	1703
MM Dkt.No.90 - 243	4337
MM Dkt.No.90 - 263	85
MM Dkt.No.90 - 263	2901
MM Dkt.No.90 - 263	5703
MM Dkt.No.90 - 273	2322
MM Dkt.No.90 - 273	6997
MM Dkt.No.90 - 279	1349
MM Dkt.No.90 - 281	1546
MM Dkt.No.90 - 282	3367
MM Dkt.No.90 - 284	5213
MM Dkt.No.90 - 284	7429
MM Dkt.No.90 - 285	2144
MM Dkt.No.90 - 290	5252
MM Dkt.No.90 - 290	7278
MM Dkt.No.90 - 295	4407
MM Dkt.No.90 - 295	7210
MM Dkt.No.90 - 302	1780

Docket Number	Page
MM Dkt.No.90 - 302	3608
MM Dkt.No.90 - 305	282
MM Dkt.No.90 - 307	2135
MM Dkt.No.90 - 309	4863
MM Dkt.No.90 - 316	2153
MM Dkt.No.90 - 321	3325
MM Dkt.No.90 - 322	6969
MM Dkt.No.90 - 323	3452
MM Dkt.No.90 - 324	5121
MM Dkt.No.90 - 325	942
MM Dkt.No.90 - 339	6083
MM Dkt.No.90 - 349	2469
MM Dkt.No.90 - 350	1385
MM Dkt.No.90 - 351	421
MM Dkt.No.90 - 352	5525
MM Dkt.No.90 - 352	5621
MM Dkt.No.90 - 354	5292
MM Dkt.No.90 - 372	2005
MM Dkt.No.90 - 373	7437
MM Dkt.No.90 - 376	576
MM Dkt.No.90 - 380	5529
MM Dkt.No.90 - 380	5519
MM Dkt.No.90 - 380	7464
MM Dkt.No.90 - 382	4642
MM Dkt.No.90 - 382	6980
MM Dkt.No.90 - 383	2172
MM Dkt.No.90 - 384	2001
MM Dkt.No.90 - 385	5835
MM Dkt.No.90 - 386	1504
MM Dkt.No.90 - 388	6636
MM Dkt.No.90 - 392	5002
MM Dkt.No.90 - 402	6064
MM Dkt.No.90 - 408	4122
MM Dkt.No.90 - 409	252
MM Dkt.No.90 - 410	152
MM Dkt.No.90 - 416	2324
MM Dkt.No.90 - 424	2325
MM Dkt.No.90 - 424	3599
MM Dkt.No.90 - 437	3482
MM Dkt.No.90 - 438	532
MM Dkt.No.90 - 439	387
MM Dkt.No.90 - 440	1394
MM Dkt.No.90 - 441	621
MM Dkt.No.90 - 442	363
MM Dkt.No.90 - 443	531
MM Dkt.No.90 - 444	591

Docket Number	Page	Docket Number	Page
MM Dkt.No.90 - 446	1502	MM Dkt.No.90 - 499	3457
MM Dkt.No.90 - 447	3326	MM Dkt.No.90 - 500	291
MM Dkt.No.90 - 448	390	MM Dkt.No.90 - 500	5658
MM Dkt.No.90 - 449	4759	MM Dkt.No.90 - 503	2013
MM Dkt.No.90 - 450	367	MM Dkt.No.90 - 509	4727
MM Dkt.No.90 - 451	2056	MM Dkt.No.90 - 512	4124
MM Dkt.No.90 - 452	4278	MM Dkt.No.90 - 513	618
MM Dkt.No.90 - 453	1597	MM Dkt.No.90 - 515	2094
MM Dkt.No.90 - 454	384	MM Dkt.No.90 - 515	3460
MM Dkt.No.90 - 455	534	MM Dkt.No.90 - 515	3575
MM Dkt.No.90 - 456	5174	MM Dkt.No.90 - 521	1553
MM Dkt.No.90 - 457	911	MM Dkt.No.90 - 525	2055
MM Dkt.No.90 - 458	2052	MM Dkt.No.90 - 526	1328
MM Dkt.No.90 - 459	366	MM Dkt.No.90 - 528	1256
MM Dkt.No.90 - 460	416	MM Dkt.No.90 - 529	3656
MM Dkt.No.90 - 461	386	MM Dkt.No.90 - 530	5785
MM Dkt.No.90 - 462	2462	MM Dkt.No.90 - 531	1826
MM Dkt.No.90 - 463	1255	MM Dkt.No.90 - 533	1905
MM Dkt.No.90 - 464	6053	MM Dkt.No.90 - 535	1532
MM Dkt.No.90 - 465	1429	MM Dkt.No.90 - 536	3587
MM Dkt.No.90 - 467	3612	MM Dkt.No.90 - 537	4729
MM Dkt.No.90 - 468	5140	MM Dkt.No.90 - 538	1259
MM Dkt.No.90 - 469	1400	MM Dkt.No.90 - 539	946
MM Dkt.No.90 - 470	619	MM Dkt.No.90 - 540	3
MM Dkt.No.90 - 471	3759	MM Dkt.No.90 - 543	2132
MM Dkt.No.90 - 472	5867	MM Dkt.No.90 - 546	1398
MM Dkt.No.90 - 473	388	MM Dkt.No.90 - 547	5539
MM Dkt.No.90 - 474	2241	MM Dkt.No.90 - 547	6961
MM Dkt.No.90 - 478	3347	MM Dkt.No.90 - 548	909
MM Dkt.No.90 - 479	3385	MM Dkt.No.90 - 549	4968
MM Dkt.No.90 - 482	2593	MM Dkt.No.90 - 551	3463
MM Dkt.No.90 - 483	945	MM Dkt.No.90 - 553	944
MM Dkt.No.90 - 484	1281	MM Dkt.No.90 - 554	1503
MM Dkt.No.90 - 484	4310	MM Dkt.No.90 - 559	253
MM Dkt.No.90 - 485	3648	MM Dkt.No.90 - 560	322
MM Dkt.No.90 - 486	417	MM Dkt.No.90 - 562	1434
MM Dkt.No.90 - 487	620	MM Dkt.No.90 - 564	1851
MM Dkt.No.90 - 488	609	MM Dkt.No.90 - 565	1257
MM Dkt.No.90 - 489	2158	MM Dkt.No.90 - 567	1258
MM Dkt.No.90 - 490	907	MM Dkt.No.90 - 568	1397
MM Dkt.No.90 - 491	910	MM Dkt.No.90 - 569	5545
MM Dkt.No.90 - 492	906	MM Dkt.No.90 - 570	2111
MM Dkt.No.90 - 493	5119	MM Dkt.No.90 - 570	3535
MM Dkt.No.90 - 495	908	MM Dkt.No.90 - 570	5093
MM Dkt.No.90 - 496	630	MM Dkt.No.90 - 570	5529
MM Dkt.No.90 - 497	4758	MM Dkt.No.90 - 572	326

Docket Number	Page	Docket Number	Page
MM Dkt.No.90 - 573	324	MM Dkt.No.90 - 622	500
MM Dkt.No.90 - 574	2159	MM Dkt.No.90 - 625	494
MM Dkt.No.90 - 575	3323	MM Dkt.No.90 - 626	579
MM Dkt.No.90 - 576	1428	MM Dkt.No.90 - 627	577
MM Dkt.No.90 - 577	1399	MM Dkt.No.90 - 628	2197
MM Dkt.No.90 - 579	1547	MM Dkt.No.90 - 629	28
MM Dkt.No.90 - 580	4860	MM Dkt.No.90 - 630	483
MM Dkt.No.90 - 581	2131	MM Dkt.No.90 - 631	514
MM Dkt.No.90 - 582	55	MM Dkt.No.90 - 632	490
MM Dkt.No.90 - 582	4307	MM Dkt.No.90 - 633	522
MM Dkt.No.90 - 583	59	MM Dkt.No.90 - 634	508
MM Dkt.No.90 - 584	255	MM Dkt.No.90 - 635	487
MM Dkt.No.90 - 585	3751	MM Dkt.No.90 - 636	511
MM Dkt.No.90 - 586	2157	MM Dkt.No.90 - 637	528
MM Dkt.No.90 - 587	6482	MM Dkt.No.90 - 638	708
MM Dkt.No.90 - 588	4207	MM Dkt.No.90 - 638	2167
MM Dkt.No.90 - 589	61	MM Dkt.No.90 - 638	5021
MM Dkt.No.90 - 590	57	MM Dkt.No.90 - 638	5522
MM Dkt.No.90 - 593	2039	MM Dkt.No.90 - 638	6484
MM Dkt.No.90 - 595	5871	MM Dkt.No.90 - 639	628
MM Dkt.No.90 - 596	2128	MM Dkt.No.90 - 640	526
MM Dkt.No.90 - 597	2057	MM Dkt.No.90 - 641	706
MM Dkt.No.90 - 598	2002	MM Dkt.No.90 - 642	704
MM Dkt.No.90 - 599	5817	MM Dkt.No.90 - 643	103
MM Dkt.No.90 - 600	391	MM Dkt.No.90 - 643	2141
MM Dkt.No.90 - 601	5631	MM Dkt.No.90 - 644	105
MM Dkt.No.90 - 602	328	MM Dkt.No.90 - 644	5159
MM Dkt.No.90 - 603	263	MM Dkt.No.90 - 645	107
MM Dkt.No.90 - 604	361	MM Dkt.No.90 - 645	2196
MM Dkt.No.90 - 604	3596	MM Dkt.No.90 - 645	4922
MM Dkt.No.90 - 605	330	MM Dkt.No.90 - 646	109
MM Dkt.No.90 - 606	359	MM Dkt.No.90 - 646	5582
MM Dkt.No.90 - 607	516	MM Dkt.No.90 - 647	111
MM Dkt.No.90 - 608	277	MM Dkt.No.90 - 648	113
MM Dkt.No.90 - 609	2537	MM Dkt.No.90 - 648	2186
MM Dkt.No.90 - 611	4293	MM Dkt.No.90 - 649	153
MM Dkt.No.90 - 612	3464	MM Dkt.No.90 - 649	4369
MM Dkt.No.90 - 613	4224	MM Dkt.No.90 - 650	155
MM Dkt.No.90 - 615	2038	MM Dkt.No.90 - 650	2043
MM Dkt.No.90 - 616	3664	MM Dkt.No.90 - 651	267
MM Dkt.No.90 - 618	495	MM Dkt.No.90 - 651	7435
MM Dkt.No.90 - 618	5879	MM Dkt.No.90 - 652	536
MM Dkt.No.90 - 619	4519	MM Dkt.No.90 - 653	540
MM Dkt.No.90 - 620	4803	MM Dkt.No.90 - 654	538
MM Dkt.No.90 - 621	497	MM Dkt.No.91 - 3	368
MM Dkt.No.90 - 621	5107	MM Dkt.No.91 - 3	4429

Docket Number	Page	Docket Number	Page
MM Dkt.No.91 - 4	370	MM Dkt.No.91 - 41	1325
MM Dkt.No.91 - 4	4430	MM Dkt.No.91 - 41	7253
MM Dkt.No.91 - 5	583	MM Dkt.No.91 - 42	1323
MM Dkt.No.91 - 5	3465	MM Dkt.No.91 - 42	4516
MM Dkt.No.91 - 6	585	MM Dkt.No.91 - 43	1321
MM Dkt.No.91 - 6	3466	MM Dkt.No.91 - 43	4398
MM Dkt.No.91 - 7	587	MM Dkt.No.91 - 44	1319
MM Dkt.No.91 - 7	4402	MM Dkt.No.91 - 44	4210
MM Dkt.No.91 - 8	589	MM Dkt.No.91 - 45	1317
MM Dkt.No.91 - 8	2623	MM Dkt.No.91 - 45	4272
MM Dkt.No.91 - 9	631	MM Dkt.No.91 - 46	1315
MM Dkt.No.91 - 10	863	MM Dkt.No.91 - 46	4279
MM Dkt.No.91 - 11	717	MM Dkt.No.91 - 47	1337
MM Dkt.No.91 - 12	880	MM Dkt.No.91 - 48	1432
MM Dkt.No.91 - 13	867	MM Dkt.No.91 - 48	4427
MM Dkt.No.91 - 14	858	MM Dkt.No.91 - 49	1395
MM Dkt.No.91 - 15	865	MM Dkt.No.91 - 50	1899
MM Dkt.No.91 - 16	897	MM Dkt.No.91 - 51	1478
MM Dkt.No.91 - 17	899	MM Dkt.No.91 - 52	1480
MM Dkt.No.91 - 18	904	MM Dkt.No.91 - 52	6632
MM Dkt.No.91 - 19	902	MM Dkt.No.91 - 53	1483
MM Dkt.No.91 - 20	882	MM Dkt.No.91 - 53	4226
MM Dkt.No.91 - 20	5290	MM Dkt.No.91 - 54	1485
MM Dkt.No.91 - 21	947	MM Dkt.No.91 - 54	4225
MM Dkt.No.91 - 23	949	MM Dkt.No.91 - 55	1487
MM Dkt.No.91 - 24	938	MM Dkt.No.91 - 55	4223
MM Dkt.No.91 - 24	4428	MM Dkt.No.91 - 56	1489
MM Dkt.No.91 - 25	940	MM Dkt.No.91 - 57	1548
MM Dkt.No.91 - 25	2329	MM Dkt.No.91 - 57	5543
MM Dkt.No.91 - 26	1235	MM Dkt.No.91 - 58	1551
MM Dkt.No.91 - 26	3726	MM Dkt.No.91 - 61	1956
MM Dkt.No.91 - 27	1237	MM Dkt.No.91 - 63	1900
MM Dkt.No.91 - 27	3366	MM Dkt.No.91 - 67	1738
MM Dkt.No.91 - 27	4793	MM Dkt.No.91 - 68	1838
MM Dkt.No.91 - 28	1279	MM Dkt.No.91 - 69	1835
MM Dkt.No.91 - 29	1282	MM Dkt.No.91 - 70	1842
MM Dkt.No.91 - 29	7111	MM Dkt.No.91 - 71	1901
MM Dkt.No.91 - 30	1284	MM Dkt.No.91 - 73	1824
MM Dkt.No.91 - 30	4222	MM Dkt.No.91 - 73	5309
MM Dkt.No.91 - 31	1286	MM Dkt.No.91 - 74	1827
MM Dkt.No.91 - 32	1253	MM Dkt.No.91 - 74	4502
MM Dkt.No.91 - 32	4273	MM Dkt.No.91 - 75	1829
MM Dkt.No.91 - 37	1365	MM Dkt.No.91 - 76	1831
MM Dkt.No.91 - 38	1392	MM Dkt.No.91 - 76	5069
MM Dkt.No.91 - 39	1366	MM Dkt.No.91 - 77	1833
MM Dkt.No.91 - 40	1364	MM Dkt.No.91 - 77	4372

Docket Number	Page
MM Dkt.No.91 - 78	1845
MM Dkt.No.91 - 78	6630
MM Dkt.No.91 - 79	1847
MM Dkt.No.91 - 80	1849
MM Dkt.No.91 - 80	6988
MM Dkt.No.91 - 81	2045
MM Dkt.No.91 - 82	2007
MM Dkt.No.91 - 83	2063
MM Dkt.No.91 - 84	2108
MM Dkt.No.91 - 85	2833
MM Dkt.No.91 - 86	2501
MM Dkt.No.91 - 86	5301
MM Dkt.No.91 - 86	5388
MM Dkt.No.91 - 86	6831
MM Dkt.No.91 - 87	2164
MM Dkt.No.91 - 88	2261
MM Dkt.No.91 - 89	2263
MM Dkt.No.91 - 90	2265
MM Dkt.No.91 - 91	2168
MM Dkt.No.91 - 93	1947
MM Dkt.No.91 - 93	4206
MM Dkt.No.91 - 94	1908
MM Dkt.No.91 - 94	6089
MM Dkt.No.91 - 96	2475
MM Dkt.No.91 - 97	2182
MM Dkt.No.91 - 98	2505
MM Dkt.No.91 - 99	2500
MM Dkt.No.91 - 100	2508
MM Dkt.No.91 - 100	3471
MM Dkt.No.91 - 101	2554
MM Dkt.No.91 - 101	7208
MM Dkt.No.91 - 102	2003
MM Dkt.No.91 - 102	4305
MM Dkt.No.91 - 103	2060
MM Dkt.No.91 - 104	2068
MM Dkt.No.91 - 105	2071
MM Dkt.No.91 - 105	6022
MM Dkt.No.91 - 106	2074
MM Dkt.No.91 - 106	6050
MM Dkt.No.91 - 107	2076
MM Dkt.No.91 - 107	6475
MM Dkt.No.91 - 108	2129
MM Dkt.No.91 - 108	6643
MM Dkt.No.91 - 109	2040
MM Dkt.No.91 - 109	5137
MM Dkt.No.91 - 110	2053
MM Dkt.No.91 - 113	2136
MM Dkt.No.91 - 113	5317
MM Dkt.No.91 - 114	2138
MM Dkt.No.91 - 114	6476
MM Dkt.No.91 - 117	2198
MM Dkt.No.91 - 117	4523
MM Dkt.No.91 - 118	2200
MM Dkt.No.91 - 118	5136
MM Dkt.No.91 - 122	2492
MM Dkt.No.91 - 122	6828
MM Dkt.No.91 - 123	2213
MM Dkt.No.91 - 123	4521
MM Dkt.No.91 - 124	2215
MM Dkt.No.91 - 124	6498
MM Dkt.No.91 - 125	2598
MM Dkt.No.91 - 126	2596
MM Dkt.No.91 - 126	5944
MM Dkt.No.91 - 127	2243
MM Dkt.No.91 - 128	2454
MM Dkt.No.91 - 129	2456
MM Dkt.No.91 - 130	2460
MM Dkt.No.91 - 131	2471
MM Dkt.No.91 - 132	2473
MM Dkt.No.91 - 133	2540
MM Dkt.No.91 - 133	5636
MM Dkt.No.91 - 134	2538
MM Dkt.No.91 - 134	5232
MM Dkt.No.91 - 135	2535
MM Dkt.No.91 - 136	2585
MM Dkt.No.91 - 136	5734
MM Dkt.No.91 - 137	2594
MM Dkt.No.91 - 140	3275
MM Dkt.No.91 - 140	4577
MM Dkt.No.91 - 140	4508
MM Dkt.No.91 - 140	4682
MM Dkt.No.91 - 144	3359
MM Dkt.No.91 - 145	3382
MM Dkt.No.91 - 145	4454
MM Dkt.No.91 - 146	3395
MM Dkt.No.91 - 147	3358
MM Dkt.No.91 - 148	3290
MM Dkt.No.91 - 148	3719
MM Dkt.No.91 - 149	3294
MM Dkt.No.91 - 149	5788
MM Dkt.No.91 - 151	3368
MM Dkt.No.91 - 151	4943

Docket Number	Page
MM Dkt.No.91 - 152	3474
MM Dkt.No.91 - 153	3518
MM Dkt.No.91 - 154	3515
MM Dkt.No.91 - 154	3515
MM Dkt.No.91 - 155	3513
MM Dkt.No.91 - 156	3517
MM Dkt.No.91 - 157	3571
MM Dkt.No.91 - 158	3573
MM Dkt.No.91 - 159	3523
MM Dkt.No.91 - 159	5561
MM Dkt.No.91 - 160	3525
MM Dkt.No.91 - 160	5368
MM Dkt.No.91 - 161	3527
MM Dkt.No.91 - 161	5834
MM Dkt.No.91 - 163	4115
MM Dkt.No.91 - 164	3617
MM Dkt.No.91 - 165	4112
MM Dkt.No.91 - 166	3619
MM Dkt.No.91 - 168	4499
MM Dkt.No.91 - 168	5707
MM Dkt.No.91 - 169	3673
MM Dkt.No.91 - 169	6588
MM Dkt.No.91 - 172	3630
MM Dkt.No.91 - 173	3633
MM Dkt.No.91 - 173	5334
MM Dkt.No.91 - 174	3658
MM Dkt.No.91 - 175	3660
MM Dkt.No.91 - 176	3650
MM Dkt.No.91 - 176	6480
MM Dkt.No.91 - 177	3652
MM Dkt.No.91 - 177	6055
MM Dkt.No.91 - 178	3654
MM Dkt.No.91 - 178	5629
MM Dkt.No.91 - 179	3662
MM Dkt.No.91 - 180	3665
MM Dkt.No.91 - 181	3727
MM Dkt.No.91 - 182	3730
MM Dkt.No.91 - 182	5630
MM Dkt.No.91 - 183	3736
MM Dkt.No.91 - 183	5559
MM Dkt.No.91 - 184	4161
MM Dkt.No.91 - 185	4120
MM Dkt.No.91 - 186	4117
MM Dkt.No.91 - 187	3756
MM Dkt.No.91 - 187	6015
MM Dkt.No.91 - 188	4158
MM Dkt.No.91 - 189	4509
MM Dkt.No.91 - 190	4676
MM Dkt.No.91 - 191	4227
MM Dkt.No.91 - 192	4220
MM Dkt.No.91 - 192	6082
MM Dkt.No.91 - 193	4274
MM Dkt.No.91 - 194	4276
MM Dkt.No.91 - 194	6011
MM Dkt.No.91 - 195	4440
MM Dkt.No.91 - 196	4514
MM Dkt.No.91 - 197	4512
MM Dkt.No.91 - 198	4679
MM Dkt.No.91 - 200	4442
MM Dkt.No.91 - 201	4438
MM Dkt.No.91 - 201	6540
MM Dkt.No.91 - 202	4444
MM Dkt.No.91 - 203	4446
MM Dkt.No.91 - 203	6489
MM Dkt.No.91 - 204	4622
MM Dkt.No.91 - 205	4627
MM Dkt.No.91 - 206	4606
MM Dkt.No.91 - 207	4463
MM Dkt.No.91 - 208	4716
MM Dkt.No.91 - 208	5087
MM Dkt.No.91 - 209	4712
MM Dkt.No.91 - 210	4465
MM Dkt.No.91 - 211	4370
MM Dkt.No.91 - 211	6483
MM Dkt.No.91 - 212	4373
MM Dkt.No.91 - 214	5956
MM Dkt.No.91 - 216	4392
MM Dkt.No.91 - 216	6045
MM Dkt.No.91 - 217	4394
MM Dkt.No.91 - 217	6115
MM Dkt.No.91 - 218	4396
MM Dkt.No.91 - 219	4500
MM Dkt.No.91 - 220	4517
MM Dkt.No.91 - 221	4961
MM Dkt.No.91 - 221	6023
MM Dkt.No.91 - 222	4725
MM Dkt.No.91 - 222	6982
MM Dkt.No.91 - 223	4730
MM Dkt.No.91 - 223	6116
MM Dkt.No.91 - 224	4732
MM Dkt.No.91 - 224	7116
MM Dkt.No.91 - 225	4734

Docket Number	Page
MM Dkt.No.91 - 225	6091
MM Dkt.No.91 - 227	5047
MM Dkt.No.91 - 229	4752
MM Dkt.No.91 - 230	4754
MM Dkt.No.91 - 231	4756
MM Dkt.No.91 - 231	7011
MM Dkt.No.91 - 232	4760
MM Dkt.No.91 - 233	4806
MM Dkt.No.91 - 234	4808
MM Dkt.No.91 - 235	5044
MM Dkt.No.91 - 236	4782
MM Dkt.No.91 - 236	7356
MM Dkt.No.91 - 237	4850
MM Dkt.No.91 - 238	4923
MM Dkt.No.91 - 238	7277
MM Dkt.No.91 - 239	4925
MM Dkt.No.91 - 240	4927
MM Dkt.No.91 - 241	5003
MM Dkt.No.91 - 242	5005
MM Dkt.No.91 - 242	6985
MM Dkt.No.91 - 243	5008
MM Dkt.No.91 - 244	4969
MM Dkt.No.91 - 244	7012
MM Dkt.No.91 - 245	4971
MM Dkt.No.91 - 245	6983
MM Dkt.No.91 - 246	4973
MM Dkt.No.91 - 246	6984
MM Dkt.No.91 - 247	4975
MM Dkt.No.91 - 247	7013
MM Dkt.No.91 - 248	4977
MM Dkt.No.91 - 249	5073
MM Dkt.No.91 - 249	6965
MM Dkt.No.91 - 250	5075
MM Dkt.No.91 - 251	5077
MM Dkt.No.91 - 252	5080
MM Dkt.No.91 - 253	5167
MM Dkt.No.91 - 254	5176
MM Dkt.No.91 - 254	7251
MM Dkt.No.91 - 255	5178
MM Dkt.No.91 - 256	5181
MM Dkt.No.91 - 257	5219
MM Dkt.No.91 - 257	7219
MM Dkt.No.91 - 259	5310
MM Dkt.No.91 - 260	5313
MM Dkt.No.91 - 261	5319
MM Dkt.No.91 - 261	7564

Docket Number	Page
MM Dkt.No.91 - 262	5315
MM Dkt.No.91 - 263	5326
MM Dkt.No.91 - 264	5328
MM Dkt.No.91 - 265	5330
MM Dkt.No.91 - 266	5332
MM Dkt.No.91 - 267	5369
MM Dkt.No.91 - 267	7119
MM Dkt.No.91 - 268	5371
MM Dkt.No.91 - 271	5534
MM Dkt.No.91 - 272	5541
MM Dkt.No.91 - 274	5557
MM Dkt.No.91 - 275	5562
MM Dkt.No.91 - 276	5564
MM Dkt.No.91 - 277	5566
MM Dkt.No.91 - 278	5580
MM Dkt.No.91 - 278	7433
MM Dkt.No.91 - 279	5619
MM Dkt.No.91 - 279	7432
MM Dkt.No.91 - 283	5627
MM Dkt.No.91 - 284	5632
MM Dkt.No.91 - 285	5634
MM Dkt.No.91 - 286	5752
MM Dkt.No.91 - 287	5760
MM Dkt.No.91 - 288	5762
MM Dkt.No.91 - 289	5775
MM Dkt.No.91 - 290	6004
MM Dkt.No.91 - 291	6092
MM Dkt.No.91 - 296	5781
MM Dkt.No.91 - 297	5791
MM Dkt.No.91 - 298	5800
MM Dkt.No.91 - 299	5838
MM Dkt.No.91 - 302	6017
MM Dkt.No.91 - 303	6012
MM Dkt.No.91 - 304	6038
MM Dkt.No.91 - 305	6046
MM Dkt.No.91 - 306	6056
MM Dkt.No.91 - 308	6128
MM Dkt.No.91 - 309	6892
MM Dkt.No.91 - 310	6117
MM Dkt.No.91 - 311	6119
MM Dkt.No.91 - 312	6086
MM Dkt.No.91 - 314	6935
MM Dkt.No.91 - 315	6490
MM Dkt.No.91 - 316	6492
MM Dkt.No.91 - 317	6513
MM Dkt.No.91 - 318	6515

Docket Number	Page
MM Dkt.No.91 - 319	6517
MM Dkt.No.91 - 320	6519
MM Dkt.No.91 - 321	6521
MM Dkt.No.91 - 323	6644
MM Dkt.No.91 - 336	6646
MM Dkt.No.91 - 337	6634
MM Dkt.No.91 - 338	6606
MM Dkt.No.91 - 339	6959
MM Dkt.No.91 - 340	6963
MM Dkt.No.91 - 341	6986
MM Dkt.No.91 - 342	7006
MM Dkt.No.91 - 343	7009
MM Dkt.No.91 - 344	7112
MM Dkt.No.91 - 345	7117
MM Dkt.No.91 - 347	7265
MM Dkt.No.91 - 348	7346
MM Dkt.No.91 - 349	7140
MM Dkt.No.91 - 350	7182
MM Dkt.No.91 - 351	7217
MM Dkt.No.91 - 352	7214
MM Dkt.No.91 - 353	7212
MM Dkt.No.91 - 354	7370
MM Dkt.No.91 - 355	7362
MM Dkt.No.91 - 356	7367
MM Dkt.No.91 - 357	7364
MM Dkt.No.91 - 358	7273
MM Dkt.No.91 - 359	7275
MM Dkt.No.91 - 533	2458
PR Dkt.No.88 - 139	2959
PR Dkt.No.89 - 45	542
PR Dkt.No.89 - 552	2356
PR Dkt.No.89 - 552	3333
PR Dkt.No.89 - 552	4229
PR Dkt.No.89 - 599	4813
PR Dkt.No.89 - 622	1456
PR Dkt.No.90 - 5	1270
PR Dkt.No.90 - 5	7133
PR Dkt.No.90 - 26	310
PR Dkt.No.90 - 26	5985
PR Dkt.No.90 - 27	506
PR Dkt.No.90 - 34	975
PR Dkt.No.90 - 34	4929
PR Dkt.No.91 - 322	6898
PR Dkt.No.90 - 34	6650
PR Dkt.No.90 - 100	337
PR Dkt.No.90 - 133	786
PR Dkt.No.90 - 134	1969
PR Dkt.No.90 - 205	714
PR Dkt.No.90 - 222	1975
PR Dkt.No.90 - 260	3721
PR Dkt.No.90 - 340	4692
PR Dkt.No.90 - 356	5083
PR Dkt.No.90 - 480	6
PR Dkt.No.90 - 481	446
PR Dkt.No.90 - 481	7297
PR Dkt.No.90 - 561	5978
PR Dkt.No.91 - 36	1305
PR Dkt.No.91 - 59	1585
PR Dkt.No.91 - 59	2938
PR Dkt.No.91 - 62	1966
PR Dkt.No.91 - 66	1800
PR Dkt.No.91 - 72	2017
PR Dkt.No.91 - 95	2151
PR Dkt.No.91 - 111	2478
PR Dkt.No.91 - 112	2145
PR Dkt.No.91 - 138	2787
PR Dkt.No.91 - 139	3426
PR Dkt.No.91 - 143	4802
PR Dkt.No.91 - 143	5335
PR Dkt.No.91 - 151	3484
PR Dkt.No.91 - 162	4886
PR Dkt.No.91 - 170	4126
PR Dkt.No.91 - 170	5513
PR Dkt.No.91 - 199	4263
PR Dkt.No.91 - 199	5751
PR Dkt.No.91 - 228	5764
PR Dkt.No.91 - 258	5340
PR Dkt.No.91 - 270	7017
PR Dkt.No.91 - 282	7139
PR Dkt.No.91 - 293	5991
PR Dkt.No.91 - 294	5994
PR Dkt.No.91 - 300	7475

Federal Communications Commission Record

Table of Cases by Rulemaking Number
Volume 6
Issue 1 - 26

Rulemaking Number	Page
RM - 4206	2806
RM - 4436	2630
RM - 4941	1493
RM - 4941	1841
RM - 5395	6829
RM - 5399	1493
RM - 5399	1841
RM - 5455	1992
RM - 5589	6829
RM - 5712	437
RM - 5751	5858
RM - 5754	3747
RM - 5772	142
RM - 5772	2050
RM - 5802	5163
RM - 5819	2187
RM - 5845	6111
RM - 5894	6975
RM - 5907	4579
RM - 5928	4852
RM - 5935	6111
RM - 5941	142
RM - 5941	2050
RM - 5960	2042
RM - 5992	6111
RM - 5995	3361
RM - 6015	5356
RM - 6090	5781
RM - 6127	246
RM - 6132	4579
RM - 6135	246
RM - 6138	1230
RM - 6146	1800
RM - 6196	1368
RM - 6201	535
RM - 6204	5163
RM - 6206	5163
RM - 6207	5163
RM - 6227	3361
RM - 6228	3361
RM - 6236	3417
RM - 6237	3417
RM - 6262	4852
RM - 6301	3613
RM - 6307	5139
RM - 6308	5138
RM - 6308	6473
RM - 6322	4579
RM - 6346	4296
RM - 6362	622
RM - 6367	6019
RM - 6371	143
RM - 6371	5786
RM - 6388	2037
RM - 6418	6966
RM - 6420	2158
RM - 6433	2880
RM - 6440	250
RM - 6469	4296
RM - 6474	1230
RM - 6489	1230
RM - 6505	1681
RM - 6507	6966
RM - 6510	4377
RM - 6510	5866
RM - 6526	1873
RM - 6532	5138
RM - 6532	6473
RM - 6533	142
RM - 6533	2050
RM - 6534	142
RM - 6534	2050
RM - 6535	142
RM - 6537	427
RM - 6537	6062
RM - 6539	1719
RM - 6546	4471
RM - 6566	7114
RM - 6569	1313
RM - 6577	2243
RM - 6578	1462
RM - 6586	4377
RM - 6586	5866
RM - 6593	6578

Rulemaking Number	Page
RM - 6595	2356
RM - 6595	4229
RM - 6596	6019
RM - 6602	1330
RM - 6606	6042
RM - 6614	5798
RM - 6620	2291
RM - 6625	4296
RM - 6626	4296
RM - 6627	4296
RM - 6628	364
RM - 6628	3384
RM - 6630	2624
RM - 6632	5142
RM - 6638	1556
RM - 6649	2291
RM - 6650	143
RM - 6650	5786
RM - 6659	3632
RM - 6665	1712
RM - 6668	3520
RM - 6669	5778
RM - 6681	4813
RM - 6683	1975
RM - 6707	6012
RM - 6711	3426
RM - 6715	6578
RM - 6716	6036
RM - 6723	6141
RM - 6725	4377
RM - 6725	5866
RM - 6725	5866
RM - 6731	7114
RM - 6737	5157
RM - 6744	6638
RM - 6746	1975
RM - 6750	2173
RM - 6760	6578
RM - 6764	1554
RM - 6767	120
RM - 6767	2744
RM - 6769	506
RM - 6770	310
RM - 6770	5985
RM - 6772	250
RM - 6777	1333
RM - 6784	4204
RM - 6792	2238
RM - 6799	6012
RM - 6802	4375
RM - 6826	5077
RM - 6839	1329
RM - 6850	5117
RM - 6855	1760
RM - 6860	6051
RM - 6877	7147
RM - 6879	5793
RM - 6882	5167
RM - 6886	714
RM - 6892	147
RM - 6897	7145
RM - 6899	3753
RM - 6910	7297
RM - 6913	7142
RM - 6929	7272
RM - 6936	2592
RM - 6936	5052
RM - 6939	3735
RM - 6940	5161
RM - 6943	5583
RM - 6954	4285
RM - 6960	3520
RM - 6962	2161
RM - 6963	6113
RM - 6966	2058
RM - 6970	2142
RM - 6971	385
RM - 6975	7434
RM - 6976	7006
RM - 6977	5830
RM - 6979	3293
RM - 6983	4920
RM - 6998	4848
RM - 7002	2624
RM - 7003	2624
RM - 7004	2624
RM - 7010	3480
RM - 7013	5796
RM - 7015	1906
RM - 7017	5783
RM - 7018	1430
RM - 7021	3753

Rulemaking Number	Page
RM - 7026	4917
RM - 7028	7563
RM - 7031	7427
RM - 7032	7250
RM - 7033	3481
RM - 7035	6580
RM - 7037	2160
RM - 7046	6036
RM - 7047	1333
RM - 7049	151
RM - 7051	4285
RM - 7053	3292
RM - 7055	5547
RM - 7057	4917
RM - 7059	2153
RM - 7061	3289
RM - 7070	4227
RM - 7073	3649
RM - 7079	4208
RM - 7082	1502
RM - 7083	3732
RM - 7085	3474
RM - 7088	5115
RM - 7089	149
RM - 7092	3474
RM - 7095	26
RM - 7096	5796
RM - 7097	4863
RM - 7100	3753
RM - 7101	5802
RM - 7102	3753
RM - 7106	26
RM - 7109	7117
RM - 7110	3289
RM - 7112	4804
RM - 7115	5547
RM - 7118	3478
RM - 7118	3479
RM - 7121	5071
RM - 7124	1491
RM - 7125	5007
RM - 7126	2049
RM - 7136	1505
RM - 7137	4294
RM - 7138	6634
RM - 7140	6601

Rulemaking Number	Page
RM - 7140	7471
RM - 7141	3654
RM - 7141	5629
RM - 7144	533
RM - 7147	6048
RM - 7150	2217
RM - 7154	3364
RM - 7160	249
RM - 7163	1827
RM - 7163	4502
RM - 7165	4861
RM - 7168	6966
RM - 7169	3367
RM - 7170	4400
RM - 7172	2593
RM - 7175	6601
RM - 7175	7471
RM - 7177	5830
RM - 7178	633
RM - 7180	111
RM - 7181	946
RM - 7183	6969
RM - 7185	1950
RM - 7188	6739
RM - 7191	2879
RM - 7196	6084
RM - 7198	1949
RM - 7200	4285
RM - 7202	2878
RM - 7203	2212
RM - 7204	4725
RM - 7204	6982
RM - 7210	621
RM - 7211	4122
RM - 7212	942
RM - 7218	3647
RM - 7219	940
RM - 7219	2329
RM - 7220	5835
RM - 7224	5213
RM - 7224	7429
RM - 7225	3474
RM - 7226	5802
RM - 7227	1325
RM - 7227	7253
RM - 7229	6636

Rulemaking Number	Page
RM - 7230	1829
RM - 7231	2134
RM - 7233	4756
RM - 7233	7011
RM - 7234	5002
RM - 7235	2144
RM - 7236	3323
RM - 7237	2056
RM - 7239	531
RM - 7240	591
RM - 7241	5978
RM - 7242	5978
RM - 7243	5978
RM - 7244	5978
RM - 7245	1689
RM - 7245	1890
RM - 7249	3259
RM - 7249	4818
RM - 7249	5169
RM - 7249	5809
RM - 7251	3593
RM - 7252	5793
RM - 7253	7142
RM - 7254	6113
RM - 7257	5583
RM - 7258	4375
RM - 7265	2161
RM - 7268	7434
RM - 7269	7147
RM - 7270	7145
RM - 7272	5161
RM - 7274	4920
RM - 7276	1504
RM - 7278	1429
RM - 7284	3482
RM - 7286	2001
RM - 7287	7437
RM - 7288	2003
RM - 7288	4305
RM - 7292	6638
RM - 7294	2133
RM - 7297	2135
RM - 7299	589
RM - 7299	2623
RM - 7300	2005
RM - 7301	5213

Rulemaking Number	Page
RM - 7301	7429
RM - 7303	3325
RM - 7309	5310
RM - 7310	4863
RM - 7314	5121
RM - 7315	6083
RM - 7316	4208
RM - 7317	2145
RM - 7320	6580
RM - 7321	3478
RM - 7321	3479
RM - 7322	1546
RM - 7324	387
RM - 7326	5541
RM - 7329	5005
RM - 7329	6985
RM - 7330	1547
RM - 7334	5932
RM - 7335	3392
RM - 7336	2017
RM - 7337	1597
RM - 7338	3751
RM - 7342	5867
RM - 7344	252
RM - 7346	2243
RM - 7347	942
RM - 7350	1489
RM - 7351	3326
RM - 7352	3474
RM - 7354	152
RM - 7355	2241
RM - 7356	534
RM - 7357	2057
RM - 7358	363
RM - 7360	4727
RM - 7361	2879
RM - 7362	4285
RM - 7363	4285
RM - 7364	4285
RM - 7365	4285
RM - 7366	4861
RM - 7371	1255
RM - 7373	1480
RM - 7373	6632
RM - 7374	619
RM - 7375	2243

Rulemaking Number	Page	Rulemaking Number	Page
RM - 7376	386	RM - 7441	532
RM - 7377	416	RM - 7442	1503
RM - 7379	417	RM - 7443	3612
RM - 7380	5140	RM - 7445	2243
RM - 7381	630	RM - 7446	5830
RM - 7385	3463	RM - 7447	3364
RM - 7386	366	RM - 7448	3364
RM - 7387	910	RM - 7452	1394
RM - 7388	618	RM - 7454	2128
RM - 7389	911	RM - 7455	4729
RM - 7390	620	RM - 7456	945
RM - 7391	367	RM - 7457	2138
RM - 7392	388	RM - 7457	6476
RM - 7393	1428	RM - 7458	909
RM - 7394	907	RM - 7461	5075
RM - 7395	609	RM - 7463	5176
RM - 7396	5174	RM - 7463	7251
RM - 7398	6084	RM - 7464	4968
RM - 7401	4433	RM - 7465	1553
RM - 7402	4433	RM - 7466	2060
RM - 7403	4433	RM - 7467	2462
RM - 7404	4433	RM - 7468	1258
RM - 7405	908	RM - 7469	1851
RM - 7406	1966	RM - 7470	6053
RM - 7408	6898	RM - 7471	2060
RM - 7414	5115	RM - 7472	5785
RM - 7416	3732	RM - 7474	2060
RM - 7417	3732	RM - 7475	2052
RM - 7419	1551	RM - 7476	1397
RM - 7420	4758	RM - 7477	5539
RM - 7422	1328	RM - 7477	6961
RM - 7423	631	RM - 7478	1281
RM - 7424	4278	RM - 7478	4310
RM - 7426	5534	RM - 7479	6482
RM - 7427	390	RM - 7487	5213
RM - 7428	1400	RM - 7487	7429
RM - 7429	5119	RM - 7488	4863
RM - 7430	4759	RM - 7494	2594
RM - 7431	944	RM - 7497	1826
RM - 7432	3759	RM - 7498	1256
RM - 7433	3648	RM - 7500	2458
RM - 7435	4124	RM - 7503	4860
RM - 7436	384	RM - 7505	2055
RM - 7437	3474	RM - 7506	2002
RM - 7438	906	RM - 7507	1399
RM - 7440	3656	RM - 7508	1259

Rulemaking Number	Page	Rulemaking Number	Page
RM - 7510	5545	RM - 7557	3368
RM - 7512	5989	RM - 7557	4943
RM - 7515	633	RM - 7558	3633
RM - 7517	6969	RM - 7558	5334
RM - 7520	1532	RM - 7559	4224
RM - 7521	2131	RM - 7560	113
RM - 7522	4207	RM - 7560	2186
RM - 7523	5817	RM - 7561	5138
RM - 7524	109	RM - 7561	6473
RM - 7524	5582	RM - 7562	5
RM - 7525	1434	RM - 7563	153
RM - 7526	1398	RM - 7563	4369
RM - 7528	3587	RM - 7565	4519
RM - 7529	1905	RM - 7569	6636
RM - 7530	2132	RM - 7570	5867
RM - 7531	5631	RM - 7575	1282
RM - 7532	2157	RM - 7575	7111
RM - 7533	4293	RM - 7576	28
RM - 7534	2159	RM - 7576	2197
RM - 7535	1286	RM - 7577	4803
RM - 7536	1257	RM - 7578	290
RM - 7537	2243	RM - 7579	103
RM - 7538	2039	RM - 7579	2141
RM - 7539	5871	RM - 7580	5534
RM - 7540	4804	RM - 7582	1845
RM - 7541	5835	RM - 7582	6630
RM - 7542	2537	RM - 7583	6086
RM - 7543	105	RM - 7584	1279
RM - 7543	5159	RM - 7585	1235
RM - 7544	267	RM - 7585	3726
RM - 7544	7435	RM - 7586	2215
RM - 7545	155	RM - 7586	6498
RM - 7545	2043	RM - 7587	583
RM - 7546	149	RM - 7587	3465
RM - 7548	4370	RM - 7588	370
RM - 7548	6483	RM - 7588	4430
RM - 7549	1237	RM - 7589	368
RM - 7549	3366	RM - 7589	4429
RM - 7549	4793	RM - 7590	585
RM - 7550	3464	RM - 7590	3466
RM - 7552	2038	RM - 7591	1483
RM - 7554	3664	RM - 7591	4226
RM - 7555	3587	RM - 7592	587
RM - 7556	107	RM - 7592	4402
RM - 7556	2196	RM - 7593	2460
RM - 7556	4922	RM - 7595	4759

Rulemaking Number	Page	Rulemaking Number	Page
RM - 7596	3612	RM - 7646	5137
RM - 7598	938	RM - 7647	1831
RM - 7598	4428	RM - 7647	5069
RM - 7599	1395	RM - 7648	1847
RM - 7600	1284	RM - 7650	5080
RM - 7600	4222	RM - 7658	4860
RM - 7601	1548	RM - 7661	1947
RM - 7601	5543	RM - 7661	4206
RM - 7604	1315	RM - 7662	1908
RM - 7604	4279	RM - 7662	6089
RM - 7606	1253	RM - 7663	3751
RM - 7606	4273	RM - 7664	2456
RM - 7607	1321	RM - 7665	4973
RM - 7607	4398	RM - 7665	6984
RM - 7608	1317	RM - 7666	5534
RM - 7608	4272	RM - 7668	2068
RM - 7609	1824	RM - 7670	2198
RM - 7609	5309	RM - 7670	4523
RM - 7614	2458	RM - 7671	2074
RM - 7616	1323	RM - 7671	6050
RM - 7616	4516	RM - 7672	1849
RM - 7618	1566	RM - 7672	6988
RM - 7618	7471	RM - 7677	2071
RM - 7619	1319	RM - 7677	6022
RM - 7619	4210	RM - 7678	2053
RM - 7620	1337	RM - 7679	4220
RM - 7621	1432	RM - 7679	6082
RM - 7621	4427	RM - 7683	5539
RM - 7623	1485	RM - 7683	6961
RM - 7623	4225	RM - 7684	4729
RM - 7624	1487	RM - 7685	3464
RM - 7624	4223	RM - 7688	5159
RM - 7625	1478	RM - 7689	2200
RM - 7627	1844	RM - 7689	5136
RM - 7628	1844	RM - 7690	2129
RM - 7629	3587	RM - 7690	6643
RM - 7634	5545	RM - 7691	4923
RM - 7635	5545	RM - 7691	7277
RM - 7640	2076	RM - 7692	2473
RM - 7640	6475	RM - 7693	2213
RM - 7641	1847	RM - 7693	4521
RM - 7643	2136	RM - 7694	2454
RM - 7643	5317	RM - 7696	3727
RM - 7644	1833	RM - 7697	2535
RM - 7644	4372	RM - 7698	3756
RM - 7646	2040	RM - 7698	6015

Rulemaking Number	Page	Rulemaking Number	Page
RM - 7699	3665	RM - 7752	4396
RM - 7701	3527	RM - 7753	4754
RM - 7701	5834	RM - 7754	6012
RM - 7702	2471	RM - 7755	4760
RM - 7705	3735	RM - 7756	4732
RM - 7708	2538	RM - 7756	7116
RM - 7708	5232	RM - 7757	6646
RM - 7709	5791	RM - 7758	4730
RM - 7710	2540	RM - 7758	6116
RM - 7710	5636	RM - 7759	4734
RM - 7711	3290	RM - 7759	6091
RM - 7711	3719	RM - 7761	4752
RM - 7712	5534	RM - 7765	5181
RM - 7714	3474	RM - 7766	5008
RM - 7716	3294	RM - 7767	5003
RM - 7716	5788	RM - 7768	4975
RM - 7717	4274	RM - 7768	7013
RM - 7718	3525	RM - 7769	4925
RM - 7718	5368	RM - 7770	4927
RM - 7719	3523	RM - 7771	6653
RM - 7719	5561	RM - 7773	6653
RM - 7720	3660	RM - 7775	4971
RM - 7721	4276	RM - 7775	6983
RM - 7721	6011	RM - 7776	4969
RM - 7726	3630	RM - 7776	7012
RM - 7727	4373	RM - 7777	5073
RM - 7728	3658	RM - 7777	6965
RM - 7729	4500	RM - 7778	4977
RM - 7733	3730	RM - 7779	5219
RM - 7733	5630	RM - 7779	7219
RM - 7734	3662	RM - 7781	5178
RM - 7735	3736	RM - 7783	5626
RM - 7735	5559	RM - 7785	5369
RM - 7737	3652	RM - 7785	7119
RM - 7737	6055	RM - 7786	5562
RM - 7738	3650	RM - 7787	6038
RM - 7738	6480	RM - 7788	5313
RM - 7742	4392	RM - 7789	5319
RM - 7742	6045	RM - 7789	7564
RM - 7743	4806	RM - 7790	5371
RM - 7744	4850	RM - 7791	5328
RM - 7745	4808	RM - 7792	5315
RM - 7746	4517	RM - 7793	5326
RM - 7747	4578	RM - 7794	5332
RM - 7751	4394	RM - 7795	5330
RM - 7751	6115	RM - 7802	5557

Rulemaking Number	Page
RM - 7803	5800
RM - 7804	5564
RM - 7805	6653
RM - 7806	6653
RM - 7807	5627
RM - 7808	5619
RM - 7808	7432
RM - 7809	5580
RM - 7809	7433
RM - 7810	5566
RM - 7811	5634
RM - 7812	5838
RM - 7813	6012
RM - 7814	5632
RM - 7823	6827
RM - 7823	7466
RM - 7824	6056
RM - 7825	6046
RM - 7826	6017
RM - 7828	6119
RM - 7829	6117
RM - 7830	6490
RM - 7832	6519
RM - 7833	6521
RM - 7834	6492
RM - 7835	7275
RM - 7836	6986
RM - 7844	6517
RM - 7850	6644
RM - 7851	6963
RM - 7852	6606
RM - 7853	6515
RM - 7854	6513
RM - 7856	7112
RM - 7857	6959
RM - 7858	7009
RM - 7862	7140
RM - 7863	7212
RM - 7864	7217
RM - 7866	7214
RM - 7867	7273

Federal Communications Commission Record

Table of Cases by City
Volume 6
Issue 1 - 26

City/State	Page
Abbeville, SC	7145
Abilene, TX	1279
Adams, WI	2038
Aguila, AZ	4278
Alachua, FL	5277
Alamosa, CO	4293
Albany, GA	5047
Albia, IA	5213
Albia, IA	7429
Albion, NE	6038
Albuquerque, NM	1899
Algoma, WI	2624
Allentown, PA	7130
Altamont, OR	6986
Altoona, WI	7212
Altus, OK	2158
Amarillo, TX	2261
Amarillo, TX	4646
Amarillo, TX	4729
Amarillo, TX	6004
Americus, GA	942
Americus, GA	4732
Americus, GA	7116
Anderson, IN	5125
Anderson, SC	6567
Andover, MA	3370
Andrews, SC	4285
Angola, IN	1230
Anniston, AL	1992
Antigo, WI	4925
Antlers, OK	4760
Apalachicola, FL	7147
Appomattox, VA	589
Appomattox, VA	2623
Ardmore, OK	7006
Arkansas City, KS	2161
Arlington, TX	142
Arlington, TX	3411
Arlington, TX	7494
Armijo, NM	4806
Arnold, CA	4860
Asbury, MO	417
Asbury, IA	6058
Ashland, OR	5330
Ashtabula, OH	7367
Aspen, CO	1602
Aspen, CO	4981
Athens, OH	1493
Athens, OH	1841
Atlantic, NC	7273
Atlantic City, NJ	925
Atwood, TN	2076
Atwood, TN	6475
Augusta, KS	155
Augusta, KS	2043
Aurora, MO	2939
Austin, NV	2495
Ava, MO	7214
Avalon, CA	687
Avalon, CA	4242
Bainbridge, MO	4496
Baker, LA	508
Baker, CA	4444
Baker, LA	4764
Baker, CA	5785
Bald Knob, AR	267
Bald Knob, AR	7435
Baldwin, FL	863
Baldwyn, MS	906
Ballston Spa, NY	1434
Baltimore, MD	81
Banks, OR	2462
Bar Harbor, ME	4124
Barbourville, KY	1397
Bartlett, TN	553
Bartlett, TN	5321
Bartonville, IL	5157
Baton Rouge, LA	259
Baton Rouge, LA	5840
Battle Creek, MI	4109
Battle Ground, IN	897
Bay City, TX	5005
Bay City, TX	6985
Bay Minette, AL	4973

City/State	Page
Bay Minette, AL	6012
Bay Minette, AL	6984
Bay Shore, NY	575
Bay Shore, NY	992
Bay Springs, MS	6012
Bay St. Louis, MS	4400
Bayboro, NC	4850
Bayshore, NY	4424
Beaumont, TX	1260
Beaumont, CA	2049
Beaumont, TX	5191
Beaver Dam, KY	5534
Beaver Springs, PA	3359
Bedford, NH	2296
Beech Mountain, NC	5835
Beeville, TX	6051
Belen, NM	6606
Belfry, KY	6019
Bella Vista, AR	576
Belle Plaine, KS	5619
Belle Plaine, KS	7432
Belton, TX	5564
Belvidere, NJ	1333
Bend, OR	4208
Benton, TN	3481
Bentonville, AR	2215
Bentonville, AR	6498
Berne, IN	1230
Berwick, LA	5080
Bethlehem, WV	2001
Big Bear Lake, CA	1240
Big Pine, CA	3395
Big Spring, TX	6086
Billings, MT	1217
Billings, MT	3632
Biltmore Forest, NC	1978
Birmingham, AL	536
Bisbee, AZ	1330
Bishop, TX	4517
Bismarck, ND	2133
Bismarck, ND	5328
Bixby, OK	3662
Blackville, SC	2243
Blair, NE	5867
Blakely, GA	6517
Blanco, TX	4248
Blanco, TX	6981
Blanco, TX	7419
Bloomer, WI	534
Bloomfield, IN	5138
Bloomfield, IN	6473
Bloomington, TX	1847
Bluffton, SC	3587
Boalsburg, PA	4296
Boise, ID	7019
Bolingbroke, GA	3573
Bolingbroke, GA	6578
Bolivar, TN	3474
Bolivar, MO	3648
Bon Air, VA	4917
Bonita Springs, FL	5338
Bonita Springs, FL	6966
Boone, IA	6036
Boonville, MO	2535
Boston, MA	4329
Bostwick, GA	5796
Bourbon, MO	250
Bowdon, GA	4863
Bowling Green, KY	1532
Bowling Green, VA	1838
Bowling Green, KY	3326
Boyne City, MI	2039
Bozeman, MO	3347
Bozeman, MT	5762
Brainerd, MN	4394
Brainerd, MN	6115
Branchville, SC	2243
Brandon, VT	511
Brandon, VT	1760
Branson, MO	7214
Brawley, CA	3480
Brillion, WI	4500
Britt, IA	4224
Bronson, MI	1483
Bronson, MI	4226
Brooklyn, MI	1230
Brookston, IN	1505
Brownsburg, IN	2094
Brownsburg, IN	3460
Brownsburg, IN	3575
Brownstown, IN	5534
Brundidge, AL	5742

City/State	Page
Brundidge, AL	6833
Brunswick, GA	1765
Brunswick, GA	6519
Brusly, LA	1554
Buckhannon, WV	2217
Buena Vista, CO	3358
Buffalo, NY	418
Buffalo, NY	616
Buffalo, KY	2160
Burgaw, NC	6969
Burlington, IA	2458
Burlington, VT	7209
Burnet, TX	6829
Burnham, PA	858
Butler, AL	6012
Byhalia, MS	2003
Byhalia, MS	4305
Cadillac, MI	3759
Caldwell, TX	1551
California, MO	3727
Calistoga, CA	5115
Callahan, FL	5319
Callahan, FL	7564
Camas, WA	4392
Camas, WA	6045
Campbell, MO	618
Campbell, NY	6959
Campbellsville, KY	2475
Campbellsville, KY	3289
Campbellsville, KY	5534
Cannelton, IN	5534
Canovanas, PR	5310
Canton, SD	533
Canton, SD	938
Canton, SD	4428
Cape Coral, FL	6966
Caribou, ME	5399
Carmel, CA	3287
Carmel, CA	4633
Carrabelle, FL	7147
Carthage, TN	5534
Cashmere, WA	2138
Cashmere, WA	6476
Casper, WY	2880
Casper, WY	7529
Castle Rock, WA	1237
Castle Rock, WA	3366
Castle Rock, WA	4793
Cave City, KY	387
Cave Junction, OR	5961
Cedar Grove, NJ	1942
Cedar Key, FL	2200
Cedar Key, FL	5136
Celina, TX	142
Center Moriches, NY	6841
Centerville, UT	909
Central, NM	1835
Central Valley, CA	1394
Centre, AL	1706
Centre, AL	3624
Ceres, CA	3613
Charleston, SC	968
Charleston, SC	4285
Charleston, MO	4396
Charlottesville, VA	1748
Charlottesville, VA	2347
Charlottesville, VA	5183
Charlottesville, VA	5393
Chatham, MA	570
Chatham, MA	3310
Chattahoochee, FL	2329
Chattanooga, TN	2080
Chattanooga, TN	6953
Chauncey, GA	3518
Chester, CA	4204
Chester, VA	4917
Chester, SC	5077
Chesterfield, SC	4377
Chesterfield, SC	5866
Chetek, WI	1253
Chetek, WI	4273
Chicago, IL	3708
Chicago, IL	502
Chicago, IL	3536
Chicago, IL	4948
Chicago, IL	5367
Chicago, IL	5950
Chico, CA	4294
Chiefland, FL	322
Chillicothe, OH	538
Chippewa Falls, WI	1429
Christiansted, VI	5161

City/State	Page
Christiansted, VI	5215
Christiansted, VI	5781
Churchville, VA	1313
Churubusco, IN	4969
Churubusco, IN	7012
Cincinnati, OH	3692
Cincinnati, OH	7522
Clarendon, AR	267
Clarendon, PA	6053
Clarendon, AR	7435
Clarksburg, WV	3323
Clarksdale, MS	1906
Clarksdale, MS	4861
Clarksville, IN	2505
Clarksville, VA	6644
Claude, TX	4729
Claude, TX	5539
Claude, TX	6961
Claxton, GA	3587
Clayton, LA	4975
Clayton, LA	7013
Clear Lake, IA	2060
Clearfield, PA	4296
Clearwater, KS	384
Cleveland, OH	3711
Cleveland, OH	4882
Cleveland, MS	5583
Cleveland, WI	7142
Clinchco, VA	3732
Clinton, AR	1553
Clinton, NC	4377
Clinton, NC	5866
Clinton, IA	6113
Clintonville, WI	5783
Clovis, NM	366
Clovis, CA	5071
Coahoma, TX	6083
Cody, WY	5337
Coffeeville, MS	3474
Cold Spring, MN	3664
Coleraine, MN	1255
Colfax, WA	4923
Colfax, WA	7277
Collins, MS	5545
Collinsville, OK	5178
Colonial Heights, TX	4509
Colony, OK	7002
Colorado City, TX	1279
Columbia, IL	103
Columbia, MO	250
Columbia, IL	2141
Columbia, MO	2535
Columbia, CA	3292
Columbia, LA	3529
Columbia, NC	3615
Columbus, KS	1597
Columbus, OH	1893
Columbus, OH	4626
Columbus, NE	6038
Columbus, KS	6943
Comfort, TX	2164
Conroe, TX	2963
Conroe, TX	7440
Conway, SC	1829
Coosa, GA	3617
Cordele, GA	6905
Corpus Christi, TX	4274
Corrales, NM	6492
Corydon, IN	1386
Corydon, IN	5819
Cosmopolis, WA	2255
Cottage Grove, OR	4208
Cottonwood, AZ	2187
Crandon, WI	2624
Crane, TX	4725
Crane, TX	6982
Crawford, GA	630
Crestwood, MN	2289
Creswell, OR	2055
Crewe, VA	4437
Crosby, MN	4734
Crosby, MN	6091
Crossville, TN	6636
Crozet, VA	105
Crozet, VA	5159
Crystal Beach, TX	7434
Cudjoe Key, FL	2078
Culebra, PR	5161
Cushing, TX	3630
Cusseta, GA	7437
D'Iberville, MS	3478
D'Iberville, MS	3479

City/State	Page
Dade City, FL	7117
Dahlonega, GA	2013
Dallas, TX	6941
Dallas, TX	7524
Dallas, TX	7491
Danville, AR	5073
Danville, CA	5336
Danville, AR	6965
Darien, GA	2098
Darien, GA	3456
Davenport, WA	3520
Davis, CA	1556
Dayton, WA	2128
De Ridder, LA	7250
DePere, WI	2624
Decatur, IN	1230
Decorah, IA	4803
Deer River, MN	1257
Del Rey Oaks, CA	631
Del Rio, TX	1956
Derby Center, VT	1849
Derby Center, VT	6988
Des Moines, IA	4622
Des Moines, IA	6901
Detroit Lakes, MN	7217
Dexter, ME	591
Dickson, TN	253
Dillwyn, VA	5159
Dimmitt, TX	4729
Dimmitt, TX	5539
Dimmitt, TX	6961
Dock Junction, GA	532
Dorrington, CA	4860
Dublin, GA	7145
Duncansville, PA	4296
Durant, OK	142
Durant, OK	2050
Durham, NC	6092
Eagle, ID	1328
Eagle Grove, IA	370
Eagle Grove, IA	4430
East Lansing, MI	7484
East Lyme, CT	3626
East Lyme, CT	6903
East Point, GA	2598
East Wenatchee, WA	2138
East Wenatchee, WA	6476
Eatonton, GA	6580
Eden Prairie, MN	873
Eden Prairie, MN	2961
Eden Prairie, MN	6909
Edenton, NC	388
Edgewater, FL	2198
Edgewater, FL	4523
Edinburgh, IN	5534
Edisto Beach, SC	3290
Edisto Beach, SC	3719
El Centro, CA	3480
El Dorado, AR	1329
El Rio, CA	5547
Eldon, IA	1323
Eldon, IA	4516
Electra, TX	7563
Elkins, WV	5830
Elkton, MD	6487
Ellisville, MS	6012
Elloree, SC	4285
Elsimore, CA	1840
Emporia, KS	1224
Endwell, NY	4679
Englewood, OH	717
Englewood, FL	1665
Ephrata, WA	577
Erath, LA	2212
Estill, SC	2243
Estill, SC	4285
Eureka Springs, AR	5313
Evansville, IN	1356
Evansville, IN	5373
Evergreen, CO	1606
Evergreen, CO	5599
Evergreen, AL	6012
Fair Bluff, NC	2172
Fairfield, IL	1337
Fairmont, NC	4285
Fallon, NV	4375
Falmouth, ME	2189
Faribault, MN	4115
Farmington, NH	324
Fayetteville, AR	1950
Felton, CA	6119
Fernandina Beach, FL	899

City/State	Page
Flagstaff, AZ	4416
Florence, OR	1905
Fort Ann, NY	907
Fort Bragg, CA	4852
Fort Bragg, CA	5817
Fort Bragg, CA	6117
Fort Kent, ME	5371
Fort Myers Beach, FL	6966
Fort Valley, GA	942
Fort Walton Beach, FL	2032
Fortuna, CA	3650
Fortuna, CA	6480
Fortuna, CA	6845
Fountain, CO	2045
Fountain, CO	6017
Fox Farm, NE	3464
Franklin, AL	2921
Franklin, TX	5562
Fredericksburg, TX	6912
Freeport, IL	2068
Fresno, CA	1570
Fresno, CA	6998
Gainesville, TX	5252
Gainesville, TX	7278
Galesburg, IL	2210
Garberville, CA	149
Garden City, IN	3747
Gardnerville-Minden, NV	386
Garrison, KY	1428
Geneva, OH	2241
George West, TX	5627
Georgetown, SC	385
Georgetown, KY	1399
Georgetown, SC	2243
Gering, NE	3464
Germantown, TN	1288
Germantown, TN	4168
Germantown, TN	4236
Germantown, TN	4579
Germantown, TN	6071
Gifford, FL	6494
Gilchrist, TX	7434
Gilette, WY	1912
Gilman, IL	28
Gilman, IL	2197
Gilmer, TX	5075
Glasgow, KY	2173
Glen Arbor, MI	147
Glen Rose, TX	3756
Glen Rose, TX	6015
Glencoe, AL	947
Glendale, CA	4387
Gluckstadt, MS	5545
Goldsboro, NC	6154
Goleta, CA	4804
Goliad, TX	3658
Good Hope, GA	5796
Goodlettsville, TN	5651
Goodlettsville, TN	6139
Gordonsville, VA	151
Gosnell, AR	4579
Grafton, WI	6640
Graham, WA	4754
Grand Rapids, MI	621
Grants, NM	6606
Grants Pass, OR	2174
Gray, GA	3619
Green Valley, AZ	1330
Greenfield, CA	631
Greenup, KY	1493
Greenup, KY	1841
Greenville, NC	6026
Greenville, TX	6048
Gretna, FL	633
Griffin, GA	4863
Grove City, PA	7114
Gualala, CA	3612
Hague, NY	3364
Hallie, WI	111
Haltom City, TX	2508
Halton City, TX	3471
Hamilton, IL	2458
Hamilton, TX	3756
Hamilton, TX	6015
Hamlet, NC	6969
Hammond, IN	2560
Hammond, LA	5025
Hampton, AR	5130
Hampton, VA	6969
Hannahs Mill, GA	3753
Hannibal, OH	2144
Harbeck-Fruitdale, OR	263

City/State	Page
Harbeck-Fruitdale, OR	6963
Harbor Beach, MI	7188
Hardinsburg, KY	5138
Hardinsburg, KY	6473
Harold, KY	6019
Hartford, VT	3744
Hartford, CT	7387
Hartselle, AL	330
Hartselle, AL	7140
Hartsville, SC	2613
Hartsville, SC	5981
Hastings, NE	2053
Hastings, NE	4808
Hawaii, HI	2885
Hawesville, KY	994
Hawesville, KY	5138
Hawesville, KY	6473
Hawley, PA	2168
Hayden, ID	5176
Hayden, ID	7251
Hayward, WI	5007
Hayward, WI	5305
Headland, AL	940
Headland, AL	2329
Helen, GA	6064
Helena, MT	4637
Hempstead, TX	1235
Hempstead, TX	3726
Herington, KS	1485
Herington, KS	4225
Hialeah, FL	5268
Highlands, NC	3
Hilham, TN	6636
Hillman, MI	4442
Hillsboro, IL	3515
Hinesville, GA	7275
Hobbs, NM	2134
Hogansville, GA	4863
Holbrook, AZ	2454
Holly Hill, FL	522
Holly Springs, MS	2003
Holly Springs, MS	4305
Homer, LA	[illegible]
Homerville, GA	5802
Homewood, AL	708
Homewood, AL	2167
Homewood, AL	5021
Homewood, AL	5522
Homewood, AL	6484
Honolulu, HI	5634
Hornsby, TX	628
Horse Cave, KY	1364
Horse Cave, KY	5534
Hot Springs, AR	3431
Hot Springs Village, AR	2007
Houston, MO	4519
Howe, TX	2050
Howland, ME	946
Hubbard, OH	4158
Hubbard, OH	7114
Hudson, MI	1230
Huntingburg, IN	6473
Huntingdon, TN	2076
Huntingdon, TN	4977
Huntingdon, TN	6475
Huntington, TX	3735
Huron, OH	4331
Idaho Falls, ID	55
Idaho Falls, ID	4307
Ilwaco, WA	2460
Imperial, CA	257
Independence, CA	5632
Indianapolis, IN	7122
Ingram, TX	2057
Iowa City, IA	4609
Jackpot, NV	4207
Jackson, FL	655
Jackson, MS	2585
Jackson, WY	3633
Jackson, WY	5334
Jackson, MS	5734
Jackson, MI	6150
Jacksonville, FL	1765
Jacksonville, FL	2596
Jacksonville, FL	5944
Jasper, AL	1546
Jasper, TX	3527
Jasper, TX	5834
Jefferson, NC	2594
Jersey Shore, PA	4296
Jesup, GA	107
Jesup, GA	2196

City/State	Page
Jesup, GA	4922
Johannesburg, CA	1681
Johnson City, TN	2874
Jonesboro, AR	1220
Jonesboro, AR	1900
Joshua Tree, CA	4968
Junction City, OR	4382
Jupiter, FL	2833
Kachina Village, AZ	5117
Kalispell, MT	1281
Kalispell, MT	4310
Kansas City, MO	872
Kansas City, MO	5188
Karnes City, TX	1489
Kaukauna, WI	7142
Kelso, WA	514
Kennett, MO	5369
Kennett, MO	7119
Kent, MD	6910
Kentwood, MI	2178
Kentwood, LA	3367
Keokuk, IA	364
Keokuk, IA	3384
Kershaw, SC	1286
Key Largo, FL	1502
Key West, FL	1714
Killington, VT	4334
Kings, MS	2471
Kings Beach, CA	4375
Kingstree, SC	340
Kingstree, SC	4823
Kingstree, SC	5077
Knob Noster, MO	4920
Kurten, TX	4373
La Crescent, MN	1908
La Crescent, MN	6089
LaFayette, GA	7427
LaPlata, MD	646
Lacombe, LA	57
Lady's Island, SC	1325
Lady's Island, SC	7253
Ladysmith, WI	111
Ladysmith, WI	1947
Ladysmith, WI	4206
Lafayette, IN	1521
Lafayette, TN	3289
Lafayette, TN	5534
Lagrange, IN	1230
Lake City, AR	3325
Lake City, MN	4122
Lake Geneva, WI	4627
Lake George, NY	5800
Lake Havasu City, AZ	2456
Lake Havasu City, AZ	5140
Lakeland, GA	5802
Lanai City, HI	1317
Lanai City, HI	4272
Lancaster, WI	6113
Laporte, PA	4296
Laramie, WY	2056
Las Vegas, NV	3695
Las Vegas, NV	1777
Las Vegas, NV	2034
Las Vegas, NV	5586
Laughlin, NV	1901
Laurel, MT	619
Laurel Hill, NC	6969
Laurens, SC	7145
LeSueur, MN	865
Lebanon, TN	326
Lebanon, PA	894
Lebanon, NH	4705
Lebanon, TN	6121
Leesburg, FL	3540
Leesburg, GA	6646
Leland, NC	2554
Leland, NC	7208
Lemoore, CA	2593
Lenwood, CA	5631
Les Cruces, NM	6486
Levelland, TX	2058
Lewisburg, PA	4296
Lewistown, MT	3632
Lexington, MS	3736
Lexington, MS	5559
Lexington, SC	7220
Lexington-Fayette, KY	391
Liberal, KS	2787
Liberty, KY	3730
Liberty, KY	5630
Liberty Hill, SC	4227
Lincoln, NE	6038

City/State	Page
Linesville, PA	3385
Litchfield, CT	1385
Litchfield, MN	3664
Little River, SC	4285
Little Rock, AR	478
Little Rock, AR	5623
Littlefield, TX	1503
Live Oak, FL	1398
Live Oak, FL	1392
Livingston, TN	1949
Lock Haven, PA	4296
Lometa, TX	5002
Lompoc, CA	4465
Long Beach, MS	885
Long Beach, MS	4485
Long Beach, CA	5752
Longmont, CO	2325
Longmont, CO	3599
Longview, TX	5525
Longview, TX	5621
Lonoke, AR	4861
Loogootee, IN	6473
Lookout Mountain, IN	610
Los Alamos, NM	5326
Los Angeles, CA	3698
Los Angeles, CA	3699
Los Angeles, CA	381
Los Angeles, CA	1816
Los Angeles, CA	2136
Los Angeles, CA	4431
Los Angeles, CA	4995
Los Angeles, CA	5317
Los Angeles, CA	6525
Los Angeles, CA	7262
Los Lunas, NM	2159
Lovington, NM	6046
Lumpkin, GA	3382
Lumpkin, GA	4454
Lynchburg, VA	944
Mableton, GA	396
Mableton, GA	2148
Macclenny, FL	1480
Macclenny, FL	6632
Macon, GA	1349
Madera, CA	5071
Magee, MS	246
Malibu, CA	5339
Maljamar, NM	34
Manahawkin, NJ	4716
Manahawkin, NJ	5087
Manchester, IA	6113
Manchester, TN	7438
Manistee, MI	6638
Manorville, NY	2254
Marathon, WI	3649
Marble Falls, TX	2151
Marianna, FL	633
Marina, CA	1491
Marion, AL	3482
Marlette, MI	2042
Maroa, IL	7112
Marquette, MI	1258
Marshall, MN	6513
Martinez, GA	4446
Martinez, GA	6489
Martinsville, VA	361
Martinsville, VA	3596
Mason, TX	6829
Matewan, WV	3732
Maumelle, AR	5119
Mauston, WI	2068
Mayaguez, PR	5310
McComb, MS	3367
McKinney, TX	142
McLain, MS	1256
McRae, GA	1987
Mechanicsville, VA	4917
Medical Lake, WA	3520
Medicine Lodge, KS	3523
Medicine Lodge, KS	5561
Memphis, MO	5213
Memphis, MO	7429
Menomonie, WI	4848
Meridianville, AL	4683
Metter, GA	5793
Miami, FL	3702
Miami, FL	3704
Miami, FL	4414
Miami, FL	7022
Miami Beach, FL	3654
Miami Beach, FL	5629
Middlebury, VT	4727

City/State	Page
Middleton, TN	3474
Middletown, CA	143
Middletown, OH	3550
Middletown, CA	5786
Midland, TX	855
Midland, TX	4170
Midland, TX	6086
Midway, GA	107
Midway, KY	889
Midway, KY	1984
Midway, KY	2093
Midway, GA	2196
Midway, GA	4922
Milan, GA	5793
Milford, IA	1432
Milford, NE	2053
Milford, IA	4427
Mill Hall, PA	4296
Milladore, WI	359
Milledgeville, GA	3753
Millersburg, PA	2265
Millington, TN	1845
Millington, TN	6630
Milton, FL	4782
Milton, FL	7370
Milton, FL	7356
Minneapolis, KS	5580
Minneapolis, KS	7433
Minot, ND	1222
Miramar Beach, FL	5778
Mishicot, WI	867
Missoula, MT	1487
Missoula, MT	4223
Moberly, MO	4920
Modesto, CA	3613
Moines, IA	1952
Mojave, AZ	6852
Moncks Corner, SC	2243
Monroe, NC	516
Monte Rio, CA	4852
Montecito, CA	990
Montecito, CA	2789
Monterey, TN	7385
Monticello, IN	1505
Monticello, ME	4337
Moriches, NY	2875

City/State	Page
Morris, IL	26
Morrison, IL	6113
Morro Bay, CA	4759
Moses Lake, WA	2879
Mount Sterling, IL	1315
Mount Sterling, IL	4279
Mountain Grove, MO	7214
Mountain Home, AR	2002
Mountain Lake Park, MD	5830
Mt. Juliet, TN	2108
Mt. Vernon, IL	1384
Mt. Vernon, IL	4180
Muncie, IN	7488
Muncy, PA	4296
Munfordville, KY	5534
Murrells Inlet, SC	4631
Muscatine, IA	5585
Muskegon, MI	6638
Muskegon Heights, MI	6634
Myrtle Beach, SC	385
Myrtle Beach, SC	1829
Myrtle Beach, SC	6947
Nashville, IN	1366
Natchitoches, LA	2040
Natchitoches, LA	5137
Nebraska City, NE	5867
Needles, CA	3294
Needles, CA	5788
Neenah-Menasha, WI	2473
Nephi, UT	2537
New Albany, IN	5139
New Bern, NC	1824
New Bern, NC	5309
New Braunfels, TX	3368
New Braunfels, TX	4943
New City, NY	7109
New Durham, NH	487
New Holstein, WI	5783
New Iberia, LA	1548
New Iberia, LA	5543
New London, NH	5163
New Madrid, MO	1321
New Madrid, MO	4398
New Market, VA	880
New Orleans, LA	17
New Orleans, LA	1245

City/State	Page
New Orleans, LA	6860
New Port Richey, FL	7364
New Sharon, IA	5213
New Sharon, IA	7429
New York, NY	706
New York, NY	5555
New York, NY	7477
Newark, NJ	704
Newark, NJ	1507
Newport, TN	4514
Newport News, VA	6969
Newton, IL	2213
Newton, IL	4521
Niceville, FL	579
Nixa, MO	3648
Noblesville, IN	3576
Nolanville, TX	2513
Nolanville, TX	6079
Nolanville, TX	7377
Nome, AK	390
Norfolk, VA	6969
North Cape May, NJ	5292
North East, PA	5871
North Fort Riley, KS	3751
North Little Rock, AR	328
North Palm Beach, FL	526
Northport, AL	421
Northumberland, PA	2557
Norwalk, CA	2136
Norwalk, CA	5317
Novato, CA	5976
Nowata, OK	5178
Noyack, NY	3571
Oakland, MD	363
Ocracoke, NC	2074
Ocracoke, NC	6050
Odem, TX	1239
Odessa, TX	4756
Odessa, TX	7011
Ogden, UT	7182
Ogelsby, IL	3293
Oildale, CA	5858
Ojai, CA	5547
Olean, NY	5871
Olivia, MN	3361
Omro, WI	3656
Opelika, AL	1842
Opelousas, LA	5080
Orange, VA	151
Orange Beach, AL	4163
Orcutt, CA	2015
Orcutt, CA	6995
Oregon, OH	486
Oriental, NC	1824
Oriental, NC	5309
Orland, CA	3652
Orland, CA	6055
Oro Valley, AZ	1416
Oroville, CA	4852
Oroville, CA	5127
Orrville, AL	3482
Osage, IA	2060
Osceola, AR	1845
Osceola, AR	4579
Osceola, AR	6630
Othello, WA	2138
Othello, WA	6476
Otterville, MO	252
Oxford, MS	585
Oxford, MS	3466
Oxford, MS	5566
Oxnard, CA	2324
Palm Bay, FL	1772
Pamplico, SC	2157
Panama City, FL	2572
Panama City Beach, FL	875
Panama City Beach, FL	1430
Paradise Valley, AR	1668
Paradise Valley, AZ	4185
Paradise Valley, AR	7539
Paragould, AR	3325
Pasadena, CA	5956
Pasco, WA	1547
Paso Robles, CA	4759
Pawley's Island, SC	282
Pearl, MS	246
Pelican Rapids, MN	495
Pelican Rapids, MN	5879
Pentwater, MI	1833
Pentwater, MI	4372
Perham, MN	6490
Perry, GA	3753

City/State	Page
Peshtigo, WI	4927
Petersburg, VA	1780
Petersburg, VA	3608
Phoenix, AZ	953
Phoenix, AZ	1518
Phoenix, AZ	1812
Phoenix, AZ	1876
Phoenix, AZ	4241
Phoenix, AZ	4959
Pickens, MS	3736
Pickens, MS	5559
Pickford, MI	152
Piedmont, MO	5557
Pierce, TX	1847
Pikeville, KY	3732
Pine Bluff, AR	5119
Pipestone, MN	5867
Pittsburgh, PA	7124
Pittsfield, MA	5259
Pleasant Hope, MO	1785
Pleasant Hope, MO	6553
Ponte Vedra Beach, FL	5239
Ponte Vedra Beach, FL	6830
Pontiac, IL	26
Pontotoc, MS	3474
Poplarville, MS	4400
Port Gibson, MS	494
Port Henry, NY	4727
Port Matilda, PA	4676
Port Saint Lucie, FL	7483
Port St. Joe, FL	6521
Port St. Lucie, FL	2063
Portageville, MO	1321
Portageville, MO	4398
Porterville, CA	5265
Portland, ME	2283
Portland, OR	6949
Portsmouth, VA	6969
Potosi, MO	4752
Poughkeepsie, NY	2497
Prairie Grove, AR	4971
Prairie Grove, AR	6983
Prescott, WI	2218
Prescott Valley, AZ	2037
Princeton, MN	3361
Princeton, IL	5142
Pueblo, CO	7548
Pullman, WA	1504
Quebradillas, PR	5310
Queensbury, NY	2221
Quincy, FL	633
Radcliff, KY	1891
Raleigh, NC	2207
Raleigh, NC	2247
Raleigh, NC	3625
Raleigh, NC	5843
Raleigh, NC	6497
Raleigh, NC	6510
Ramer, TN	3474
Ranch Mirage, CA	2523
Rancho Mirage, CA	5552
Randolph, VT	1760
Rapid City, SD	4463
Rapid City, SD	4471
Ravenswood, WV	3660
Redding, CA	6951
Redmond, OR	2463
Redmond, OR	5332
Reedsport, OR	368
Reedsport, OR	4429
Reno, NV	2465
Renovo, PA	4296
Reserve, LA	1831
Reserve, LA	5069
Richmond, VA	607
Richmond, VA	1262
Richmond, VA	4474
Richmond Hill, GA	2243
Richwood, LA	583
Richwood, LA	3465
Richwood, OH	6084
Ridgeland, SC	1325
Ridgeland, sc	7253
Rienzi, MS	3474
Ringgold, GA	902
Ripley, OH	2132
Ripley, TN	4579
Riverside, PA	4296
Riviera Beach, FL	1413
Roanoke, IN	1230
Roanoke, VA	1421
Roanoke, VA	4407

City/State	Page
Roanoke, VA	7210
Rochester, NY	225
Rochester, NY	1697
Rochester, MN	2060
Rochester, NY	7479
Rock Hill, SC	1814
Rock Island, WA	2879
Rock Valley, IA	5867
Rockingham, NC	6969
Rockledge, FL	249
Rocky Mount, NC	2153
Rohnerville, CA	3650
Rohnerville, CA	6480
Rolla, MO	3727
Rome, GA	7234
Roseburg, OR	153
Roseburg, OR	4369
Rosedale, MS	5583
Roswell, GA	2841
Round Rock, TX	277
Royal City, WA	4220
Royal City, WA	6082
Royalton, VT	5163
Royston, GA	7272
Rozel, KS	4730
Rozel, KS	6116
Ruckersville, VA	4917
Rusk, TX	5008
Russell Springs, KY	3517
Sacramento, CA	2601
Sacramento, CA	5510
Safford, AZ	6056
Sag Harbor, NY	2036
Saint Louis, MO	6957
Saint Pauls, NC	4377
Saint Pauls, NC	5866
Salem, WV	4172
Salina, KS	952
Salina, KS	5760
Salinas, CA	1491
Saltville, VA	2594
San Angelo, TX	4276
San Angelo, TX	6011
San Antonio, TX	2897
San Bernardino, CA	25
San Clemente, CA	5221
San Francisco, CA	625
San Francisco, CA	1808
San Francisco, CA	1983
San Francisco, CA	4411
San Francisco, CA	7497
San Francisco, CA	7507
San Juan, PR	5310
San Luis Obispo, CA	3352
San Luis Obispo, CA	4837
Sandpoint, ID	1247
Sandpoint, ID	3520
Sandy Springs, GA	6580
Santa Fe, NM	497
Santa Fe, NM	5044
Santa Fe, NM	5107
Santa Rosa, NM	2592
Santa Rosa, NM	5052
Santa Ynez, CA	4804
Saranac Lake, NY	5121
Sarasota, FL	6547
Saratoga Springs, NY	1434
Saugerties, NY	908
Schenectady, NY	6945
Scotland Neck, NC	388
Scottsboro, AL	6111
Scottsburg, IN	6473
Scottsville, MI	147
Scranton, PA	1333
Seabrook, TX	3665
Searsport, ME	945
Seaside, CA	1491
Seaside, CA	4642
Seaside, CA	6980
Seattle, WA	4998
Secaucus, NJ	193
Secaucus, NJ	131
Secaucus, NJ	1524
Secaucus, NJ	4350
Secaucus, NJ	4878
Secaucus, NJ	5106
Secaucus, NJ	6569
Selbyville, DE	721
Selmer, TN	3474
Seymour, WI	5850
Shalimar, FL	5960
Shawnee, OK	7453

City/State	Page
Sheboygan Falls, WI	1395
Sheridan, WY	2880
Sherman, TX	7006
Shingletown, CA	4204
Shirley, NY	4606
Shrevenport, LA	6826
Shreveport, LA	1499
Shreveport, LA	5018
Shubuta, MS	5545
Sibley, IA	5867
Signal Mountain, TN	1885
Signal Mountain, TN	2182
Signal Mountain, TN	6111
Sikeston, MO	531
Sioux Falls, SD	5798
Sioux Falls, SD	5867
Skowhegan, ME	4124
Smithville, GA	942
Snyder, TX	5791
Socastee, SC	2071
Socastee, SC	6022
Socorro, NM	587
Socorro, NM	4402
Sonora, CA	6042
South Bend, WA	3463
South Bend, IN	7362
South Burlington, VT	1282
South Burlington, VT	7111
South Waverly, PA	2135
South Webster, OH	904
Southern Pines, NC	4377
Southern Pines, NC	5866
Southport, NY	4117
Sparta, GA	4863
Spencer, WI	4848
Spokane, WA	500
Spokane, WA	528
Spokane, WA	2005
Springtown, TX	2009
St. Joseph, MO	1564
St. Louis, MO	3689
St. Marys, KS	3751
St. Marys, PA	4296
St. Marys, GA	5319
St. Marys, GA	7564
Statenville, GA	5802
Steeleville, IL	1478
Steelville, MO	5308
Stephenson, MI	2142
Sterling, KS	3525
Sterling, KS	5368
Stevens Point, WI	3649
Stewartville, MN	483
Strasburg, CO	4440
Stuart, FL	2303
Stuart, IA	6036
Sullivan's Island, SC	4285
Sulphur, OK	7009
Summerton, SC	5077
Summerville, SC	535
Sumrall, MS	5545
Sumter, SC	1567
Sumter, SC	4630
Sumter, SC	5997
Sun City, CA	4712
Sun Prairie, WI	2068
Superior, NE	2129
Superior, NE	6643
Sutherlin, OR	5181
Swainsboro, GA	5793
Sylvester, GA	1864
Sylvester, GA	4183
Syracuse, NY	13
Syracuse, NY	2603
Syracuse, NY	7160
Tallahassee, FL	633
Tallulah, LA	4370
Tallulah, LA	6483
Tampa, FL	4327
Tampa, FL	6966
Tannersville, PA	1333
Taos, NM	2052
Taos, NM	3647
Tavernier, FL	6128
Temecula, CA	6143
Temecula, CA	6892
Tempe, AZ	2604
Temple, TX	1383
Terrell, TX	142
Texarkana, AR	1703
Thayer, MO	4519
Thief River Falls, MN	1945

City/State	Page
Three Lakes, WI	6515
Tioga, PA	4296
Tioga, PA	5167
Tipton, CA	2593
Tishomingo, OK	620
Toledo, OH	7127
Tomah, WI	1259
Topeka, KS	955
Topeka, KS	4455
Topeka, KS	5391
Topsail Beach, NC	5003
Trade, TN	5835
Trenton, GA	6111
Trinity, TX	5541
Trion, GA	5227
Trion, GA	6548
Troy, MO	2263
Trussville, AL	2322
Trussville, AL	6997
Tuckerton, NJ	4112
Tucson, AZ	573
Tucson, AZ	891
Tucson, AZ	4238
Tucson, AZ	5550
Tucumcari, NM	2592
Tucumcari, NM	5052
Tulsa, OK	2233
Turners Falls, MA	5109
Turners Falls, MA	6561
Tuscaloosa, AL	1400
Tuscaloosa, AL	1546
Tuscaloosa, AL	1826
Tusculum, TN	6482
Unadilla, GA	6578
Unadilla, GA	6646
Union City, TN	2878
University, MS	949
Vacaville, CA	143
Vacaville, CA	5786
Valdosta, GA	4347
Valdosta, GA	4635
Valley, AL	5775
Van Buren, AR	416
Vanderbilt, MI	1284
Vanderbilt, MI	4227
Venice, FL	5719

City/State	Page
Venice, FL	7219
Ventura, CA	283
Vergennes, VT	3364
Vermillion, SD	5867
Victoria, TX	3368
Victoria, TX	4506
Victoria, TX	4943
Vieques, PR	5161
Vieques, PR	5310
Ville Platte, LA	1548
Ville Platte, LA	5543
Vine Grove, KY	2160
Vinton, VA	10
Vinton, VA	869
Vinton, VA	4723
Virgie, KY	4512
Virginia Beach, VA	3452
Virginia Beach, VA	3609
Volcano, HI	4120
Volga, SD	2131
Wabasha, MN	4122
Waco, TX	1350
Waco, TX	2894
Wailuku, HI	2538
Wailuku, HI	5232
Wakefield-Peacedale, RI	490
Waldron, AR	2590
Walker, MI	3375
Walker, MI	4381
Walker, MI	4453
Walker, MI	4636
Wallace, ID	882
Wallace, ID	2138
Wallace, ID	5290
Walland, TN	4702
Walpole, NH	540
Walterboro, SC	2243
Walterboro, SC	5315
Warden, WA	2879
Warner Robbins, GA	6578
Warren, VT	410
Warrenton, MO	1319
Warrenton, MO	4210
Warrenton, GA	5174
Warrior, AL	61
Waseca, MN	4848

City/State	Page
Washington, IA	364
Washington, DC	1559
Washington, DC	1867
Washington, DC	1869
Washington, DC	1871
Washington, ID	2138
Washington, DC	5397
Washington, DC	7462
Water Valley, MS	1906
Waterbury, VT	5163
Waupun, WI	3656
Wautoma, WI	5783
Waxhaw, NC	1286
Waynesboro, TN	1851
Waynesboro, GA	3587
Waynesboro, MS	6012
Waynesville, MO	4752
Wedgefield, SC	4672
Wedgefield, SC	5077
Weiser, ID	113
Weiser, ID	2186
West Lafayette, IN	59
West Liberty, KY	1365
West Liberty, OH	6084
West Palm Beach, FL	1827
West Palm Beach, FL	4502
West Palm Beach, FL	6975
Westernport, MD	5830
Westport, NY	3364
Wheeling, MO	4920
Whippany, NJ	2571
White City, FL	2501
White City, FL	5301
White City, FL	5388
White City, FL	6831
White Stone, VA	2500
Whitewater, WI	4438
Whitewater, WI	6540
Whiting, WI	2624
Wickenburg, AZ	2540
Wickenburg, AZ	5140
Wickenburg, AZ	5636
Wiggins, MS	3478
Wiggins, MS	3479
Wilburton, OK	4760
Williamsburg, VA	4917
Williamstown, WV	3660
Williston, FL	1480
Williston, FL	6632
Willmar, MN	3361
Wilmington, NC	6969
Winchester Bay, OR	5181
Windsor, CA	5115
Winfield, KS	2161
Winneshiek, IA	5306
Winona, MS	3474
Winona, MI	3513
Winslow, AZ	5117
Winters, CA	1556
Winterset, IA	367
Wisconsin Dells, WI	910
Woodsville, NH	609
Woodville, MS	1554
Wrens, GA	5793
Wrightsville Beach, NC	63
Yadkinville, NC	1527
Yadkinville, NC	2193
Yadkinville, NC	4409
Yadkinville, NC	5057
Yadkinville, NC	5023
Yonkers, NY	2628
York, PA	7528
Yreka, CA	109
Yreka, CA	5582
Yuba City, CA	149
Yuma, AZ	7476
Zachary, LA	5948
Zebulon, GA	4161
Zolfo Springs, FL	911

Federal Communications Commission Record

Subject Index
Volume 6
Issue Number 1 - 26

Subject **Page**
Access Charges
  End users, computation of charges on
    Equipment/facilities assigned to Special Access (investment) 547, 7284
    IXCs' use of local exchange carrier common line 547, 5202
    Single/multi/party line end users, charges on common line 1418
  Exchange Carrier Association
    Board of directors and three subsets of membership 3387, 5209, 54
    Payments according to an approved formula, company 2082, 3589, 3668, 4195 6608
  Expenses, apportionment of
    Revenue accounting expenses in Account 6620 1596
  General information
    Notice, filing of tariff to provide minimum 5516
    Subpart: rules for interstate/foreign access services 3792
  Net investment, apportionment of
    Central office equipment 5068
    Investments, other 2483
    Net investment 2483
    Revenue requirements, computation of 2483
  Transition charges, computation of
    Premium (MTS-WATS equivalent service included) charges 547
    Subpart effective ending December 31, 1992 547

Adjudication
    Air hazard 1777, 3375, 4488, 6826
    Burden of proof 1288, 1668, 17 2523, 5221, 52
    Channel spacing 4327
    Civic participation 869, 955, 9 1668, 1785, 22 2523, 2613, 52 6064
    Construction period, premature 1785
    Declaratory ruling 1785
    Exceptions 1288, 1668, 25 5277
    Limited partnership 340

FEDERAL COMMUNICATIONS COMMISSION

Subject **Page**
Administrative Law Judge Decision 5976, 7278
    Abuse of process 570, 912, 1524, 6905
    Air hazard 7278
    Alien ownership 257
    Character qualifications 625, 1808, 1816, 2604
    Comparative coverage 912, 1665, 5188
    Cross interest 1891
    Distribution of broadcast facilities 418, 1527, 2193
    Diversification of control of mass media 259, 259, 1384, 1665, 4180
    Evidentiary privilege 5301, 5388
    Failure to prosecute 895, 2322
    Financial qualifications 570, 875, 1262, 1518, 1499, 1524, 1507, 1602, 1697, 2347, 2875, 2603, 2961, 3626, 4238, 4455, 4630, 4723, 4959, 5819, 5843, 5981, 6553, 6841, 6995, 7210, 7440
    Integration of ownership (qualitative), female ownership 1350, 1952, 1952, 2557, 2296, 5393, 6548, 6548, 6998, 6998
    Integration of ownership into management, effectuation 17, 885, 721, 994, 1262, 1350, 1384, 1606, 1697, 1665, 1978, 1952, 2557, 2497, 2601, 2894, 3411, 3411, 4163, 4180, 4242, 4416, 4454, 4485, 5188, 5599, 5586, 6548, 6553, 6901, 6998, 7377, 7377, 7440, 7539
    Licensee responsibility 1570, 4424
    Limited partnership 2497, 2601, 5976, 6998
    Misrepresentation and lack of candor 925, 992, 1507, 2604, 4163, 4331, 4879, 5321, 6548, 6841, 7440
    Noncommercial educational 259, 2577
    Real party in interest 4163, 5819
    Renewal expectancy 2601, 4948
    Reopening of record 1524, 1507, 2604
    Site availability or suitability 912, 992, 1606, 1602, 1978, 4331, 4424, 5599, 5819, 5843, 6071

Subject **Page**
Orders or Notices
  Hearing Designation Order 2151, 2787
  Lottery to select licensee 3, 55, 57,
    61, 63, 253, 2
    277, 322, 324, 3
    328, 330, 359, 3
    391, 410, 508, 5
    514, 483, 490, 4
    495, 497, 500, 5
    538, 540, 516, 5
    487, 526, 528, 5
    579, 628, 717, 8
    865, 867, 880, 8
    858, 897, 899, 9
    904, 947, 949, 13
    1365, 1366, 1392, 20
    2063, 2045, 2167, 21
    2164, 2182, 2475, 25
    2500, 2554, 2598, 25
    2921, 3359, 3358, 33
    3549, 3518, 3471, 33
    3513, 3515, 3517, 35
    3573, 3617, 3619, 41
    4115, 4117, 4120, 41
    4158, 4463, 4465, 44
    4438, 4446, 4442, 44
    4509, 4514, 4606, 46
    4676, 4679, 4712, 47
    5044, 5087, 5752, 57
    5760, 5762, 6092, 60
    6058, 6128, 6143, 68
    7182, 7362, 7364, 73
    7387
  New service v. expansion of existing service 1899, 1900, 5191
  Notice, public 5850
  Partnership 340, 2247, 2513, 26
    2963, 5227, 7220
  Pleadings, parties requested to file 4622, 5239, 5850, 73
  Program origination requirements 1386, 5239, 5191, 58
  Programming, deceptive 955, 2963
  Programming, specialized 704, 706, 1386, 18
    1900, 4683, 5239, 58
  Reconsideration, timeliness and 4327, 5879
  Reopening of record 704, 706, 1899, 19
  Rules, violation of 5221

Subject **Page**

    Silent station 2108
    Strike application 5221
    Translator 955, 5277, 6912
  Review Board or Commission Decision
    Abuse of process 131, 4350, 5106, 7453, 7419
    Air hazard 2172, 4307, 5734, 5997, 7160
    Comparative coverage 2221, 2841, 4407, 5252, 5109, 5292, 5997
    Diversification of control of mass media 553, 573, 2841
    Financial qualifications 553, 1356, 1706, 1703, 3596, 4334, 5107, 5742, 6121, 7160
    Integration of ownership (qualitative), local residence 2221, 5109, 5109
    Integration of ownership into management, qualitative exp 553, 553, 573, 2841, 2789, 2789, 3576, 5109, 5109, 5109, 5742
    Misrepresentation and lack of candor 1247, 1706, 2221, 2841, 3576, 4350, 4334, 5106, 5109, 5742, 7160, 7419
    Noncommercial educational 3596
    Real party in interest 1356, 3352, 4347, 5025
    Reopening of record 1247, 2098, 2098, 2841, 2789, 3375, 4350, 4683, 5107, 5239, 5292, 5850, 5997, 6860, 7453, 7387, 7356, 7419

Amateur Radio Service (ARS)
  ARS - Aliens, operation of station by
    Alien amateur to operate a station in the U.S., permission for an 337, 4811
    Permit, conditions necessary for 4811
    Station identification 337, 4433
  ARS - General information
    Definitions 5978
  ARS - Licenses, examinations for operators'
    Elements and standards in examination 2959
  ARS - Licenses, operator
    Application requirements 5978
  Volunteer-Examiner Coordinators (VEC)
    Rules apply, organizations to which 5083

Subject **Page**
Aviation Services
  Developmental operation
    Frequencies assigned and available 1456
  Operating requirements
    Communications permitted, type of 2291
    Operator requirements 4692

Broadcast Radio Services - General Rules
  Applications
    Dismissal of application, situations which institute a 3625, 4185, 463
    Eligible to sign an application, those 4705
    Facilities, applications to modify/change control of unbuilt 5265, 6026
    Renewal/assignment/transfer, amendment to applications for 5968
  Applications for authorization
    AM broadcast station applications, processing of 4382, 4411
    Acceptance of applications, procedure for 7265
    Amendment of applications 4626, 5191, 726
    Conflicts in applications, agreement for removing 85, 25, 283, 150
      1608, 1808, 1816, 181
      2324, 2901, 3456, 438
      4382, 5522, 6079, 649
      6561, 7022
    FM broadcast and FM translator stations applications: pro 1772, 3472, 4631, 476
    Grant of an application can be made without a hearing 2560, 7548
    Hearing if FCC unable to make findings, designation for 5047
    Public inspection file of commercial stations, local 646, 1507, 2111, 256
      4191, 5130, 6548
    Public notice of designation for hearing, local 4782
    Public notice of filing of broadcast applications, local 1617, 1738, 4329
    TV, low power TV, TV translator stations applications: pro 3472
  Changes, renewals in existing stations
    Assignment or transfer of control, application for volun 81, 193, 984, 221
      2874, 4172, 4882, 504
      5265, 5399, 6026, 612
      6567
    Assignment or transfer of control, procedures for 81, 1808, 4431, 526
    Changes in existing stations, application for 1564
  Construction permits
    Extension/replacement, application for 5259, 6026
    Forfeiture of permit 7024
    Period of time for construction 7024
  Equipment
    Antenna structure, marking and lighting of 2585

FEDERAL COMMUNICATIONS COMMISSION

Subject — Page

General information
- Radio astronomy, notification concerning interference to 1748, 5393
- Written statements of fact, the Commission may require 2585, 4782, 4782

Licenses and permits
- Community, provisions concerning main studio in principal 646, 3615, 4172
- Community, provisions concerning program origination in principal 646
- Filing of contracts with FCC, provisions concerning 2628, 2897
- Multiple ownership of broadcast stations in the same servic 81, 78, 952, 984, 1812, 1867, 1869, 2492, 3744, 4212, 4329, 4410, 4637, 4882, 5010, 5397, 6547, 6567, 7024, 7479
- Transferred stations 6121

Operating hours
- Discontinuation 2585

Operation of station
- Facilities and modification of 4431
- Program tests 3403

Policies of the FCC
- Character evaluation of broadcast applicants 4384, 5047
- Educational broadcast stations, non-commercial nature of 2009, 2034
- Minority ownership/tax certificates/distress sales 5047, 6905
- Time brokerage 1867, 1869, 1871, 5397, 6121

Program contents
- Candidates for public office 1798, 4998, 5130, 5200, 5840, 7109, 7120, 7522, 7524, 7528, 7491, 7494, 7497
- Contests 2560, 4170, 7385
- Lottery information 5305
- Personal attacks 6640
- Sponsorship identification 1987, 2560, 4387, 5861, 7548
- Telephone conversations for broadcasting, recording of 7548

Records kept by stations
- Equal employment opportunity program 855, 1876, 2340, 2303, 2560, 4437, 4672, 4938, 5623, 5968, 6510, 6569
- Ownership report 4622

Subject **Page**
Broadcasting - AM Stations
  Applications for antennas
    Antenna system, showing required for 617
  Applications for new, additional or different facilities
    Facilities and overlap of signal strength contours 4411
  Radiation
    Radiation limitation during daytime 418

Broadcasting - FM Stations
  Allotments and assignments
    Allotments, table of 4375, 26, 28, 2
103, 147, 105, 1
109, 111, 149, 1
152, 113, 155, 2
250, 249, 143, 3
364, 366, 367, 3
385, 368, 386, 3
417, 416, 390, 3
387, 583, 585, 5
609, 589, 591, 5
532, 533, 534, 5
619, 620, 621, 6
630, 631, 633, 9
907, 908, 909, 9
911, 942, 1328, 9
940, 944, 945, 9
1230, 1235, 1237, 12
1279, 1281, 1282, 12
1253, 1255, 1256, 12
1258, 1259, 1329, 13
1333, 1337, 1315, 13
1319, 1321, 1323, 13
1313, 1430, 1432, 14
1428, 1434, 1491, 13
1399, 1397, 1395, 13
1400, 1502, 1503, 15
1505, 1493, 1478, 14
1483, 1485, 1487, 14
1532, 1547, 1548, 15
1553, 1554, 1556, 15
1681, 2071, 1760, 18
1827, 1829, 1831, 18
1845, 1847, 1849, 18
1905, 1906, 1908, 19

Subject **Page**
Broadcasting - FM Stations
  Allotments and assignments
    Allotments, table of
1949, 1950, 1841, 2001
2002, 2005, 2060, 2068
2049, 2037, 2038, 2039
2043, 2040, 2052, 2053
2055, 2042, 2056, 2057
2058, 2133, 2134, 2135
2136, 2138, 2141, 2142
2144, 2153, 2157, 2158
2159, 2160, 2161, 2050
2454, 2006, 2073, 2074
2076, 2187, 2186, 2197
2196, 2200, 2198, 2212
2215, 2217, 2128, 2129
2131, 2132, 2241, 2243
2456, 2458, 2460, 2462
2471, 2473, 2540, 2537
2535, 2173, 2594, 2590
2592, 2593, 2329, 2623
2624, 2878, 2879, 3289
3323, 3323, 3325, 3290
3292, 3326, 3293, 3294
3361, 3364, 3366, 3463
3464, 3465, 3466, 3367
3474, 3478, 3479, 3480
3481, 3482, 3520, 3523
3525, 3527, 3587, 3612
4204, 4122, 3747, 3630
3632, 3633, 3656, 3658
3660, 3647, 3648, 3649
3650, 3652, 3654, 4227
3662, 3664, 3665, 3726
3727, 3730, 3732, 3735
3736, 3751, 3753, 3384
3756, 3759, 4124, 4206
4207, 4208, 4210, 4220
4223, 4224, 4225, 4226
4272, 4279, 4273, 4274
4276, 4278, 4285, 3719
4377, 4370, 4372, 4373
4305, 4294, 4296, 4310
4392, 4394, 4396, 4398
4400, 4402, 4427, 4428

Subject **Page**

Broadcasting - FM Stations
  Allotments and assignments
    Allotments, table of
4516, 4500, 4517, 442
4430, 4502, 4519, 452
4522, 4523, 4471, 457
4752, 4754, 4756, 475
4759, 4760, 4803, 480
4806, 4808, 4793, 485
4850, 4848, 4863, 486
4861, 4725, 4727, 473
4729, 4732, 4734, 491
4920, 4922, 4923, 492
4927, 5002, 5003, 500
5007, 5008, 4968, 496
4971, 4973, 4975, 497
4943, 5069, 5071, 507
5075, 5077, 5080, 511
5117, 5119, 5121, 513
5137, 5138, 5139, 514
5142, 5157, 5159, 521
5161, 5163, 5167, 505
5174, 5176, 5178, 518
5309, 5310, 5319, 531
5326, 5328, 5330, 533
5334, 5215, 5217, 521
5232, 5583, 5368, 537
5534, 5539, 5541, 563
5543, 5545, 5547, 555
5559, 5561, 5562, 556
5566, 5636, 5778, 578
5783, 5785, 5786, 578
6042, 6017, 6015, 601
5800, 5802, 5798, 579
5793, 5580, 5619, 558
5627, 5629, 5630, 563
5634, 5830, 5834, 583
5871, 5817, 5867, 585
5866, 6022, 6019, 601
6051, 6056, 6055, 605
6050, 6086, 6084, 608
6082, 6091, 6089, 611
6115, 6116, 6117, 611
6045, 6046, 6048, 648
6475, 6482, 6476, 648
6473, 6498, 6490, 649

Subject **Page**

Broadcasting - FM Stations
  Allotments and assignments
    Allotments, table of 6513, 6515, 6517, 6519, 6521, 6580, 6036, 6111, 6606, 6630, 6632, 6636, 6638, 6578, 6643, 6644, 6646, 6829, 6634, 6959, 6961, 6963, 6965, 6966, 6975, 6982, 6983, 6984, 7009, 6985, 7011, 6986, 6988, 7012, 7013, 7111, 7112, 7114, 7117, 7116, 7140, 7142, 7145, 7147, 7212, 7214, 7217, 7219, 7250, 7251, 7253, 7277, 7275, 7273, 7272, 7427, 7429, 7432, 7433, 7434, 7435, 7437, 7563, 7564
    Distance separation requirements,reference points to deter 4879, 7346
    Distances between stations, minimum 1606, 3417, 3601, 4879, 5356
  Technical requirements
    Antenna systems 5356
    Stations at spacings below minimum separation 3417
    Transmitter location 4879

Broadcasting - Noncommercial Educational FM
  Applications and licenses
    Licensing requirements 2009, 2034
  Power considerations
    Signal strength contours, overlap of 2207
  Services
    Schedule and time sharing, operating 4622

Broadcasting - TV Stations
  Allocations/assignments/licenses
    Distance separations between stations, minimum 2465
    Table of assignments 30, 153, 1284, 1826, 1992, 2213, 2880, 3368, 3613, 4369, 4293, 5313, 5369, 5791, 5838, 6038, 6969, 7024, 7119

Subject **Page**
  Services
    Affiliations; network program practices; territor 2622, 5013, 5014, 6563
    7234
    Subsidiary, e.g. functional music 5681
  Subscription TV
    Services: who may provide and limitations on 4948
  Technical considerations
    Antenna height and power 5265, 5681
    Field strength measurements 3621
    Tranmission system requirements 5148
    Transmitter location and antenna system 1240, 7022

Cable Television Relay Service (CARS)
  Technical regulations
    Antenna standards 5658

Cable Television Service
  68, 52, 557
  Cablecasting
    Sponsorship identification 5861
  Markets and services
    Boundaries, list of reference points to determine 5681
    Signals significantly viewed, method to determine 52, 3670, 584
  Network nonduplication protection
    Signals, priority of 2218, 5573, 684
  Operating requirements
    Records to be maintained 2111, 5093
  Rules
    Rate regulation by franchising authority 208, 5842
  Technical regulations
    Measurements and performance requirements 3673
    Performance tests 3673, 6588
    Signal leakage performance criteria 6487
    Standards: frequencies/signal levels and radiation 3673, 6487, 658

Carriers: Service Altered
  Cable television video programming facilities
    Construction/distribution facilities unaffiliated with cable 688
    Video programming facilities by telephone common carriers 688
    Waiver to 63.54 and 63.55 688
  Discontinuance/reduction/impairment
    Public coast station, applications to close/reduce service 245, 1580, 1885, 255
    4702, 4703, 4704, 718
    Type of request requiring formal application 688

Subject **Page**

Extensions and supplements
- Applications, contents of 347, 115, 230, 232, 236, 238, 241, 242, 243, 262, 244, 320, 321, 297, 425, 426, 592, 732, 734, 859, 1406, 1410, 1412, 1581, 1582, 1744, 1745, 1746, 1747, 1767, 1768, 1769, 1770, 1771, 1883, 1886, 1887, 1888, 1889, 1958, 1962, 1963, 1964, 1965, 2011, 2338, 2339, 2205, 2206, 2490, 2485, 2234, 2235, 2236, 2237, 2299, 2300, 2301, 2546, 2547, 2552, 2868, 2869, 2887, 2888, 2891, 2940, 2944, 2956, 2957, 2958, 3635, 3645, 3683, 3684, 4175, 4270, 4385, 4386, 4649, 4503, 4504, 4505, 4618, 4648, 4650, 4651, 4774, 4982, 4821, 4875, 4877, 4983, 4984, 4987, 4987, 4986, 4986, 4988, 5038, 5268, 5274, 5276, 5289, 5518, 5572, 5571, 5570, 5568, 5755, 5756, 5757, 5758, 5759, 5789, 5953, 6031, 6032, 6535, 6536, 6922, 6923, 6924, 6925, 6938, 6926, 7189, 7191, 7192, 7263
- Non-dominant international services, special provisions for 83, 5268

Various applications, contents of
- Change in service not specifically provided for in this Par 688

Commercial Radio Operators

Applications
- First class certificate, requirements for 5805

General
- Eligibility for license 5919

Subject	Page			
Commission Organization				
Delegations of authority - Chief, Common Carrier Bureau				
Limitations on delegated authority	43,	44,	46,	
	76,	447,	448,	7
	743,	742,	745,	9
	970,	979,	1251,	12
	1541,	1588,	1590,	15
	1561,	1621,	1600,	16
	1689,	1741,	1742,	18
	1895,	1897,	2089,	21
	2107,	2257,	2312,	23
	2569,	2567,	2907,	29
	3467,	3586,	3473,	37
	3714,	3718,	3742,	37
	4197,	4198,	4199,	42
	4280,	4283,	4450,	44
	4426,	4406,	4866,	48
	4884,	5144,	5272,	53
	5353,	5271,	5617,	66
	6545,	6546,	6543,	70
	7181,	7231,	7353,	74
	7526,	7527		
Delegations of authority - Chief, Mass Media Bureau				
Commission en banc, matters to be referred to the		1413,	1820	
Delegations of authority - Chief, Private Radio Bureau				
Commission en banc, matters to be referred to the	6,	1712,	2171,	23
Delegations of authority - General Counsel				
Authority delegated, listing of		1564		
Delegations of authority - Review Board				
Certification of matters to the Commission		259,	3575	
Composition of Board/quorum/duties of Board		5651		
General information - Commission organization				
Composition of Commission and term of office		1368		
General information - FCC				
Locations of FCC offices		7153		
Paperwork Reduction Act, OMB control numbers assigned regarding		5589		
General public information and inspection of records				
Witholding of records from public inspection, requests for		36,	5058	
Mass Media Bureau				
Functions: recommend/administer policy re radio/television		1413		
Common Carriers/Affiliates: Reports				
Contracts and concessions with respect to communication traffic		3552		
Depreciation rates, reports of proposed changes in		750,	5015	

ubject **Page**

ommon Carriers: Miscellaneous Rules
  Allocation of costs to regulated or non-regulated costs 713, 445, 637, 2152, 2302, 2950, 4389, 4619, 5235, 5812, 5865, 6500, 6603, 6851, 7108, 6990, 7536

  Enhanced services (computer) and customer-premises equip 443, 357, 598, 1363, 1506, 1559, 1817, 1807, 2310, 4196, 4839

  Hearing aid compatible telephones by exchange carriers 4657
  Hearing/speech/vision/mobility, equipment and services 4657
  TDD users, notification of termination of assistance to 4657

ommunications Act of 1934
 Common Carriers
  Accounts, records, memoranda,forms of; depreciation char 637, 638, 3303, 3328, 5015, 5209, 7467

  Charges, just and reasonable 2348, 3434, 7193
  Charges, schedules of 1618, 5268, 7186
  Complaints to the commission 905, 1516, 1618, 1911, 2327, 2608, 2909, 2910, 2911, 2912, 2913, 2914, 2915, 2916, 2917, 2918, 3303, 4190, 5170, 5202, 5517, 5663, 5848, 5849, 5849, 5873, 7018, 6991

  Consolidation,acquisition and control of telephone co 4405, 7136, 7185

  Discrimination and preferences 2418, 1999, 2286, 3434, 3546, 5873, 6939, 6939, 7481

FEDERAL COMMUNICATIONS COMMISSION

Subject	Page
Extension of lines, certificate for	347, 83, 232, 2
	238, 242, 243, 2
	244, 245, 320, 4
	426, 592, 613, 7
	734, 859, 987, 10
	1269, 1406, 1412, 15
	1582, 1611, 1746, 17
	1769, 1770, 1771, 18
	1885, 1886, 1887, 18
	1889, 1958, 1962, 19
	1964, 1965, 2011, 20
	2338, 2339, 2205, 22
	2490, 2485, 2236, 22
	2299, 2300, 2301, 28
	2869, 2887, 2889, 28
	2932, 2940, 2944, 29
	2957, 2958, 3434, 35
	3635, 3645, 3683, 41
	4177, 4175, 4269, 42
	4262, 4289, 4292, 43
	4649, 4503, 4504, 45
	4618, 4648, 4703, 46
	4651, 4654, 4774, 47
	4821, 4875, 4877, 49
	4987, 4986, 4988, 50
	5038, 5268, 5286, 52
	5289, 5518, 5571, 55
	5568, 5732, 5674, 57
	5756, 5757, 5758, 57
	5789, 5862, 5962, 59
	5953, 6031, 6032, 65
	6535, 6536, 6922, 69
	6924, 6925, 7189, 71
	7192, 7187, 7186
Pole attachments, regulation of	951, 1562, 6651, 68
	6849, 6850, 7558, 75
Service and charges	1418, 2608, 3434, 35
	5663, 6992, 7187, 73
Federal Communications Commission	
Purposes of the Act	1942

Subject	Page
Penal provisions; forfeitures	
Rebates and offsets, forfeitures in cases of	3695, 3689, 3698, 3699
	3702, 3704, 3708, 3708
	3711, 502, 855, 1876
	2009, 2034, 2174, 2178
	2340, 2210, 2289, 2303
	2628, 2874, 4437, 4496
	4695, 4799, 4672, 4782
	4938, 5305, 5623, 5961
	5968, 5950, 6523, 6154
	6510, 7484
Procedural and Administrative provisions	
Inquiry by Commission on its own motion	7262
Reconsiderations of actions taken by Commission	1416, 1617, 6569, 7193
Radio, provisions for	
Candidates for public office, facilities for	1798, 4998, 5200, 5840
	7109, 7122, 7120, 7511
	7522, 7524, 7528, 7491
	7494, 7497, 7507
Radio, provisions relating to	
Applications, special requirements with respect to	4782, 4782
Applications;form of and conditions attached to licenses	230, 234, 238, 239
	314, 297, 379, 855
	1576, 1876, 2036, 2340
	2485, 2233, 2303, 2889
	2932, 3544, 4201, 4414
	4672, 4782, 4782, 4938
	5623, 5968, 6150, 6510
	6569, 7246
Commission, general powers of	1857, 2585
Construction permits	230, 238, 239, 981
	1576, 2485, 2889, 2932
	4496
License for radio communication or transmission of energy	2348, 4496
Licenses and allocation of facilities, term of	1240, 5127
Licenses, limitation on holding and transfer of	193, 381, 987, 1611
	1867, 1869, 1871, 2210
	2628, 2874, 2921, 4172
	4652, 5397, 5399, 6547
	6569, 6905

Subject — **Page**

- Sanctions, administrative 2585, 3385, 6150, 750
- Scope of the act
  - Applications of the act 4449

Direct Broadcast Satellite Service (DBS)
- General information
  - Definitions 2581
- Licenses
  - Authorization conditions 2269

Domestic Public Fixed Radio Services
- Applications and licenses, filing requirements
  - Defective applications 5125
  - Forms shared by all domestic public services, miscell 6792
  - Requirements, general application 5125, 7019, 7124, 712
7130
- Applications and licenses, processing
  - Consideration of applications, proceedings in 5125
  - Forfeiture and termination of station authorization 332, 1945
  - License, time period for 332
  - Opposition to applications 7019, 7124, 7127, 713
- Multipoint distribution service
  - Eligible, those common carriers 6792, 7019, 7124, 712
  - Emissions and bandwidth 6764
  - Frequencies available for assignment 7019, 7130
  - Frequency interference 6764
- Point-to-point microwave radio service
  - Eligible, those common carriers 332
- Technical standards
  - Antennas, directional 332

Employee Responsibilities and Conduct
- Ethical and other conduct of employees
  - Specific provisions 4762

Frequency Allocations and Radio Treaty Matters
- Allocation, assignment, and use of radio frequencies
  - International and U.S. table of frequency allocations 636, 1368, 1750, 541
5932, 6792
- Equipment authorization procedures: application procedures
  - Hearing based on questions about applicant/equipment/use 2572

Subject **Page**

- Harmful interference, importation of devices and
  - Entry into U.S. of devices or subassemblies, conditions for 3296
  - Imports when authorization is not required, disposition of 3296
  - Imports when authorization is required, disposition of 3296
  - Purpose of subpart: rules concerning importation of equipm 3296
  - Trade shows or testing, entry for 3296

Jurisdictional Separations Procedures
- Facilities and property
  - C&WF(Category 1),apportionment procedures in exchange line 1407, 1873, 5123, 5198 5515
- Jurisdictional Separations Procedures
  - General 2936, 5068, 6541, 6542

Maritime Services
- 1600 gross tons vessels - radiotelegraph (Rg)
  - Exemptions 1969
- Frequencies
  - Radiodetermination stations, table for 2478
- Frequencies - radiotelegraphy
  - Digital selective calling (DSC), table of frequencies for 786
  - Distress et al. calls, table of frequencies for 786
  - Morse code working frequencies, table of 4232
- Frequencies - radiotelephony
  - Private communications frequencies 506
  - Public correspondence frequencies 5555
- Operating procedures - ship stations
  - Communications at ship stations, provisions for 5985
- Public coast stations (land stations)
  - Services, ship/shore radio- telephone/telegraphy 4846
- Rules, applications and licenses
  - Forms to be used, standard 7153
- Technical standards for coast and ship stations
  - Emission limitations, schedule of 1456
  - Frequency tolerances/bands/categories of stations, table 2478
  - Transmitter power expressed in various terms, maximum 437
  - Transmitters (type accepted), licensing of 310, 5989, 5994
- Voluntary telegraphy
  - EPIRB - Emergency position indicating radiobeacon 1456

Operational-Fixed Microwave Service, Private
- Applications, authorizations, notifications
  - Applications: requirements and procedures 7238
- Requirements, general
  - Frequencies, policies governing the assignment of 4320, 4614

Subject **Page**

Technical standards
  Antenna, table of performance standards of directional 6792
  Frequencies available, tables of assignments of 1912, 6486
  Power and frequency bands, table of 4320

Personal Radio Services: GMRS, R/C, CB
  All services - technical standards
    Channel frequencies for R/C 1975
    Emission, spurious 1975
  GMRS - operation of a system
    Communications permitted 1601

Practice and Procedure
  1999

  Application procedures, general
    Detailed procedures; cross-references 75, 5647
    Information furnished by applicants, changes in 270, 570, 1942, 28
      3448, 4186, 5088, 53
      6841
  Common carriers: applications
    Signatories, those eligible to be 4990
  Common carriers: applications under Title II Act
    Licenses, cable landing 2335
  Common carriers: complaints
    Formal or informal 33, 648, 652, 6
      653, 650, 649, 6
      644, 640, 639, 6
      642, 643, 696, 6
      698, 699, 700, 7
      702, 664, 662, 6
      658, 657, 656, 14
      1402, 1403, 1405, 14
      2181, 2949, 2952, 34
      4182, 4318, 4826, 48
      5171, 5172, 5173, 52
      5211, 5549, 5577, 55
      5579, 6081, 6080, 72
      7289, 7290, 7291, 72
      7293, 7294, 7295, 72
      7535

Subject **Page**

Common carriers: complaints, formal
  Copies of pleadings and briefs; service of copy of comp 1418
  Discrimination/preference/prejudice 1999
  Form 1999
  Issues amd facts, statement of 1999
  Motions to dismiss or edit complaints 6991
  Oppositions to motions to dismiss 1999
  Supplemental complaints 1999, 5233
  Tariff schedule references 1999
Common carriers: complaints, informal
  Procedure 2327
  Unsatisfied complaints and formal complaints related to 2909, 2910, 2911, 2912 2913, 2914, 2915, 2916 2917, 2918
Common carriers: grants by random selection
  Multichannel multipoint distribution service 6792
  Public land mobile and public cellular radio 405, 6185
Common carriers: tariffs
  Filing, petitions related to new 2632
Fees filed with Commission: schedules: general information
  Exceptions, general 3403
  Filing/grant/license/cable television 7238
  Private radio services 6489
  Radio broadcast services 3403
  Special temporary authority (sta) or waiver, general rules for 7238
Hearing proceedings
  Applicability of hearing procedures 3403
Hearing proceedings: evidence
  Speakerphone, testimony by 3403
Hearing proceedings: hearing and intermediate decision
  Hearing and burden of proof, full 2604
Hearing proceedings: interlocutory actions
  Interlocutory actions, general provisions regarding 1910
Hearing proceedings: participants and issues
  Intervene, petitions to 1245, 1586, 4837, 5299 6995
  Issues, motions to enlarge/change/delete 570, 4238, 4331
  Notice of hearing and appearances 895, 4782, 4782
Hearing proceedings: presiding officer
  Disqualification of presiding officer 396, 381, 6525

Subject **Page**
Hearing proceedings: presiding officer's rulings
  Final ruling, appeal from 282, 575, 889, 18
  3626, 4829, 5944
  Interlocutory ruling, appeal from 13, 421, 576, 6
  891, 1245, 1385, 20
  2015, 2094, 2148, 32
  3460, 3599, 3609, 42
  4409, 4454, 4633, 46
  4642, 5018, 5023, 52
  5299, 5185, 5301, 55
  5519, 5388, 5621, 64
  6484, 6540, 6831, 69
  7208

Hearing proceedings: review proceedings
  Decision, appeal and review of initial 1524, 3608, 3624, 41
  6830
  Exceptions to the initial decision and oral argument 6833
Information, general
  Declaratory rulings 1545, 1596, 2148, 24
  4652, 4652
  Time, computation of 1418, 4797
Parties, practitioners, witnesses
  Bar and their authority to act as representatives, members 2203
  Censure/suspension/disbarment of persons who appear before FCC 2203, 2491
Pleadings, briefs
  Extension of time, motions for 42, 1348, 1608, 2
  1910, 1996, 3332, 3
  4241, 4292, 4577, 4
  6827, 6849, 6850, 7
  Informal requests for Commission action, persons may make 1586, 3303, 6
  Pleadings for different request, separate 4827
  Service of documents and proof of service 2885
  Signature and verification 4705
  Stay, cross-reference for a request for a 5057
Pole attachment (cable television) complaints: procedures
  Response and reply, procedures for 6849
Private radio services: filing requirements
  Forms and locations for filing of applications 7153

Subject **Page**

- Proceedings, miscellaneous
  - Forfeiture proceedings 638, 655, 861, 855, 1222, 1876, 1880, 2078, 2340, 2210, 2303, 2572, 3403, 4437, 4506, 4496, 4646, 4672, 4938, 5336, 5337, 5338, 5339, 5308, 5623, 5968, 6154, 6510, 7002, 7483
- Reconsideration/review of Commission action
  - Actions by delegated authority modified or set aside 4453, 4636
  - Actions by delegated authority, application for review of 283, 285, 418, 570, 610, 1384, 1602, 2347, 2286, 2603, 2961, 4218, 4331, 4630, 4959, 5191, 5188, 5599, 5386, 5585, 6026, 6903, 6995, 6980, 7565
  - Reconsideration of a final FCC action, petition for 65, 225, 786, 872, 873, 895, 1260, 992, 989, 1224, 1416, 1383, 1984, 2894, 3303, 3636, 4180, 4186, 4416, 4424, 4626, 4631, 4764, 4878, 5088, 5125, 5183, 5391, 6901, 6981, 7482
  - Review and deferred consideration of application 2286
- Rulemaking proceedings: inquiries
  - Notice of inquiry 1305
- Rulemaking proceedings: petitions
  - Petitions 5, 290
  - Public notice in Dockets Reference Room 3488, 6543
- Rulemaking proceedings: proceedings
  - Decision by Commission 4813
  - Reconsideration, petitions for 7193
  - Sources of commencement of proceedings 1857

Subject **Page**

- Private Land Mobile Radio Services
  - Applications and authorizations
    - License term 2356
  - Emergency radio service, special
    - Frequencies available, table of 2017
    - Paging operations and table of urbanized areas 2017
  - Industrial radio services
    - Business radio service, table of and reference coordinates for 542
    - Motion picture radio service, table of frequencies for 1966
  - Licensing/use of frequencies in 806-821, 851-866 MHz bands
    - Frequencies, selection and assignment and table of 4929
    - Loading requirements for trunked systems 1533
  - Paging operations
    - 929-930 mhz, table of one-way and shared paging in 542
  - Policies governing the assignment of frequencies
    - Coordination requirements 2356
  - Technical standards
    - Bandwidth limitations 2356, 2145
    - Type acceptance 3392

- Public Mobile Service
  - Transfers and assignments of applications 2921, 4186, 5966, 61 7178
  - Applications and licenses-filing requirements
    - Additional channels, conditions for granting applications in 351, 1224
    - Amendment of applications 285, 3431, 41
    - Authorization, temporary 6150
    - Communications by radio, authorization required 405, 861, 2078, 44 4646
    - Defective applications 285, 264, 596, 5 5966, 5948
    - Forms and permissive changes or minor modifications 5338, 5339, 7483
    - Requirements 65, 1942, 5088, 6
    - Technical content of applications 264, 2255, 3429, 34
    - Waiver of rules, conditions for granting 351, 1938, 2254, 6 6856
  - Applications and licenses-processing
    - Consideration of applications 894, 1840
    - Construction, time period allowed for 273, 405, 4496, 5 6523
    - Dismissal and return of application 6158
    - Grants by random selection 270, 2189, 2463, 2 3431, 3370

Subject **Page**

- Licenses, time period allowed for and date of expiration 4646, 5308
- Mutually exclusive applications 1220, 2463, 3431, 4186
- Opposition to applications 405
- Ownership changes and agreements to amend/dismiss 6158
- Public notice period 7238
- Receipt of application 6834
- Station authorization, transfer of control/assignment of 401, 1217, 2572
- Domestic public cellular radio telecommunications service
  - Applications for markets below the top 90, ownership in 270, 596, 605, 2921, 7178
  - Applications, amendment of 285
  - Financial qualifications 285, 402, 736, 2921, 4990, 5378, 6033, 6538, 6745
  - Frequencies available 4990, 5378, 6852
  - Permissible communications 5948
  - Service areas 968, 1583, 1408, 1521, 4469, 6158, 7488
- General information
  - Definitions 2255
- Miscellaneous
  - Discontinuance of station operation, procedure for 3550, 5088
- Public land mobile service
  - Air-ground radio telephone service 2238, 4261
  - Antenna height and erp limit 5054
  - Base stations by antenna height and erp, classification of 5054
  - Erp for various stations 5054
  - Frequencies, assignment of 1938, 1942, 2254, 4320
  - One way signalling station, application provisions for a 1224
  - Reliable service area for a two-way communications service 5054
  - Traffic load studies, conditions requiring 351

Radio Frequency Devices

- Administrative provisions
  - Marketing of an RF device in Part 2, cross reference to 5405
- Lowpower communication devices: general requirements
  - Between 26.97-27.2 MHz, requirements for cordless telephone 5409
  - Between 49.82-49.90 MHz, alternative specifications for the band 2420
- Lowpower specific devices: control and security alarms
  - Certification required 5409
  - Technical standards 3593, 5405
- Lowpower specific devices: cordless telephones
  - Non-interference, requirement for 3593
  - Technical specifications 434

Subject **Page**

Rates of Return
  Exchange carriers
    Filings, required 7193
  Procedures
    Rate of return submissions, procedures for filing 5863

Satellite Communications
  Operation of stations, factors in
    Radiodetermination satellite service 2083

Special Broadcast Services
  FM broadcast translator and booster stations
    Antenna location 422
    Interference considerations 1765
    Licensing requirements 422
    Power limitations 422
    Services permissible 422
  Remote pickup broadcast stations
    Emissions specifications and type accepted equipment 3457
    Station identification by call sign 3457
  Television broadcast auxiliary stations
    Antenna standards 5658

Statutory Citations Other than Communications
    Implementation of policy 1269, 4654, 4654,
    Public information 7014
  Administrative Procedure
    Costs and fees of parties 2491
    Information,public; agency rules, opinions, orders 8, 404, 4325,
    5414, 7561
  Income taxes
    Sale or exchange to effect FCC policy, gain from 2080
  Obscenity
    Obscene language, broadcasting 3695, 3698, 3702,
    3708, 3711, 610,
    2178, 5961, 5950,
    7484

Tariffs (Schedules of Rates and Regulations)
  Rules, general
    Letters of transmittal: supporting information to be submitted 51, 41,
  Specific tariff publications
    Effective period required before changes in rates/regulations 746, 3468
    Notice requirements 746, 719, 3468,

Subject **Page**

Telecommunications Companies: Classes A and B
  Nonregulated activities 713, 445, 637, 636, 2152, 2302, 2950, 4389, 4619, 5235, 5812, 5865, 6500, 6603, 6851, 7108, 7536
  Regulated accounts 713, 445, 637, 636, 2152, 2302, 2542, 2950, 4389, 4619, 5235, 5812, 5865, 6500, 6603, 6851, 6974, 7108, 6990, 7536
  Transactions with affiliates 1880, 3303, 6500, 6851

Telephone Companies
  Applications, contents of 4405
  Public hearing regarding application, request for 4405

Terminal Equipment Connected to Network
  Registration procedures
    Application for registration 427, 6062
  Terminal equipment, conditions on use of
    Hearing aid compatibility, phones with 4799

Uniform Systems of Accounts
  Instructions and information, general

*U.S. Government Printing Office: 1992 — 312-024/60008

Volume 7, No. 1, Pages 1 to 399,
December 30, 1991 - January 10, 1992

FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

ALFRED C. SIKES, CHAIRMAN

James H. Quello
Sherrie P. Marshall
Andrew C. Barrett
Ervin S. Duggan

Minneapolis Public Library
and Information Center

APR 7 1992

Government Documents Dept.
Depository 302

The contents of this document are subject to correction by means of an erratum appearing at a future date in the FCC Record. Users should notify the Secretary of errors so that an erratum can be inserted in a later publication.

The appropriate citation for documents printed in the FCC Record should include the volume number, page number, and year. See 47 C.F.R. §1.14. Earlier Commission documents may continue to be cited to the FCC Reports.

Citation Form: 7 FCC Rcd 1 (1992)

United States Government Printing Office • Washington, D.C.

For Sale by the Superintendent of Documents, U.S. Government Printing Office on a subscription basis

Federal Communications Commission Record

Volume 7
Issue 1

Table of Contents

Table of Cases.. i

Table of FCC and Delegated Authority Numbers............... iii

Table of Docket Numbers.................................. v

Table of Rulemaking Numbers.............................. vi

Table of Localities...................................... vii

Table by Subject Matter.................................. viii

Table by Statutory and Rule Provisions..................... x

Decisions, Reports, Memorandum Opinions, Orders, and Other Selected Material.................................. 1

Federal Communications Commission Record

Table of Cases
Volume 7
Issue 1

Case Name	**Page**
ALLTEL Service Corporation	52
AT&T Communications	156
AT&T Communications	38
Advanced Technology Cellular Telecommunications	115
Algreg Cellular Engineering	18
Amendment of Part 22 - Cellular Service	251
Amendment of Part 22 - Cellular Telephones/Cell Enhancers	23
Amendment of Part 63 - Telephone/Cable TV Cross-Ownership Rules	300
Amendment of Part 65 - Rate Base and Net Income	296
Amendment of Part 90 - Frequencies for Low-Power Mobile	293
Amendment of Parts 2, 22 and 25 - Mobile Satellite Service	266
Americall Systems of Louisville	129
American Network Exchange, Inc.	163
American Public Communications	169
American Telegraph and Telephone Company	130
American Telephone and Telegraph Company	255
American Telephone and Telegraph Company	31
American Telephone and Telegraph Company	32
American Telephone and Telegraph Company	33
American Telephone and Telegraph Company	35
American Telephone and Telegraph Company	113
American Telephone and Telegraph Company	71
American Telephone and Telegraph Company	120
American Telephone and Telegraph Company	134
American Telephone and Telegraph Company	136
American Telephone and Telegraph Company (ERRATUM)	22
Ameritech Operating Companies	257
Ameritech Operating Companies	116
Ascom Autelca Communications	175
Bay Communications	254
BellSouth Telephone Companies	112
Bernstein, Edwin A.	37
Cable and Wireless Communications, Inc.	127
Columbia Communications Corporation	122
Com Systems, Inc.	67
Communications Satellite Corp.	50
Communications Satellite Corporation	149
Competitive Telecommunications Association	119
Conquest Telecommunications, Inc.	66
Evaluation of the Syndication and Financial Interest Rules	345
Fee Decisions of the Managing Director	280
Fiberline Network Communications	188

FEDERAL COMMUNICATIONS COMMISSION

Case Name	Page
Fone America, Inc.	181
GTE Hawaiian Telephone Company, Inc.	147
InterMart Broadcasting Gulf Coast, Inc.	83
Ju-Le Corporation	194
Kennedy Broadcasting, Inc.	19
Lawhorne, Thomas W.	13
MCI Communications Corporation	128
McCaw RCC Communications, Inc.	76
McCaw RCC Communications, Inc.	77
Midwest Cable and Satellite, Inc.	151
Midwest Communications, Inc.	159
Mobile Marine Radio, Inc.	62
NetExpress Communications, Inc.	51
One Call Communications, Inc.	200
Orkus, Judith O. and Larry R.	20
PCI Communications, Inc.	63
Pay Com, Inc.	207
Pilgrim Telephone, Inc.	213
Quests, Inc.	29
SEG Cellular Limited Partnership	74
Skidelsky, Barry	1
South Texas Phone, Inc.	68
Southeast Pay Telephone, Inc.	219
TRT/FTC Communications, Inc.	252
Table of Allotments, FM, Bixby, OK	59
Table of Allotments, FM, Christiansted, VI	111
Table of Allotments, FM, Dyersburg, TN and De Witt, AR	60
Table of Allotments, FM, Epworth and Dyersville, IA	106
Table of Allotments, FM, Gilmer, TX	47
Table of Allotments, FM, Grenada, Artesia and Okolona, MS	56
Table of Allotments, FM, Harrisburg and Albemarle, NC	108
Table of Allotments, FM, Houma and Chalmette, LA	40
Table of Allotments, FM, Jourdanton, TX	43
Table of Allotments, FM, Nassawadox, VA	48
Table of Allotments, FM, Trinity, TX	39
Table of Allotments, TV, Springdale, AR	45
TelTrust, Inc.	69
Telephone Operating Systems	225
U.S. Communications of Westchester	237
U.S. Fiberline Communications	70
U.S. Long Distance, Inc.	73
US Sprint Communications Company Limited Partnership	148
US West Communications	55
USA Payphone Systems	231
United Tele-Systems of Virginia	244
United Telephone Company of Indiana	53
Woods Communications Group, Inc.	78

Federal Communications Commission Record

Table of Cases by Delegated Authority and FCC Number
Volume 7
Issue 1

Delegated Authority or FCC Number	Page
DA 91 -1499	255
DA 91 -1575	31
DA 91 -1576	32
DA 91 -1577	33
DA 91 -1578	35
DA 91 -1579	39
DA 91 -1580	40
DA 91 -1581	43
DA 91 -1583	156
DA 91 -1586	45
DA 91 -1587	29
DA 91 -1588	47
DA 91 -1589	48
DA 91 -1590	53
DA 91 -1594	128
DA 91 -1595	127
DA 91 -1596	129
DA 91 -1598	55
DA 91 -1600	163
DA 91 -1601	169
DA 91 -1602	175
DA 91 -1603	181
DA 91 -1604	188
DA 91 -1605	194
DA 91 -1606	200
DA 91 -1607	207
DA 91 -1608	213
DA 91 -1609	219
DA 91 -1610	225
DA 91 -1611	231
DA 91 -1612	237
DA 91 -1613	244
DA 91 -1614	73
DA 91 -1615	115
DA 91 -1616	66
DA 91 -1617	67
DA 91 -1618	68
DA 91 -1619	69
DA 91 -1620	70
DA 91 -1621	71
DA 91 -1622	113
DA 91 -1623	112
DA 91 -1624	251
DA 91 -1626	22
DA 91 -1628	119
DA 91 -1629	116
DA 91 -1630	120
DA 91 -1631	38
DA 91 -1632	52
DA 91 -1633	257
DA 91 -1634	50
DA 91 -1635	51
DA 91 -1636	63
DA 91 -1638	56
DA 91 -1639	59
DA 91 -1640	60
DA 91 -1642	111
DA 91 -1643	106
DA 91 -1644	108
DA 91 -1647	252
DA 91 -1648	147
DA 91 -1649	148
DA 91 -1650	149
DA 91 -1651	151
DA 92 - 2	62
DA 92 - 4	280
DA 92 - 9	254
FCC 91 - 315	293
FCC 91 - 324	296
FCC 91 334	300
FCC 91 - 336	345
FCC 91 - 399	23
FCC 91 - 415	159
FCC 91 - 416	130
FCC 91 - 418	134
FCC 91 - 419	136
FCC 91 - 422	78
FCC 91 - 423	74
FCC 91 - 425	76
FCC 91 - 426	77
FCC 91 - 427	266
FCC 91 - 429	122

Delegated Authority or FCC Number	Page
FCC 91R - 115	1
FCC 91R - 116	13
FCC 91R - 117	18
FCC 91R - 118	19
FCC 91R - 119	20
FCC 91R - 120	37
FCC 92D - 1	83

Federal Communications Commission Record

Table of Cases by Docket Number
Volume 7
Issue 1

Docket Number	Page
CC Dkt.No.86 - 497	296
CC Dkt.No.87 - 266	300
CC Dkt.No.90 - 6	251
CC Dkt.No.91 - 142	18
CC Dkt.No.91 - 324	115
CC Dkt.No.91 - 327	66
CC Dkt.No.91 - 329	67
CC Dkt.No.91 - 332	68
CC Dkt.No.91 - 334	70
CC Dkt.No.91 - 335	73
CC Dkt.No.91 - 365	163
CC Dkt.No.91 - 366	169
CC Dkt.No.91 - 367	175
CC Dkt.No.91 - 368	181
CC Dkt.No.91 - 369	188
CC Dkt.No.91 - 370	194
CC Dkt.No.91 - 371	200
CC Dkt.No.91 - 372	207
CC Dkt.No.91 - 373	213
CC Dkt.No.91 - 374	219
CC Dkt.No.91 - 375	225
CC Dkt.No.91 - 376	231
CC Dkt.No.91 - 377	237
CC Dkt.No.91 - 378	244
GEN Dkt.No.84 - 1234	266
MM Dkt.No.87 - 563	60
MM Dkt.No.88 - 183	78
MM Dkt.No.88 - 584	37
MM Dkt.No.89 - 384	106
MM Dkt.No.89 - 406	56
MM Dkt.No.89 - 594	108
MM Dkt.No.90 - 106	83
MM Dkt.No.90 - 162	345
MM Dkt.No.90 - 181	1
MM Dkt.No.90 - 192	13
MM Dkt.No.90 - 479	29
MM Dkt.No.91 - 179	59
MM Dkt.No.91 - 190	20
MM Dkt.No.91 - 203	19
MM Dkt.No.91 - 250	47
MM Dkt.No.91 - 272	39
MM Dkt.No.91 - 296	111
MM Dkt.No.91 - 361	40
MM Dkt.No.91 - 362	43
MM Dkt.No.91 - 363	45
MM Dkt.No.91 - 364	48
PR Dkt.No.91 - 295	293

Federal Communications Commission Record

Table of Cases by Rulemaking Number
Volume 7
Issue 1

Rulemaking Number	Page
RM - 6078	60
RM - 6090	111
RM - 6710	60
RM - 6745	56
RM - 6884	106
RM - 7142	108
RM - 7182	293
RM - 7205	106
RM - 7255	56
RM - 7318	108
RM - 7326	39
RM - 7461	47
RM - 7502	40
RM - 7734	59
RM - 7780	48
RM - 7873	43
RM - 7877	45

Federal Communications Commission Record

Table of Cases by City
Volume 7
Issue 1

City/State	Page
Albemarle, NC	108
Artesia, MS	56
Ashtabula, OH	29
Bixby, OK	59
Center Moriches, NY	37
Chalmette, CA	40
Christiansted, VI	111
Colorado Springs, CO	76
Colorado Springs, CO	77
Columbia, LA	78
De Witt, AR	60
Des Moines, IA	74
Dodgeville, WI	106
Dyersburg, TN	60
Dyersville, IA	106
Epworth, IA	106
Gilmer, TX	47
Grenada, MS	56
Harrisburg, NC	108
Heber Springs, AR	60
Houma, LA	40
Hoxie, AR	60
Jonesboro, AR	60
Jourdanton, TX	43
Martinez, GA	19
Nassawadox, VA	48
Newport, AR	60
Okolona, MS	56
Port Matilda, PA	20
Punta Rassa, FL	83
Queensbury, NY	1
Springdale, AR	45
Sylvester, GA	13
Trinity, TX	39

Federal Communications Commission Record

Subject Index
Volume 7
Issue 1

Subject **Page**

Adjudication
  Administrative Law Judge Decision
    Character qualifications 13
    Distribution of broadcast facilities 78
    Integration of ownership into management, effectuation 1
    Misrepresentation and lack of candor 1
    Reopening of record 1, 13
    Site availability or suitability 1, 13
  Orders or Notices
    Translator 83

Broadcast Radio Services - General Rules
  Applications for authorization
    Amendment of applications 20
    Conflicts in applications, agreement for removing 20
  Licenses and permits
    Multiple ownership of broadcast stations in the same service 159
  Operating hours
    Discontinuation 29
    Schedule 29

Broadcasting - FM Stations
  Allotments and assignments
    Allotments, table of 39, 40, 43, 47, 48, 56, 59, 60, 111, 106, 108

Broadcasting - TV Stations
  Allocations/assignments/licenses
    Antenna site precludes licensing, exclusive use of 159
    Table of assignments 45

Carriers: Service Altered
  Extensions and supplements
    Applications, contents of 50, 51, 63, 136, 147, 148, 149, 151, 252

Commission Organization
  Delegations of authority - Chief, Common Carrier Bureau
    Limitations on delegated authority 255, 257, 116, 119, 120, 22, 55

Subject **Page**

Communications Act of 1934
  Common Carriers
    Extension of lines, certificate for 50, 63, 136, 147, 148, 149, 151, 252
    Service and charges 62
  Radio, provisions relating to
    Applications;form of and conditions attached to licenses 122
    Construction permits 122
    Licenses and conditions for foreign communication, applications 122
    Sanctions, administrative 29

Practice and Procedure
  Common carriers: applications under Title II Act
    Licenses, cable landing 130, 134
  Common carriers: complaints, informal
    Procedure 254
  Proceedings, miscellaneous
    Forfeiture proceedings 37, 76, 77
    Revocation/cease and desist proceedings/hearings, procedures in 29, 29
  Reconsideration/review of Commission action
    Reconsideration of a final FCC action, petition for 18, 19

Public Mobile Service
  Applications and licenses-filing requirements
    Communications by radio, authorization required 76
  Domestic public cellular radio telecommunications service
    Service areas 251

TABLE OF STATUTORY AND RULE PROVISIONS

Page
001.006 Petition for Reconsideration 29
001.080 Forfeiture proceedings. 74
001.080 Forfeiture proceedings. 76
001.080 Forfeiture proceedings. 77
001.091 Revocation Proceedings; Hearings 29
001.092 Revocation after Waiver of Hearing 29
001.106 - Reconsideration Denied 18
001.106 Petition for Reconsideration, Dismissed 19
001.177 Formal or informal complaints 127
001.177 Formal or informal complaints 128
001.177 Formal or informal complaints 129
001.177 Formal or informal complaints 38
001.717 Informal Complaints; Procedure 254
001.718 Unsatisfied informal complaints 254
001.767, Cable Landing Licenses 130
001.767, Cable Landing Licenses 134
001.800 Forfeiture Proceedings 37
022.003 Authorization required. 74
022.003 Authorization required. 76
022.003 Authorization required. 77
022.911 Permissible communications 23
022.930 Special provisions for alternative cellular technolo 23
063.001 Contents of Application 51
063.001 Contents of Application 63
063.001 Contents of Application 147
063.001 Contents of Applications 136
063.001 Contents of Applications 148
063.001 Contents of Applications 149
063.001 Contents of Applications 151
063.001 Contents of Applications 252
063.01 Contents of Application 50
073.1740 Minimum Operating Schedule 29
073.1750 Discontinuance of Operation 29
073.202 FM Table of Allotments 40
073.202 FM Table of Allotments 43
073.202 FM Table of Allotments 47
073.202 FM Table of Allotments 48
073.202 FM Table of Allotments 56
073.202 FM Table of Allotments 59
073.202 FM Table of Allotments 60
073.202 FM Table of Allotments 106
073.202 FM Table of Allotments 108
073.202 FM Table of Allotments 111
073.3522 Amendment, Accepted 20
073.3525 Settlement Agreement, Approved 20
073.3555 Multiple Ownership 159
073.606 TV Table of Allotments 45
073.635 Use of Common Antenna Site 159
300.201 Service and Charges 62
300.202 Discrimination and Preferences 62

300.214 Extension of Lines 50
300.214 Extension of Lines 51
300.214 Extension of Lines 63
300.214 Extension of Lines 136
300.214 Extension of Lines 147
300.214 Extension of Lines 148
300.214 Extension of Lines 149
300.214 Extension of Lines 151
300.214 Extension of Lines 252
300.303 General Powers of Commission 266
300.308, Application for Licenses; Cond. in License for Fore 122
300.309 Action Upon Applications; Form of and Conditions 266
300.309, Actions Upon Appls., Form and Conds. Attached to Li 122
300.312 Administrative Sanctions 29
300.319, Construction Permits 122
300.34, Cable Landing License Act 130
300.34, Cable Landing License Act 134
300.402 Proceedings to Enjoin, Set Aside, Annul, or Suspend 266
47 C.F.R. Section 0.291 delegated authority 22
47 C.F.R. Section 0.291 delegated authority 31
47 C.F.R. Section 0.291 delegated authority 32
47 C.F.R. Section 0.291 delegated authority 33
47 C.F.R. Section 0.291 delegated authority 35
47 C.F.R. Section 0.291 delegated authority 55
47 C.F.R. Section 0.291 delegated authority 66
47 C.F.R. Section 0.291 delegated authority 67
47 C.F.R. Section 0.291 delegated authority 68
47 C.F.R. Section 0.291 delegated authority 69
47 C.F.R. Section 0.291 delegated authority 70
47 C.F.R. Section 0.291 delegated authority 71
47 C.F.R. Section 0.291 delegated authority 73
47 C.F.R. Section 0.291 delegated authority 112
47 C.F.R. Section 0.291 delegated authority 113
47 C.F.R. Section 0.291 delegated authority 115
47 C.F.R. Section 0.291 delegated authority 116
47 C.F.R. Section 0.291 delegated authority 119
47 C.F.R. Section 0.291 delegated authority 120
47 C.F.R. Section 0.291 delegated authority 156
47 C.F.R. Section 0.291 delegated authority 163
47 C.F.R. Section 0.291 delegated authority 169
47 C.F.R. Section 0.291 delegated authority 175
47 C.F.R. Section 0.291 delegated authority 181
47 C.F.R. Section 0.291 delegated authority 188
47 C.F.R. Section 0.291 delegated authority 194
47 C.F.R. Section 0.291 delegated authority 200
47 C.F.R. Section 0.291 delegated authority 207
47 C.F.R. Section 0.291 delegated authority 213
47 C.F.R. Section 0.291 delegated authority 219
47 C.F.R. Section 0.291 delegated authority 225
47 C.F.R. Section 0.291 delegated authority 231
47 C.F.R. Section 0.291 delegated authority 237
47 C.F.R. Section 0.291 delegated authority 244
47 C.F.R. Section 0.291 delegated authority 255
47 C.F.R. Section 0.291 delegated authority 257

47 CFR § 69, Access Charges 53
500.005 - Integration, Qualitative 83
500.170 - Financial Qualifications 83
500.3040 Integration of ownership into management, questions 1
500.3085 Integration of ownership into mgt., quantitative 78
500.3086 Integration of ownership into mgt., effectuation 78
500.3095 Character Qualifications 13
500.3125 Misrepresentation and lack of candor 1
500.3139 Programming, past 78
500.3180 Site availability or suitability 1
500.3180 Site Availability or Suitability 13
500.3200 Reopening of record 1
500.3200 Reopening of Record 13
73.202 FM Table of Allotments 39
Section 22.2 unserved area 251
Section 22.903 Cellular geographic service area 251
Section 22.925 filing of updated system information 251
Use of cellular telephones in aircraft and cell enhances in 23

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-181

In re Applications of

BARRY SKIDELSKY	File No. BPH-870819MO
BRADMARK BROADCASTING COMPANY	File No. BPH-870819MT
NORMANDY BROADCASTING CORPORATION	File No. BPH-870819NK

For Construction Permit for
New FM Station, Channel 289B1,
Queensbury, New York

Appearances

Barry Skidelsky, pro se; *David Tillotson* on behalf of Bradmark Broadcasting Company; *Jerome S. Boros* and *Jerome S. Silber* on behalf of Normandy Broadcasting Company; and *Y. Paulette Laden* on behalf of Chief, Mass Media Bureau.

DECISION

Adopted: December 12, 1991; Released: January 2, 1992

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Member BLUMENTHAL:

1. Under review is the *Initial Decision* (*I. D.*) of Administrative Law Judge Edward J. Kuhlmann (ALJ), 6 FCC Rcd 2221 (1991), granting the application of Bradmark Broadcasting Company (Bradmark) for a new FM station on Channel 289B1 in Queensbury, New York. The opposing applicants, Barry Skidelsky (Skidelsky) and Normandy Broadcasting Corporation (Normandy) filed Exceptions; and Skidelsky, Bradmark, and the Commission's Mass Media Bureau replied to those Exceptions.[1] Oral argument was held August 16, 1991.

2. Originally, six applicants for this new FM station were designated for hearing on March 15, 1990. *Faye M. Brennan*, 5 FCC Rcd 2690 (1990) (*Hearing Designation Order*). Three subsequently were dismissed. A year ago, on October 16-19, 1990, the ALJ conducted a hearing with respect to the three remaining applicants, Bradmark, Skidelsky, and Normandy, on the following issues:

> 1. To determine whether Bradmark misrepresented, withheld evidence and/or lacked candor in its representations to the Commission about who holds ownership interests in the applicant and, if so, whether Bradmark should be disqualified.
>
> 2. (a) To determine whether Normandy engaged in misrepresentation, or was lacking in candor, when it certified in its application that it had reasonable assurance of a transmitter site.
>
> (b) To determine in light of the evidence adduced under the foregoing issue whether Normandy is qualified to be a Commission licensee.
>
> 3. (a) To determine whether Normandy engaged in material misrepresentations in its Threshold Showing Concerning Broadcast Record.
>
> (b) To determine in light of the evidence adduced under the foregoing issue whether Normandy is qualified to be a Commission licensee.
>
> 4. To determine whether Normandy has an unusually poor broadcast record with respect to station WYLR(FM).
>
> 5. (a) To determine whether Normandy misrepresented and/or lacked candor in its representations to the Commission about who has ownership interests in the applicant.
>
> (b) To determine with regard to (a) whether Normandy's certification of its integration and diversification statement is false and whether Normandy abused the Commission's processes.
>
> (c) To determine whether, in light of the foregoing issues, Normandy is qualified to be a Commission licensee.
>
> 6. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 7. To determine in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

I. D., para. 1.

3. The ALJ concluded that Bradmark did not misrepresent, intentionally withhold evidence, or lack candor regarding a warrant (and its attendant "put and call" feature) to acquire 27% of Bradmark's stock now held by AT&T Commercial Credit, Inc. (AT&T). By contrast, and in decisional respects, the ALJ determined that Normandy did not have "reasonable assurance" for its initial transmitter site; that its "threshold showing" on its non-entertainment programming was carelessly prepared, could not be relied upon, and was untruthful in material portion; and that it failed to report a contingent ownership interest, and its explanation for the failure was disingenuous. The ALJ, thus, determined that Normandy was disqualified to operate the facility "because it has not established that it can be relied on to provide truthful information to the Commission." *I. D.* at para. 73. As to the two basically qualified applicants, Bradmark and Skidelsky, the ALJ found parity on *quantitative* integration proposals, but that Bradmark was superior *qualitatively*, in addition to the superiority of its signal coverage proposal. We affirm the grant of the Construction Permit to Bradmark.

BRADMARK

4. *Misrepresentation*. The circumstances leading to the addition of a misrepresentation issue against Bradmark are as follows. Bradmark is a New York corporation with one class of voting stock held by Donald W. and Betty Jean Heckman as joint tenants. They are the sole officers and directors of Bradmark; Donald Heckman is President and Treasurer and Betty Jean Heckman is Vice President and Secretary. During the summer of 1988, Bradmark borrowed from Pacificorp Credit, Inc. (Pacificorp); and, in return, Bradmark issued a warrant, convertible to 20% of Bradmark's common stock. Bradmark Hearing Exhibit 1, Exhibit A. On April 24, 1989, a revised warrant was issued, giving Pacificorp the right to 27% of Bradmark's stock. *Id.*, Exhibit B. A related "put and call" agreement attached, under which the lender was granted the right (the "put") to require Bradmark to purchase the warrant for a price determined by a formula set forth in the agreement, while Bradmark was granted the prior right (the "call") to purchase the warrant for a price determined by the same formula. Bradmark Hearing Exhibit 1. It was Bradmark's alleged understanding that the sole reason that Pacificorp required Bradmark to issue the warrant was "to enable Pacificorp to earn a greater return on its loans to Bradmark, commensurate with the level of risk that Pacificorp had taken in connection with those loans, in the event that Bradmark was successful in increasing the value of its business"; and, more importantly, "that Pacificorp had no interest in, or intention of, actually exercising the . . . warrant, unless such exercise was necessary in order to enable Pacificorp to realize the extra return on its loans represented by the warrants . . . ." *Id.*, at 3. On January 31, 1990, Pacificorp assigned its rights to AT&T. Bradmark claimed a similar "understanding" with AT&T.

5. On July 13, 1990, all applicants for the new FM station in Queensbury, New York were required to file Integration and Diversification of Ownership Statements, which were to include "copies of agreements that may result in changes in ownership, such as . . . a loan agreement providing for a conversion of debt to ownership." *Order*, FCC 90M-1957, released July 5, 1990.[2] The applicants also were required to describe "oral" agreements that affected control. *Id.* Further, the Statement and the documents were required to be certified by a principal of each applicant. *Id.* Although Donald Heckman signed Bradmark's Statement, he did not attach copies of the warrant (or the "put and call" agreement), nor did he describe his oral understanding with AT&T. According to Heckman, he did read the ALJ's *Order* ; and, in fact, it was explained to him by counsel.

6. Bradmark was also required to produce documents relating to potential ownership pursuant to a separate document production order. *Memorandum Opinion and Order*, FCC 90M-2544, released August 16, 1990 (ALJ). While Heckman likewise reviewed the document request with counsel, he did not initially produce the warrant documents. However, certain other corporate documents were produced that plainly reference the warrant documents; and the production of those underlying corporate documents ultimately led to inquiry at Heckman's deposition, and later to the production of the actual warrant documents. As a result of Bradmark's failure to identify and produce the warrant documents, however, the ALJ designated the issue "to determine whether Bradmark misrepresented, withheld evidence and/or lacked candor in its representations to the Commission about who holds ownership interests in the applicant." *Order*, FCC 90M-3195, released October 9, 1990 (ALJ) at para. 6.

7. At hearing, Donald Heckman testified that he had not identified or attached the warrant documents to Bradmark's Integration Statement because he believed they represented merely "an opportunity for my lender to get extra money when and if the stations were sold." Tr. 359. Heckman further believed that, because Bradmark had the right to purchase the warrant, thereby foreclosing AT&T from obtaining stock, there was little likelihood that AT&T would obtain an interest in Bradmark. *I. D.*, para. 47. He claims to have reached this conclusion from explanations of the loan transaction provided by Bruce Carr, local counsel, and Stephen J. Turpin, Jr., Vice President and Manager of the Media Finance Group at the original lender, Pacificorp (and subsequently Vice President-Media Finance Group of AT&T). Tr. 360. Despite the fact that Heckman believed that the warrant was unlikely to be exercised, he did testify at hearing that he is aware that, if AT &T exercised the warrant and received stock, Bradmark's integration credit would be reduced, Tr. 374-75, a possibility he discussed with his wife. *See I. D.*, para. 6.

8. AT&T's Turpin also testified at hearing, Tr. 478-544, and his testimony coincided with Heckman's testimony. Turpin averred that the purpose of the warrant was to ensure a greater return on the loan to Bradmark than would otherwise be permitted by New York State lending laws, since AT&T was taking a greater risk. Tr. 497. [3] Turpin further testified that both Pacificorp and AT&T had repeatedly advised Heckman that they did not intend to exercise the warrant or obtain an ownership interest in Bradmark. Tr. 503, 506. Finally, Turpin testified that if AT&T did exercise the warrant, it would be contrary to its agreement with the borrower. Tr. 506.

9. After reviewing all of the evidence, the ALJ concluded that Bradmark's failure to report the warrant documents did not reflect misrepresentation, intentional withholding of evidence, or lack of candor. In relevant part, the ALJ stated:

> There is no question that Bradmark should have reported the warrant but when all the facts are assessed, it does not lead to the conclusion that Bradmark intentionally misrepresented its ownership interest or intentionally withheld AT&T's interest from scrutiny. In fact, although Bradmark did not produce the loan documents with its integration statement, when a joint request for documents was made, Mr. Heckman obtained what he believed were all the corporate documents from his local counsel, Bruce Carr, with the intention that the documents should be provided to the other parties. He was not aware that the loan documents were not included in the corporate folder he obtained from Mr. Carr. And through that production, corporate records, which reflected the existence of the warrants and the put and call agreement were produced, but not the loan agreements. Furthermore, when Mr. Heckman was questioned about them at his deposition, he immediately produced them and was questioned about them.

I. D., at para 47. The ALJ acknowledged that "the possibility exists that Mr. Heckman deliberately withheld from the Commission the existence of AT&T's interest to avoid any impact on Bradmark's comparative proposal," but he viewed that as an "unlikely possibility on this record." *Id.*, at para. 48. The ALJ relied upon Turpin's testimony that AT&T had no interest in obtaining the Bradmark stock, and on his judgement that it was unlikely that AT&T would want to obtain the stock, since the Heckmans would retain control.

10. Skidelsky raises numerous arguments in excepting to the ALJ's conclusion on this issue. Skidelsky contends: (1) that it is incredible that Heckman would not have discussed the warrant, and the need to produce it, with counsel; (2) that Turpin's testimony was incredible and he had a motive to testify in a light favorable to Bradmark; (3) that Bruce Carr, Bradmark's local counsel, should have testified; (4) that the ALJ improperly relied upon an alleged "oral agreement" between the lenders and Bradmark; (5) that AT&T is the real-party-in-interest; (6) that Bradmark does not know how it could extinguish its debt if it were required to do so; (7) that the circumstances surrounding Bradmark's failure to report this ownership information are practically identical to those surrounding Normandy's failure to report certain ownership information, and therefore, Bradmark (like Normandy) should be disqualified; and (8) that Bradmark failed to identify and produce other ownership-related documents.

11. In response, Bradmark contends that though it initially failed to identify and provide the warrant documents, once that omission was realized it was corrected. Bradmark asserts that the lack of intentional deceit is further evidenced by several facts: (1) Bradmark voluntarily produced the corporate documents that referenced the warrant documents; (2) Heckman candidly testified at deposition (and at hearing) regarding the same; and (3) Turpin testified at hearing, corroborating Heckman's version. Bradmark submits that the ALJ, who had the opportunity to view the demeanor of both Donald Heckman and Turpin, credited their testimony. Finally, Bradmark submits that collateral facts also lend credibility to Heckman and Turpin's testimony, *e.g.*, the fact that even if AT&T exercised its right under the warrant, it would still not gain control of Bradmark.

12. *Discussion*. There is no question that Bradmark violated the Commission's reporting requirements in failing to initially produce the warrant documents for its opponents. Where information is required to be reported, a significant failure invariably raises questions of intent. *Edwin A. Bernstein*, FCC 91R-105, released November 20, 1991, *citing David Ortiz Radio Corp. v. FCC*, No. 90-1412 (D.C. Cir. August 20, 1991). In the aforecited cases, further exploration of significant reporting failures was demanded. Here, the ALJ did add and try a truthfulness issue against Bradmark on the failure. The key inquiry is, of course, one of intent, since "it is well-established that the mere existence of an error without any indication that the [applicant] meant to deceive the Commission does not elevate the mistake to the level of an intentional misrepresentation.'" *Valley Broadcasting Co.*, 4 FCC Rcd 2611, 2615 (Rev. Bd. 1989)(subsequent affirmance omitted), *citing George E. Cameron Jr. Communications*, 91 FCC 2d 870, 989-99 (Rev. Bd. 1982).

13. We will not disturb the ALJ's conclusion for several reasons. First, while Bradmark did not initially supply the warrant documents themselves, it did immediately supply corporate documents that clearly adverted to the warrants as well as the "put and call" feature. Thus, it supplied a document entitled "Unanimous Written Consent of the Board of Directors of Bradmark Broadcasting Company, Inc.," part of which read:

> RESOLVED, that the Corporation enter into a Put and Call Agreement (the "Put and Call Agreement") with the Lender pursuant to which if any warrants are issued to the Lender *as provided in the Loan Agreement* the Lender shall have the right under certain circumstances to sell the warrants and the Corporation shall have the right under certain circumstances to call the warrants, which Put and Call agreement is to be substantially in the form of that presented to this meeting, with such changes in the text . . . .

See Skidelsky Exhibit 4 (emphasis added).[4] In *Omaha Channel 54 Broadcasting Group, Limited Partnership*, 3 FCC Rcd 870 (Rev. Bd. 1988) *review denied*, 3 FCC Rcd 6136 (1988), an applicant's corporate structure itself was unclear; but we there found that because the applicant had "openly and promptly exchanged its Articles of Incorporation, . . . we can hardly charge it with either misrepresentation or lack of candor." *Id.*, at n.3. Similarly, here, Bradmark promptly produced the documents in question.

14. Second, the ALJ heard both Heckman and Turpin's testimony that there was never an intention on the part of the warrant holder to exercise the warrant, but that it existed merely as a mechanism to skirt the New York State usery laws (*see supra* note 3). As we have stated many times, the Board is generally enjoined to defer to the credibility findings of an ALJ. *TeleSTAR, Inc.*, 2 FCC Rcd 5, 12-13 (Rev. Bd. 1987)(subsequent history omitted), and it does so regularly where the record evidence supports those findings. *See e.g., Cannon Communications Corp.*, 5 FCC Rcd 2695, 2700-03 (Rev. Bd. 1990)(subsequent history omitted); *Advanced Broadcast Technologies, Inc.*, 5 FCC Rcd 1960, 1964 (Rev. Bd. 1990), *aff'd* , 5 FCC Rcd 7651 (1990); *Adlai E. Stevenson IV*, 5 FCC Rcd 1588, 1589 (Rev. Bd. 1990); *Tri - State Broadcasting Co., Inc.*, 5 FCC Rcd 1156, 1169-73 (Rev. Bd. 1990)(subsequent history omitted); *Atlantic City Community Broadcasting, Inc.*, 6 FCC Rcd 925, 927 (Rev. Bd. 1991). We find such evidence here and do not overturn the credibility findings.

15. Finally, and in response to Skidelsky's demand that AT&T be regarded as a real-party-in-interest to the Bradmark application, we observe that the case law has rather consistently held that convertible interests will not affect the ownership/integration analysis unless there appears to be a likelihood that the interests will be converted. Hence, in *Channel 32 Broadcasting Company*, 5 FCC Rcd 7373, 7376-77 (Rev. Bd. 1990) *recon. denied*, 6 FCC Rcd 872 (1991), *modified*, FCC 91-271, released September 4, 1991,[5] we stated:

> In *Signal Ministries, Inc.*, ... the Board rehearsed the long-standing doctrine that "[w]here . . . it is *unlikely* that a convertible interest will be exercised, the potential ownership interest will have no impact on the comparative analysis." 104 FCC 2d at 1491

> (emphasis added) (*citing Washington's Christian TV Outreach, Inc.*, 99 FCC 2d 395, 410-414 (Rev. Bd. 1984) (subsequent affirmances omitted)).
>
> In *Signal Ministries* and *Washington's Christian*, we did forbear from attributing equity interests convertible to active status because the preponderance of record evidence in each specific case persuaded us that conversion was unlikely for the (then) forseeable future.

Cf. Doylan Forney, *supra*, 5 FCC Rcd at 5427-28.

16. Whereas the question of conversion "likelihood" is always somewhat speculative, and the burden is on the applicant to show that the likelihood of conversion is remote, we will not upend the *I. D.* on this aspect. One, an officer for the warrant holder, Turpin, testified under oath that it was never the intention of the warrant holder to exercise the warrant, and that "understanding" was repeatedly communicated to Bradmark.[6] Two, the "put and call" agreement does enable Bradmark to extinguish AT&T's purchase rights. In that regard, Skidelsky argues that Bradmark's "call" option is of dubious value in forefending any AT&T assault on Bradmark stock, since Bradmark once defaulted on a loan payment (December, 1988), and thus lacks the financial muscle to pin AT&T. Skidelsky Exceptions at 30. At the same time we reflect (as Skidelsky does not) that (a) Bradmark negotiated a deferral at that point; and (b) the default occassioned no conversion, the very point at issue. And three, AT&T, like its predecessor Pacificorp, has thus far taken no actions inconsistent with those of a passive lender.[7]

17. Applying the *Signal Ministries* standard, we will not overturn the ALJ's determination that Bradmark has demonstrated the unlikelihood of an AT&T conversion. Although the Board has not hesitated to reduce integration credit where an applicant's ownership share might soon diminish because of a pre-existing equity agreement, 104 FCC 2d at 1497-98 n.16; *Payne Communications, Inc.*, 1 FCC Rcd 1052, 1057-58 (Rev. Bd. 1986)(option holder shown likely to exercise) *settled, sub nom. Evergreen Broadcasting Co.*, 4 FCC Rcd 8224 (1989), *vacated*, 6 FCC Rcd 1606 (1990), *modified*, 6 FCC Rcd 5599 (1991); *cf. George Henry Clay*, 5 FCC Rcd 317, 319-20 (Rev. Bd. 1989)(integration credit denied where applicant principal unlikely to acquire equity share), *recon. denied sub nom. Alabama Radio Movement, Inc.*, 5 FCC Rcd 2997 (1990), we find the Bradmark/AT&T situation to be a reasonable "integration" analogue to *Doylan Forney*, where an applicant received no "diversification" demerit simply because one of its principals was the director of a lender which, in turn, held warrants convertible to stock in several other broadcast stations. Citing *Signal Ministries*, the Commission there found no likelihood that the warrants would be converted and it assessed no comparative penalty. 5 FCC Rcd at 5427-28.

18. In finding that Bradmark did not misrepresent, lack candor, or intend to deceive, we reject Skidelsky's contentions regarding the warrant documents. To the extent that Skidelsky argues that the ALJ improperly relied upon an oral agreement between the lenders and Bradmark, Skidelsky lobbies for a strict application of the parol evidence rule, which excludes extrinsic evidence to vary the terms of a written instrument. Skidelsky Exceptions at 19-21. At the same time, the parties' mutual interpretation of an agreement is customarily favored. *See* WILLISTON ON CONTRACTS, THIRD EDITION, 623. Thus, we conclude that the ALJ did not err in relying upon Bradmark's "understanding" with its lenders. *See Washington's Christian*, *supra*, 99 FCC 2d at 413.

19. Skidelsky also argues that the circumstances surrounding Normandy's failure to report ownership information are almost identical to those surrounding Normandy's failure to report such information, and since Normandy was found unqualified on this basis, Bradmark too should be found unqualified. Skidelsky Exceptions at 8-12. The Board, however, does not reach the reporting issue against Normandy, because we find Normandy lacked reasonable assurance for its transmitter site and is unqualified on that basis alone. We, nevertheless, find the following language in the *I. D.* instructive:

> Mr. Lynch's failure to report a contingent ownership interest would not, standing alone, disqualify Normandy but his explanation of why he acted as he did is inconsistent with reliable, trustworthy behavior. He knew or should have known that the ownership agreement needed to be produced but he did not produce it. *When this incident is considered with his behavior in certifying Normandy's antenna site and the multiple misrepresentations in its Threshold Showing on programming, it is evident that the Commission can not rely on Normandy's representations in this proceeding and that there is a substantial likelihood that Normandy will not make a trustworthy licensee. Normandy has failed to meet its burden on these issues; it is not qualified.*

I. D., at para. 62 (emphasis supplied).

20. Lastly, Skidelsky questions Bradmark's financial ability to extinguish the warrant. Skidelsky states that, "Bradmark lacks any ability to extinguish or thwart the exercise of the warrant, or put by its lender or any subsequent assignee." Skidelsky Exceptions at 31. However, in the following sentence Skidelsky more accurately states that "Bradmark has not inquired, nor is it aware, of any lender or equity sources available to it with sufficient funds so that Bradmark could extinguish or thwart the exercise of the warrant . . . ." *Id.* Thus, Skidelsky points to no solid evidence that Bradmark could not later arrange funding to thwart the exercise of the warrant. Under these circumstances, we cannot speculate at this stage that Bradmark would be unable to preclude the exercise of the warrant.

21. *Post-I. D. Pleadings*. Also under review are various pleadings against Bradmark submitted by Skidelsky subsequent to the release of the *I. D.* These include: a Petition To Enlarge Issues, filed May 22, 1991; a Motion To Compel Disclosure, filed May 22, 1991; a Petition To Enlarge Issues, filed August 15, 1991, and a Motion For Production of Documents, filed August 15, 1991. Bradmark has opposed these pleadings. In turn, Skidelsky has responded to Bradmark's opposition.[8] The Board recently stated in another case that:

> [we have] been recently deluged with *post*-oral argument filings in numerous proceedings. Henceforth, the Board will follow the example of the Commission and summarily dismiss any pleading seeking to argument exceptions or to raise new matter, *cf. Texas Communications Limited Partner-*

> *ship*, 6 FCC Rcd 5191, 5194 n.1 (1991); *Sharron Annette Haley*, 6 FCC Rcd 4630 n.1 (1991), unless the pleading meets the standards of Section 1.229 of the Rules. *Great Lakes Broadcasting, Inc.*, 6 FCC Rcd 4331, 4332 (1991).

Edwin A. Bernstein, FCC 91R-105, released November 20, 1991 at n.1. Some of the unauthorized Skidelsky pleadings were filed prior to oral argument, but we treat on the "merits," as we must, *Great Lakes*, only the petitions to enlarge (*see supra* note 8).

22. *May 1991 Petition To Enlarge*. In his first petition, Skidelsky seeks the addition of a misrepresentation and/or candor issue against Bradmark based on a perceived inconsistency between the hearing testimony of Donald Heckman and his alleged comments to reporter Barbara Ballman of the *Capital District Business Review*, as revealed in her article "Bradmark Wins Round 1 In Tough License Fight," published during the week of May 6-12, 1991. According to Skidelsky, Heckman testified at hearing that he "had discussed Bradmark's Queensbury application with a broker (Media Venture Partners or MVP) and potential buyers," citing to, among other things, Tr. 338-39, but that Heckman stated for publication that "he had not yet spoken with any potential buyers for Bradmark's existing local AM/FM radio stations." May 1991 Petition, at 2. Skidelsky attaches his own Declaration and a copy of the Ballman article, but fails to include a signed Declaration from Ballman. Skidelsky admits that his allegation relies on hearsay, and he explains that he "has been unsuccessful in obtaining a Declaration signed by the subject article's author, Ms. Ballman . . . [because] her publisher . . . refused to allow her to do so." *Id.*, at 3. He contends, nonetheless, that because the reporter has accurately reported Heckman's statements in prior articles, "Mr. Heckman has likely been quoted accurately again." *Id.*, at 4. Skidelsky concludes that, "given these circumstances, the ends of justice will be better served by relaxing the formal rules of evidence and allowing any hearsay in order to support adding the requested issues, as permitted pursuant to Section 1.351 of the Commission's rules." He also submits that "good cause" has been shown for a waiver of Section 1.3 of the Rules. *Id.* In the alternative, he requests that the Board reopen and remand the proceeding to the ALJ with instructions to subpoena the reporter, to allow additional discovery, and to conduct further hearing pursuant to Section 1.276 (c).

23. Bradmark responds that the petition is based on insufficient evidence, citing Section 1.229 (d). Bradmark also states that:

> [w]hatever statements that Mr. Heckman made to the reporter who wrote the article were in the context of an interview regarding the *Initial Decision* and what steps, if any, Bradmark had taken to comply with the divestiture condition attached to the grant of Bradmark's application. In this context, there would have been no reason for Mr. Heckman to have referred to unsuccessful efforts that he had made to sell Bradmark's existing stations which ended in the Fall of 1989.

Bradmark Opposition, *supra* note 8, at 2-3 (footnote omitted). Bradmark further pleads that Skidelsky knows Heckman's testimony to be truthful because, among other things, he had obtained a copy of the sales presentation materials from Bradmark's broker, MVP, as well as an earlier-filed Declaration of a MVP partner which confirmed "the facts regarding MVP's efforts to sell the stations on behalf of Bradmark." *Id.*, at 3.

24. Skidelsky replies that Bradmark's opposition contains no Declaration from its principal, Donald Heckman, as required by the Commission's Rules; that Skidelsky does not necessarily know that Heckman was truthful simply because Skidelsky cross-examined Heckman; and that Bradmark's efforts to sell its existing station did not end in the Fall of 1989, as alleged by Heckman.

25. *August 1991 Petition To Enlarge*. In his second petition, Skidelsky again seeks a misrepresentation and/or candor issue against Bradmark but this time based on a telephone conversation with a "Mr. William Kayo" on August 13, 1991. According to Skidelsky, he learned during that call that Bradmark has been negotiating with Kayo for the sale of this Channel 289B1 for several months. As was the case with Skidelsky's May 1991 petition, Skidelsky has failed to provide a Declaration of Mr. Kayo attesting to the fact that such a telephone conversation did occur, but instead cites to rule Sections 1.351 and 1.3 as support for relaxing the rules of evidence. Skidelsky does provide his own Declaration.

26. Bradmark, of course, opposes Skidelsky's second petition on the grounds that it is unsupported by an affidavit or Declaration of Kayo, "the person whom Skidelsky claims possesses the personal knowledge of facts on which his Petition is predicated," citing to Section 1.229 (d). Bradmark Opposition, *supra* note 11, at 2. Bradmark also opposes the petition on the basis of false allegations, and it attaches the Declarations, under penalty of perjury, of Kayo and Donald Heckman that "neither Bradmark nor anyone acting on its behalf has ever offered to sell the Queensbury B1 to Mr. Kayo and that it has never even been suggested to Mr. Kayo that he might be able to purchase the B1 from Bradmark." *Id.*, at 3. Rather, according to Bradmark, it has had discussions with Kayo concerning the possibility that either he, or a group of investors that he represents, might (a) make a loan to Bradmark to enable it to pay-off its outstanding indebtedness to AT&T; (b) provide Bradmark with a commitment for funding for the B1 which would replace the commitment from AT&T that Bradmark has been relying upon, and (c) purchase *nonvoting* stock in Bradmark. *Id.* Bradmark concludes, "There is nothing improper in Bradmark having had such discussions with Mr. Kayo and the fact that Bradmark has had discussions looking to refinance its existing loan and raise new capital clearly does not cast any doubt on the sincerity of Bradmark's intentions to construct and operate the Queensbury B1 or the sincerity of the Heckmans' commitment to integrate themselves into the operations of that station." *Id.*, at 4.

27. Skidelsky replies that Bradmark's opposition is untimely by two days;[9] that his second petition is supported by his own Declaration and that he has knowledge of the telephone conversation with Kayo; and that "the sole fact alleged in Skidelsky's Petition which is denied by Bradmark's Opposition is that a sale of the B-1 is on the table." Skidelsky Reply, *supra* note 8, at 3. Skidelsky has also filed a Supplement to the second petition, appending a copy of an article from the *Capital District Business Review*, reporting on October 14-20, 1991 that the New York State Insurance Department has revoked the license

of Great Northern Associates Inc., of which William Kayo is President, for breach of fiduciary duty. Skidelsky Supplement, filed November 15, 1991.

28. *Discussion*. Section 1.229 (d) of the rules controls. It states that motions to enlarge issues:

> shall contain specific allegations of fact sufficient to support the action requested . . . [and that] such allegations of fact, except for those of which official notice may be taken, shall be supported by affidavits of a person or persons having personal knowledge thereof.

47 C.F.R. 1.229 (d). Here, Skidelsky has failed to support either petition with a proper affidavit. The Commission recently admonished the ALJs and the Board to "strictly adhere" to the standards established in Rule 1.229. *Proposals to Reform the Commission's Comparative Hearing Process*, 6 FCC Rcd 157, 161 (1990) ("To avoid the need to try unnecessary issues, we expect ALJs and the Review Board to strictly adhere to the standards established in the rule [1.229]."); *Great Lakes Broadcasting, Inc., supra*, 6 FCC Rcd at 4333. ("We believe that the Board and ALJs should strictly enforce the provisions of Section 1.229, including the requirement that petitions to enlarge issues rely on evidence that is new and that could not reasonably have been discovered earlier, in order to expedite the hearing process and the institution of new service.") Further, Skidelsky's argument for relaxation of Rule 1.229, pursuant to Rule 1.351, or waiver, pursuant to Rule 1.3, is unconvincing where the "specific allegations of fact" are contained only in Mr. Skidelsky's own Declarations. As we have stated, "relevant and material hearsay" may be considered but the weight to be accorded hearsay depends on whether "the declarants are disinterested witnesses." *Janice Fay Surber*, 5 FCC Rcd 6155, 6158 (Rev. Bd. 1990). Here, Mr. Skidelsky is clearly not a disinterested witness and, therefore, no weight may be given his statement.

29. An even more critical deficiency in Skidelsky's Petitions to Enlarge is his failure to make the requisite showing for reopenning the record. As stated by the Commission in *Washoe Shoshone Broadcasting*, 5 FCC Rcd 5561 (1990)(citations omitted):

> It is well established that, to justify a reopening of the record, a petitioner must show unusual or compelling circumstances. A petition to reopen must be supported by a showing that the petitioner could not, through the exercise of due diligence, have discovered the facts relied upon at an earlier date, and that the new evidence, if true, would affect the ultimate disposition of the proceeding.

See Kaye -Smith Enterprises, 98 FCC 2d 675, 686 (Rev. Bd. 1984) ("the requisite showing for reopening the record [is] the petition must be supported by newly discovered evidence; the facts relied on must show that the petitioner could not with due diligence have known or discovered such facts at the time of the hearing; and the new evidence must, if true, affect a basic part of the decision.") (subsequent history omitted); *Kern Radio Dispatch*, 20 RR 967, 969 (1960). The record in this proceeding closed October 19, 1990. *Order*, FCC 90M-3351, released October 24, 1990. Skidelsky has not raised a substantial and material question of fact concerning Bradmark's truthfulness, and he has certainly not presented evidence that would affect the ultimate disposition of the case, if true. Bradmark's explanations for the alleged inconsistencies appear reasonable and, in the absence of a Declaration from Ballman or Kayo corroborating Skidelsky's allegations, we deny the Petitions to Enlarge. *See Henderson Broadcasting Co., Inc.*, 39 RR 2d 257 (Rev. Bd. 1976) (request to reopen record denied where "new evidence" offered was based on newspaper articles reporting plans of applicant's principal to devote time to activities other than proposed broadcast station but principal unequivocally represented that he had abandoned those plans), *cf. Boca Broadcasters, Inc.*, 7 FCC 2d 198 (1967) (request to reopen record granted where "new evidence" consisted of newspaper advertisement for actual sale of CP of proposed station). We likewise deny this second Petition.

NORMANDY

30. *Transmitter Site*. Normandy originally specified a transmitter site at the intersection of New York Rte. 9 and Northern Pines Road in Wilton, New York.[10] Normandy Application, Section V-B, Question 2a. Its sole voting shareholder, President, Treasurer, and Chairman of the Board Christopher P. Lynch, certified that Normandy had obtained "reasonable assurance" that the site would be available from Frederick Abess, the site owner. *Id.*, Section VII. However, in a Declaration dated June 7, 1990, Abess avowed:

> To the best of my knowledge and recollection, I have never spoken with Christopher P. Lynch, or with anyone who identified himself or herself as acting on behalf of Normandy Broadcasting concerning the utilization of my property for a radio station transmitter site, or about any other matter.

Bradmark Petition, filed June 15, 1990, Exhibit 2. Consequently, the ALJ added an issue "[t]o determine whether Normandy engaged in a misrepresentation, or was lacking in candor, when it certified in its application that it had reasonable assurance that its proposed transmitter site was available." *Order*, FCC 90M-2284, released July 30, 1990.

31. At hearing, the only evidence submitted by Normandy regarding this issue was Lynch's own testimony. In relevant part, Lynch stated:

> 3. One of the telephone numbers I called [regarding sites] was of Bob Howard Realty; I had obtained the number from a "For Sale" sign on property in Wilton. I spoke to a person at Bob Howard Realty, who professed knowledge of the property. The person -- identified the land as belonging to Frederick Abess and said that Mr. Abess had listed the property for sale with Bob Howard Realty; - the person gave me a description of the land, including the price and a number of details . . . . -told me that Mr. Abess had complained that Bob Howard Realty had not aggressively marketed the property. I asked the person whether I could negotiate a lower price. The person told me to call Mr. Abess, and provided me with his telephone number.

> 4. I telephoned Mr. Abess from my home. . . . The call lasted about 5-10 minutes. I identified myself and the person at the other end of the line identified himself as Frederick Abess. I explained the purpose of my call which was to find a property I could buy for transmitter-tower site. I also asked whether Mr. Abess' land corresponded to the description that Bob Howard Realty agent had given me. I specifically asked whether the property was available for purchase. Mr. Abess answered that the land was available for sale, and he quoted me a price about $40,000, which I was willing to pay.
>
> 5. The next day, I discussed the site with [Frank E.] Shoupe [Normandy's engineer]. I told him to walk the land.
>
> 6. He thereafter reported that he had walked the land, and he gave specific descriptions of the land. Based on his report, I concluded that the Abess site was suitable and I specified it in the application Normandy filed in August 1987 . . . . I had no further contact with Mr. Abess until June, 1990, when I received a telephone call from a male caller who stated that he was Mr. Abess, and who asked if he had an arrangement about selling his land to me. I thought this was strange and told him that if he were indeed Mr. Abess, he should know whether or not we had an agreement. I asked him why he was asking me and he seemed to get quite agitated. I suggested that if he came down to the radio station the next day, I would be more than happy to discuss the matter with him, but in return for my information, I would definitely want to know why he was pursuing the matter. At that time, he got even more agitated saying something to the effect that "he would just have to do what he had to do." I am reasonably sure the gentleman I spoke to was Mr. Abess because I had to return his call from a message he left on my answering machine; the number was registered to a Mr. Abess. I did not recognize his voice and I declined to answer his question.

Normandy Exh. 7 at 3-4. However, Lynch could not provide the name of anyone he spoke with at the Bob Howard Realty, Tr. 1097; the listing with the realtor had apparently expired, though nobody told Lynch, Tr. 1098-99; and Lynch could find nobody at the realtor who recalled speaking with him. Tr. 1097. The ALJ held that Lynch had failed to support his account of the circumstances surrounding the site certification with "any objective or corroborating evidence," he found Lynch's account otherwise "implausible." *I. D.* at para. 50.

32. But, more importantly, the ALJ concluded that even if Lynch's account were accurate, it "does not support his claim that he had reasonable assurance for the site." *Id.*, at para. 49. The ALJ observed that Lynch "does not explain why he believed he had assurance for the site on the basis of [a five to ten minute] . . . conversation," in which (according to Lynch alone) he and Abess merely discussed the price of the land, and whether Abess would permit Lynch to walk the land to determine if it were suitable for the antenna site. Missing from the "conversation" was any discussion of whether Lynch determined that the land would be available when needed in two to four years, or whether Abess would be willing to sell the land in question on Lynch's terms. *See id.*, para. 51. The ALJ further observed that, even if Abess had forgotten the conversation (as Lynch speculated), Lynch "did not even go to see him or talk with him after Mr. Abess provided his declaration." *Id.* The ALJ concluded:

> On this record, the only conclusion that can be reached is that Normandy designated a site for which it had no assurance and that it knew when it designated the site that it had none . . . .Form 301 has only a few substantive answers which actually provide specific details about an applicant's proposal. The assurance of an antenna site is one of them. If the Commission cannot rely on a truthful answer when so little is asked, it is unlikely that it will be able to do so when the applicant must act as a steward of the public interest over an extended period of time. Normandy has not established that it responded honestly when it told the Commission that it had reasonable assurance for the use of Mr. Abess' land.

Id., at para 52.

33. Normandy excepts to its disqualification based on its site certification, arguing that multiple sites, including the Abess site, were available to the Queensbury applicants in July and August 1987 and, therefore, it had no motivation to lie to the Commission about the Abess land when presumably it could have easily obtained reasonable assurance of any number of sites. *See* Normandy Exceptions at 12.

34. Both Bradmark and Skidelsky have replied. Bradmark argues that the only evidence presented by Normandy was "Lynch's self-serving recollection of his conversations with Abess and a real estate agent whose name Lynch could not recall;" and, as a matter of law, that does not establish that Lynch and Abess reached a "mutual understanding." Bradmark Reply at 4. Bradmark further contends that the "fatal flaw in Normandy's showing . . . is that Lynch clearly failed to discuss with Abess *any* terms for lease or ownership." citing *62 Broadcasting, Inc.*, 4 FCC Rcd 1768, 1772 (Rev. Bd. 1989), *review denied*, 5 FCC Rcd 830 (1990); *Radio Delaware, Inc.*, 4 FCC Rcd 8630, 8631 (Rev. Bd. 1989); *Progressive Communications, Inc.*, 3 FCC Rcd 5758, 5759 (Rev. Bd. 1988)(subsequent history omitted). Bradmark also faults Normandy for failing to present any witnesses to corroborate Lynch's account, citing *Port Huron Family Radio, Inc.*, 4 FCC Rcd 2532, 2535 (Rev. Bd. 1989)(settled in part 4 FCC Rcd 6144) (1989), *review granted in part*, 5 FCC Rcd 4562 (1990). Similarly, Skidelsky argues that "at best Lynch expressed a mere general willingness to buy the land" and that is not "a specifically negotiated understanding sufficient to constitute a reasonable assurance of transmitter site availability." Skidelsky Reply at 4-5.

35. *Discussion.* Our review of the record does not persuade us that the ALJ erred in finding that Normandy lacked "reasonable assurance" of a site and disqualifying it accordingly. Though the standard for "reasonable assurance" is a liberal one, there must be "some clear indication from the landowner that he is amenable to entering into a future arrangement with the applicant for the use of the property as a transmitter site, on terms to be negotiated, and that he would give notice of any change of intention." *Elijah Broadcasting Corp.*, 5 FCC Rcd 5350, 5351 (1990); *see also Genesee Communication, Inc.*, 3 FCC

Rcd 3595 (Rev. Bd. 1988) (there must be at least a meeting of the minds resulting in some firm understanding as to a site's availability). Here, we agree with Skidelsky, there was no "clear indication" from Abess, the landowner, that he was "amenable" to allowing Normandy to use his land for an antenna site. *See Adlai E. Stevenson IV, supra*, at 1589. On the contrary, Abess claimed no recollection of being contacted by anyone from Normandy. In this regard, it is worth noting that in appending the site certification to the FCC Form 301, the Commission sought to insure that applicants do, in fact, obtain reasonable assurance from the property owner or its agent that the site will be available thereby deterring "speculative applications." *Order* (*In the Matter of Amendment of Sections 73. 3572 and 73. 3573 Relating to Processing of FM and TV Broadcast Applications*), 58 RR 2d 776, 782 (1985). Based on the record here, it can only be concluded that Normandy's application is "speculative," precisely the kind the Commission sought to avoid.[11] We affirm the ALJ. *See REM Malloy Broadcasting*, 6 FCC Rcd 5843, 5845-46 (Rev. Bd. 1991). Because Normandy is disqualified on the basic site issue, we need not go further to determine whether Normandy's conduct amounted to misrepresentation.[12]

COMPARATIVE CONSIDERATIONS

36. *Diversification*. The ALJ found that neither Bradmark nor Skidelsky suffer a diversification demerit. *I. D.*, para. 72. Skidelsky challenges this conclusion as to Bradmark. Skidelsky Exceptions at 23-26. Although the Heckmans testified that they will divest WSTL(AM) and WENU(FM), and leave their current management positions at those stations (Bradmark Exhibit 1 at 3; Bradmark Exhibit 2 at 5; Bradmark Exhibit 3 at 6) Skidelsky contends that some of their testimony indicates that they believe that they can keep their AM station.[13] Skidelsky further argues that Bradmark's divestiture pledge lacks "a reasonable assurance of effectuation," since it is unclear whether the Heckmans can sell the stations. In response, Bradmark asserts that it and the Heckmans have made "a specific and binding divestiture commitment". They concede that the fact that they will remain in the same broadcast market may affect the price ultimately received for the AM and FM stations, but there is "no record support" for the argument that "it will be impossible for Bradmark to find a buyer." Bradmark Reply at 14-17.

37. We will also credit Bradmark's divestiture pledge. It appears here that Skidelsky is fly-specking the hearing transcript for alleged inconsistencies in the testimony of the Heckmans (*see supra* note 8). The Heckmans have made an unequivocal pledge to the FCC to divest; and have previously retained a media broker to do just that. We have conditioned a grant to Bradmark on its fulfillment of its pledge. Under these circumstances, we find no basis to question the pledge.

38. *Bradmark Integration*. Both Bradmark and Skidelsky, the only qualified applicants, propose 100% integration and were credited with such by the ALJ. *I. D.*, para. 69. Skidelsky and Normandy, however, mutually except to Bradmark's integration credit, and Normandy excepts to Skidelsky's integration credit. Turning first to Bradmark, Donald and Betty Jean Heckman both propose to work full-time as managers, he as general manager and she as business manager. As noted by the ALJ in the *I. D.*, these are positions they currently hold at WENU(FM), Hudson Falls, New York, and WSTL(AM), South Glen Falls, New York. Mrs. Heckman testified as to her specific duties at the proposed station[14] and summed up her role as follows:

> My husband and I have owned and managed Stations WENU and WSTL as a husband and wife "team," and we intend to continue this team management approach in connection with the management of Bradmark's Queensbury FM station. As part of a management team . . . in addition to performing the duties of Business Manager . . . when my husband is absent . . . I will exercise full management authority with respect to all aspects of the station's operations including the programming and sales and routinely participate with my husband in making all major decisions relating to the management and operation of the Queensbury station, and he and I will regularly, and jointly, hold meetings with department heads to discuss and review operating policies and procedures.

Bradmark Exhibit 3, at 2.

39. In part, Skidelsky argues that Betty Jean Heckman is unlikely to exercise management-level responsibilities and that, therefore, Bradmark is entitled to no integration credit or something far less than 100%. Skidelsky specifically argues that Mrs. Heckman: had no role in the preparation of the Queensbury application; was unaware that another Bradmark application was pending at the FCC; was unable to prepare the list of her proposed responsibilities as business manager without her husband's assistance and could not recite them to the ALJ at the hearing without referring to a prepared, written exhibit listing them, even though she currently holds the same position at Stations WENU and WSTL; and that most of her proposed duties are clerical in nature. Skidelsky concludes that,"[c]ontrary to Bradmark's claim of joint team management, the husband (an experienced broadcaster) is clearly the driving force." Skidelsky Exceptions at 28.

40. Bradmark replies that: the portions of the record cited by Skidelsky do not support his argument; in actuality, there is "substantial" record evidence to support the award of integration credit, including Bradmark Exhibit 3; both Heckmans testified as to their management team approach in which they work jointly on matters; and the Heckmans testified as to specific instances involving their existing stations where the managerial role of Mrs. Heckman is evident. Bradmark Reply at 19-20, *citing National Communications Industries*, 6 FCC Rcd 1978, 1982 (Rev. Bd. 1991), in support.

41. We agree with Bradmark that *National Communications Industries* is controlling here. In that case, a similar argument was made that an applicant's integration credit should be diminished because one of its principals (again, the wife in a husband-wife team), who proposed to work full time at the station as the Director of Public Affairs and Public Service, was unlikely to have a managerial role. The argument there was premised on the fact that the principal's current duties at another broadcast station (owned by the same couple) were primarily clerical, and there was testimony that the proposed station would be operated "the same way" as the currently-owned station. We declined there to decrease the integration credit, heeding "the court's admonition in *Office of Communications*

of United Church of Christ v. FCC, 425 F.2d 543, 549 (D.C. Cir. 1969), that evidence which is 'not contradicted . . . or on its face incredible . . . [is] entitled to carry the day in terms of establishing the point to which it was directed.'"

42. Skidelsky made essentially the same argument before the ALJ, who rejected it, concluding in relevant part:

> The evidence does not support Skidelsky's claim [that Ms. Heckman's proposal is to work, in effect, as an office manager not a business manager]. Bradmark established that Ms. Heckman will supervise employees and that she will have the authority to hire and fire them. She also, according to Mr. Heckman, is consulted on and helps make policy decisions at the stations they currently operate....Mr. Heckman also provided a very plausible explanation of how they operate as a team and share authority at the stations they now operate; he represents that they will continue to share authority at the proposed Queensbury facility.

I. D. at para. 69. As we have said on numerous occasions, "[u]nless clear error is shown, it has been the Board's usual practice to yield to the sapience of *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), and to defer on such sensitive factual judgments to 'an impartial, experienced examiner who has observed the witness and lived with the case . . . .' 340 U.S. at 496." *Knoxville Broadcasting Corp.*, 103 FCC 2d 669, 688 (Rev. Bd. 1986); *accord*, *Ft. Collins Telecasters*, 103 FCC 2d 978, 986 (Rev. Bd. 1986) (affirming ALJ's conclusions, in part, based on fact that Board "will generally defer to an ALJ's well-considered conclusions regarding the integration claims of an applicant's principals, particularly where such judgments partake of what we might call a 'credibility' finding'....")(subsequent history omitted). Thus, here too, we will defer to the judgment of the ALJ.

43. Next, Skidelsky and Normandy argue that Bradmark's integration should be reduced by 27% due to the existence of the AT&T warrant. Skidelsky Exception at 30-31; Normandy Exceptions at 18. However, as we indicated *supra*, paragraphs 15-16, warrants are not attributed to applicants in comparative proceedings for purpose of determining integration unless there is a "likelihood" of conversion. *Channel 32 Broadcasting Company*, *supra*. Here, we find no "likelihood" for the reasons explicated above, and we reject Skidelsky and Normandy's arguments accordingly.

44. Skidelsky further argues that Bradmark should not be credited fully because it lacks a *bona fide* intent to construct as allegedly evidenced by the fact that a prospectus circulated by its broker contained references to a Queensbury "B-1 Upgrade" as being for sale. Skidelsky Exceptions at 32-39. The prospectus, and the alleged sale of a "B-1 Upgrade," were also the subject of a Petition To Enlarge Issues filed by Normandy on November 15, 1990. The ALJ denied the Petition in the *I. D.*, paras. 65-67, finding that the prospectus was a "misunderstanding" by the broker, and that once the mistake was discovered, Donald Heckman "left no doubt that he did not intend to sell the construction permit for the Queensbury facility." *Id.* at para. 67. Significantly, the ALJ found that Heckman had testified to this effect, *id.*, and that Randall E. Jeffrey, a partner in the brokerage firm of Media Venture Partners, had signed a declaration which corroborated Heckman's testimony. Bradmark Opposition To Petition To Enlarge Issues, filed November 28, 1990, Declaration of Randall E. Jeffery at 1.

45. We find that the ALJ did not err in refusing to add the requested issue, since the facts presented were not "newly discovered evidence." These had already been revealed at the hearing, the prospectus marked as Skidelsky Exhibit 3. Further, even if it were "newly discovered evidence," we will not overturn the ALJ's determination that the discussion of the "B-1" in the prospectus was merely a mistake. This conclusion is supported by the fact that when Bradmark was approached about a potential buyer for the AM-FM combination and the B-1 upgrade, according to the broker:

> Mr. Heckman explained that the application that I had assumed involved an "upgrade" of the facilities of Station WENU actually was for an entirely new Class B1 Station, that Bradmark could not sell its interest in this application, and that Bradmark intended to prosecute the B1 application and, ultimately, own and operate the B1 station.

Bradmark Opposition To Petition To Enlarge Issues, *supra*, Declaration of Randall E. Jeffery at 1. Though Skidelsky excepts to this conclusion, he provides no contraverting evidence which would require us to overturn the ALJ's refusal to add the issue or reopen the record.

46. *Skidelsky Integration*. Skidelsky, now a lawyer who proposes to abandon his practice, proposed to work full-time as the station's general manager. Skidelsky Exhibit 1 at 1. Skidelsky testified that, if granted the CP, he would "fully withdraw from all employment, business and any other interests which would interfere with my integration commitment." *Id.* He also testified as to various positions he has held at broadcast stations over a period of fourteen years (from 1969-1973), including but not limited to general manager, sales manager, account executive, program director and air talent.

47. Nonetheless, Normandy contends that Skidelsky should receive no integration credit because "[i]t is settled doctrine that the Commission views with askance a professional's proposal to leave his profession to become a licensee." Normandy Exceptions at 18-19. It is not. For instance, in one recent case where a similar assault was made regarding an attorney's integration pledge, we stated that "we take notice of the fact that any number of attorneys (including communications specialists) have migrated from the field of law to a pursuit in broadcasting." *Renee Marie Kramer*, 5 FCC Rcd 563, 565 (Rev. Bd. 1990), *review denied*, 5 FCC Rcd 5749 (1990), *aff'd by judgment sub nom. Joyner Communications Limited Partnership v. FCC*, No. 90- 1510 (D.C. Cir. September 16, 1991). Normandy has not refuted Skidelsky's sworn pledge to leave the law alone, in a manner of speaking, and repair to Queensbury should he here prevail (which he does not in any event). Based on our review of the record and close reading of Skidelsky's quite numerous pleadings, we do not find unbelievable his stated desire to foresake the law.

48. *Coverage Comparison*. Skidelsky excepts to the ALJ's award of a moderate preference to Bradmark for its proposal to serve more people overall than Skidelsky (Bradmark will serve 261,856; Skidelsky will serve

193,031), and to provide a second nighttime service to 2,834 (Skidelsky will not provide a second service to anyone).[15] *I. D.*, para. 71. Skidelsky first argues that he, alone, is in full compliance with Rule 73.315(a), in that he proposes 100% city grade (3.16 mV/m) coverage but the other applicants do not. The others do propose coverage in excess of 80% of the community. The Mass Media Bureau responded to this argument, pointing out that only "substantial compliance" with Rule 73.315 (a) is required, citing *John R. Hughes*, 50 Fed. Reg. 5679 (Feb. 11, 1985), and that 80% coverage constitutes such compliance. Mass Media Bureau Reply at 3-4.[16] We must concur with the Mass Media Bureau on this point.

49. Skidelsky also complains that, though he amended his application subsequent to the "B cutoff date" to increase his proposed (3.16 mV/m) coverage in response to a *Memorandum Opinion and Order*, 4 FCC Rcd 5709 (MMB 1989), he is "entitled to restore or maintain the [1mV/m] coverage proposed as of the B cutoff date," rather than the lesser 1mV/m coverage proposed in his amendment. Or, as the Mass Media Bureau pleaded:

> Skidelsky maintains, he should receive credit for the better coverage which he would have provided from a proposal which he has since abandoned. While it may be necessary to employ a fiction to insure that an applicant does not upgrade its comparative coverage as a result of an amendment, it makes no sense to employ one to credit an applicant with coverage that he will not provide.

Bureau Reply at 5. *Women's Broadcasting Coalition Inc.*, 59 RR 2d 730 (1986), cited by Skidelsky as support, runs against him. There an applicant was required to amend to a new transmitter site as a result of the withdrawal of FAA approval. In so doing, the coverage proposed by the applicant was increased from approximately 37,000 to 41,000 people. The Commission there held that the applicant could claim credit for coverage to 37,000 people only, and it held:

> Although [the applicant] cannot effectuate its original proposal, it can provide equivalent coverage from its new site, for which we will give [it] equal credit. Our aim is to accord [the applicant] that degree of credit which would best reflect the actual coverage [it]will provide without unduly prejudicing the other applicant.

59 RR 2d at 733. We find no basis to overturn the ALJ.

50. *Comparative Summation*. Bradmark and Skidelsky have been awarded 100% integration credit, and neither has been accorded diversification demerits. Both propose auxiliary power. However, Bradmark is entitled to a preference for its coverage proposal. Further, Bradmark is qualitatively superior to Skidelsky, as concluded by the ALJ and not excepted to by Skidelsky. We, therefore, affirm the ALJ's award to Bradmark.

51. ACCORDINGLY, IT IS ORDERED, That the Motion To Strike Skidelsky's Exceptions filed July 1, 1991 by Bradmark Broadcasting Company IS DENIED; that the Petition To Enlarge Issues filed May 22, 1991 by Barry Skidelsky IS DENIED; that the Motion To Compel Disclosure filed May 22, 1991 by Barry Skidelsky IS DENIED; that the Petition To Enlarge Issues filed August 15, 1991 by Barry Skidelsky, and the accompanying Motion for Production of Documents, ARE DENIED; and the Motion For Acceptance of Late Filed Opposition filed September 19, 1991 IS DISMISSED AS MOOT.

52. IT IS FURTHER ORDERED, That the application of Bradmark Broadcasting Company (File No. BPH-870819MT) for a Construction Permit for a new FM station at Queensbury, New York, IS GRANTED provided that Bradmark severs all connection with WENU (FM), Hudson Falls, New York, and WSTL (AM), South Glens Falls, New York, before the commencement of program test authority; and, that the applications of Barry Skidelsky (File No. BPH-870819MO) and Normandy Broadcasting Corporation (File No. BPH-870819NK) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Bradmark filed a Motion To Strike Skidelsky's Exceptions on July 1, 1991 and Skidelsky opposed the Motion a week later, on July 8, 1991. We will deny Bradmark's Motion because Skidelsky's Exceptions, while unconvincing, are not "sham and false," such that they should be stricken under Section 1.52 of the Commission's Rules, as requested by Bradmark.

[2] More specifically, that *Order* required that the applicants (*id.*, at n.4):

> submit copies of agreements that may result in changes in ownership, such as unexercised stock option agreements or a loan agreement providing for the conversion of debt to ownership. In addition, any oral agreement which affects control should be described. The description should include the substance of the agreement with an explanation of the circumstances under which it arose. Copies of the statement and any attached documents should be signed by a principal . . . . The parties are reminded that the completeness and accuracy of their statements may be used to form judgments about the applicant's reliability and truthfulness.

Neither the application form in use at that time (FCC Form 301, Oct. 1986), nor the instructions thereto, clearly required the reporting of outstanding convertible interests in the applicant entity. Indeed, both the questions on the form itself and the instructions are linked to the Commission's multiple ownership rules, under which "warrants, debentures and, other convertible interests" are not considered cognizable ownership interests. *Ownership Attribution*, 97 FCC 2d 997, 1021-22 (1984). *But see Doylan Forney, infra* note 5, 5 FCC Rcd at 5427 (convertible interests may yet be considered in comparative hearing process).

[3] We make no judgement here, of course, as to whether AT&T's "understanding" with Bradmark would amount to an improper evasion of state usery laws.

[4] Although the *I. D.*, at para. 5, appears to indicate that this document is contained in "Bradmark Exhibit 4," we found it in "Skidelsky Exhibit 4." Assuming the exhibit to be Skidelsky's,

he was clearly alerted to the warrant agreement. Assuming the exhibit to be Bradmark's, there was disclosure to Skidelsky. The warrant itself was produced by August 22, 1990, and the hearing did not commence until nearly two months later on October 16, 1990. Bradmark Opposition To Consolidated Motion To Enlarge Issues, filed September 17, 1990, at 3.

[5] In fact, recognizing that the Commission's ownership attribution rules categorically exclude convertible rights as a reportable ownership interest when "the contingency upon which the conversion rests is beyond the control of the holder...," *Ownership Attribution*, *supra* note 2, 97 FCC 2d at 1021-22, (1984), the Board in *Doylan Forney*, 3 FCC Rcd 6330, 6337 (Rev. Bd. 1988), sought to engraft that absolute standard to its own comparative analysis and did not attribute the interests of a warrant holder. However, in its review, 5 FCC Rcd 5423 (1990), *aff'd by judgment sub nom. Maricopa Media, Inc. v. FCC*, No. 90-1456 (D.C. Cir. October 7, 1991), the Commission corrected the Board and held that the more flexible *Signal Ministries* standard is the correct one. *See Signal Ministries, Inc.*, 104 FCC 2d 1481 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 1259 (1987), *aff'd by judgment sub nom. Adelphi Broadcasting Corp. v. FCC*, 838 F.2d 571 (D.C. Cir. 1988). In that regard, a Commission opinion recently noted:

> The Committee correctly observes that in comparative broadcast cases the Commission has adopted a rebuttable presumption that options will be exercised, *see Washington's Christian TV Outreach, Inc.*, 94 FCC 2d 1360, 1366 (Rev. Bd. 1983)(subsequent history omitted) . . . .

WWOR-TV, Inc., FCC 91-347, released November 13, 1991 at n. 13. We do not believe, however, that this passing footnote language was intended to modify the Commission's prior *Doylan Forney* articulation.)

[6] Skidelsky argues that the "oral understanding" is undermined by the fact that AT&T has allegedly sought to take over stations when the debtor licensees have suffered financial reverses, as evidenced by the filing of applications for assignment of four radio station licenses from Marathon to an AT&T subsidiary, Atmor Properties, Inc. Skidelsky Exceptions at 21-22. However, at oral argument counsel for Bradmark urged that the example cited was a "consensual work out." Tr. 1319. Without more, the Marathon situation does not undermine the "oral understanding" between Bradmark and AT&T. An AT&T Vice President has here sworn on the public record to an "understanding" not to convert. *See generally AT & T v. FCC*, 551 F.2d 1287 (D.C. Cir. 1977) (sworn representations of AT&T official not to be simply disregarded). Should it renege, punitive steps can be taken.

[7] Skidelsky argues that AT&T "is clearly in a position to own or control Bradmark" as evidenced by the fact that "AT&T has directly (by its own check) even paid Bradmark's counsel." Skidelsky Exceptions at 22-23. However, as explained by Bradmark, "on a single occasion, when Bradmark sought to use funds available to it under a line of credit from AT&T's predecessor, Pacificorp, to pay Bradmark's communications counsel, Pacificorp wrote the check directly, and charged the line of credit, rather than writing a check to Bradmark so that Bradmark could then make the payment with its own check" Bradmark Reply at 13. Bradmark rejoins that, in fact, it "maintained full control over the disbursement of funds from the line of credit it had with its lender." *Id.* Under these circumstances, we find the fact that Pacificorp wrote a check for Bradmark to be inconsequential.

[8] Bradmark filed an Opposition To Petition To Enlarge Issues, on May 30, 1991; an Opposition To Motion To Compel Disclosure, on May 30, 1991; an Opposition To Petition To Enlarge Issues, on August 28, 1991; a Motion for Acceptance of Late Filed Opposition, on September 19, 1991. Skidelsky filed a Reply on June 7, 1991; a Motion To Strike and/or Petition For Leave To File Reply on June 7, 1991; a Reply to Bradmark's Opposition on September 9, 1991; an Opposition to Bradmark's Motion For Acceptance of Late Filed Opposition on September 25, 1991; and a Supplement to the August 1991 Petition To Enlarge Issues on November 15, 1991.

Apart from Skidelsky's Petitions To Enlarge and Bradmark's responses, we will dismiss all of the other pleadings as unauthorized. *See* 47 C.F.R. 1.276; 1.277. Nor has Skidelsky made the showing necessary to reopen the record. *See infra* para. 29 and cases cited therein.

[9] Inasmuch as we find that Skidelsky has not adequately supported this petition, Bradmark's lateness is irrelevant.

[10] In October 1987, Normandy amended its application to specify a different site because its original site apparently had "potential FAA problems." Normandy Exhibit 7 at 3.

[11] Normandy contends that the ALJ wrongly placed the burden of proceeding and the burden of proof on it. Specifically, Normandy complains: "As to each issue added against Normandy by the ALJ, he [the ALJ] failed to make any finding that 'the operative facts with respect to the specified issues are *peculiarly* within the knowledge of [Normandy's] . . . principals . . . ' . . . and, accordingly, the evidentiary burden of proof should *not* have been put on Normandy." Normandy Exceptions at 6. The ALJ did not err. "The operative facts," here, with respect to the site certification issue were unquestionably "peculiarly within the knowledge of" Mr. Lynch, a principal in Normandy -- he certified on the Form 301 that Normandy had reasonable assurance of a site owned by Mr. Abess and he contacted Abess about the site. Thus, the ALJ's decision on the burdens of proceeding and proof was proper. *See Elyria - Lorain Broadcasting Co.*, 6 RR 2d 191 (1965).

[12] Normandy also excepts to the ALJ's conclusions that its Threshold Showing cannot be relied upon because it contains so many errors and was untruthful in material respects, and that Normandy's failure to report a contingent ownership interest is particularly problematic because its explanation for not doing so was "disingenuous." Normandy Exceptions at 12-18. However, because the Board has already found Normandy to be unqualified for lack of transmitter site, it need not and will not reach these issues.

[13] Skidelsky cites to Tr. 367-368 for testimony of Donald Heckman, and Tr. 100 for testimony of Betty Jean Heckman.

[14] Mrs. Heckman testified that she will: prepare monthly station billings and statements; coordinate final billing figures with the General Manager and Sales Department; generate monthly Profit and Loss Statements; manage and direct the administrative offices, including traffic, receptionist and the sales secretary; hire and fire in the administrative offices; serve as payroll officer; administer state and federal employment regulations; serve as insurance officer; and prepare and file quarterly tax reports for state and federal agencies. Bradmark Exhibit 3 at 1-2.

[15] Skidelsky will provide a third nighttime service to 912 people, but this is decisionally insignificant. *Cf. Woods Communications Group, Inc.*, 6 FCC Rcd 3529 (Rev. Bd. 1991) (applicant's proposal to provide third and fourth TV service not

entitled to preference); *Mark L. Wodlinger*, 101 FCC 2d 762, 773 (Rev. Bd. 1985)(preferences awarded where "*substantial* differences in the provision of third, fourth, and even fifth services.")

[16] Skidelsky is correct when he states that, generally "the applicant who proposes full compliance" with the Commission's Rules is preferred over "those applicants proposing non-compliant sites," Skidelsky Exceptions at 41. However, the competing applicants here are not proposing non-compliant sites, so his general proposition is inapposite. Further, *Millard Orick, Jr.*, 89 FCC2d 571 (Rev. Bd. 1982), relied upon by Skidelsky "predates the processing guideline enunciated in *John R. Hughes*." Bureau Reply at n.1.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-192

In re Applications of

THOMAS W. LAWHORNE File No. BPH-880505OA

CAM-BROADCASTING, INC. File No. BPH-880505OJ

For Construction Permit for
New FM Station, Channel 271A,
Sylvester, Georgia

Appearances

Bruce A. Eisen on behalf of Thomas W. Lawhorne; *Robert W. Thompson* on behalf of CAM-Broadcasting, Inc.

DECISION

Adopted: December 18, 1991; Released: January 2, 1992

By the Review Board: MARINO (Chairman), ESBENSEN, and GREENE.

Board Member ESBENSEN:

1. Before the Review Board is the *Initial Decision* (I.D.) of Administrative Law Judge Edward J. Kuhlmann (ALJ), 6 FCC Rcd 4183 (1991), as well as the exceptions of CAM-Broadcasting, Inc. (CAM) and a reply thereto filed by the prevailing applicant, Thomas W. Lawhorne (Lawhorne).

2. The following issues were ultimately specified in this proceeding (I.D., para. 1):

> 1. To determine whether or not CAM-Broadcasting, Inc. has reasonable assurance that its specified antenna site will be available to it.
>
> 2. To determine whether or not CAM-Broadcasting, Inc. has abused the Commission's processes by threatening a competing applicant with use of unknown information to be filed as a motion to enlarge issues unless the applicant acceded to its settlement demands.
>
> 3. To determine whether or not CAM-Broadcasting, Inc. falsely certified and misrepresented facts to the Commission concerning its financial qualifications to build and operate its proposed radio station at Sylvester, Georgia.
>
> 4. To determine, in light of the evidence adduced under the foregoing issues, whether or not CAM-Broadcasting, Inc. is qualified to become a Commission licensee.
>
> 5. To determine which of the proposals would on a comparative basis, best serve the public interest.
>
> 6. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applicants should be granted, if any.

BACKGROUND

3. Prior to issuance of the I.D., the following events occurred in this proceeding: On June 25, 1990, Lawhorne filed a Motion to Enlarge seeking site availability and abuse of process issues against CAM. As to CAM's transmitter site, Lawhorne alleged that while CAM certified in its application that "Thomas Bozeman" owned the property upon which CAM's transmitter would be located, the coordinates of CAM's proposed transmitter site (as specified in CAM's application) did not, in fact, match the actual land which CAM intended to use.

4. In its Opposition filed July 12, 1990, CAM submitted that, because of an "inadvertent error," the wrong coordinates were listed in its application. However, CAM stated that it "always intended" to use Bozeman's land. In support, CAM submitted the affidavit of Bozeman, President of a real estate firm, stating that he was indeed contacted by a CAM principal in 1988, and that he had agreed in a May 3, 1988 letter to sell five acres of his land to CAM for its use as a transmitter site. Bozeman further stated that, although the coordinates in his letter to CAM were apparently incorrect, the narrative description of the site in CAM's application was correct. CAM then claimed that a "corrective" technical amendment would be filed promptly.

5. At the July 30, 1990 prehearing conference, the ALJ established a procedural schedule, memorialized by *Order*, FCC 90M-2313, released August 1, 1990. Therein, January 8, 1991 was set as the date for the exchange of the applicants' written cases, well in advance of the January 22, 1991 hearing. In a subsequent *Memorandum Opinion and Order*, FCC 90M-2335, released August 2, 1990, the ALJ granted Lawhorne's Motion to Enlarge, and added Issues 1 and 4, *supra*, against CAM.

6. On October 25, 1990, more than three months after it promised to file a "corrective" amendment, CAM filed a Petition for Leave to Amend its application. The proffered amendment revised its transmitter site coordinates and increased CAM's effective radiated power from three kilowatts to six kilowatts. Further, in a contemporaneous Declaration, Bozeman stated that CAM's problems were caused when he erroneously "pinpointed the location of my land on the . . . map that was provided by CAM . . . approximately one mile north of where it really is." The ALJ accepted the CAM amendment, noting that it had disclaimed any upgrading of its comparative position in the proceeding. *See Memorandum Opinion and Order*, FCC 90M-3717, released November 26, 1990.

7. On November 28, 1990, CAM filed a Motion for Summary Decision with the ALJ on its site availability issue, urging that its corrective amendment had been previously accepted by the ALJ, and that therefore there remained no further question that Bozeman would make that site available to CAM. On December 12, 1990, Lawhorne opposed CAM's motion, contending that the added issue "relates not merely to the placement of inaccurate coordinates, but to the facts and circumstances surrounding the placement of the coordinates and the availability of the CAM tower site." Lawhorne further

asserted that Bozeman failed to explain in his October 25, 1990 Declaration exactly why he made the mistake of pointing to the wrong spot on the map.

8. However, on December 13, 1990, Lawhorne filed its "Further Comments and Withdrawal of Thomas W. Lawhorne's Opposition to Motion for Summary Decision." Lawhorne now stated that he deposed Bozeman on December 12, 1990, and that: "The deficiencies in his declaration . . . were not all resolved. However, Lawhorne believes that further inquiry into the site availability issue could be fruitless. It does appear that CAM has reasonable availability of the Bozeman site, notwithstanding the fact that the reasons for CAM's original error in specifying the coordinates remain unclear."

9. On January 8, 1991, CAM exchanged its direct case exhibits. There, its Exhibit 4 addressed the outstanding site availability issue in two simple sentences as follows:

> **Site Issue**
>
> The Federal Aviation Administration has notified CAM- Broadcasting, Inc. that our proposed tower site (corrected coordinates) would not be a hazard to air navigation. A copy of the FAA notice is attached hereto as Appendix A.

10. However, by *Order*, FCC 91M-77, released January 9, 1991, the ALJ denied CAM's Motion for Summary Decision "[f]or the reasons given by Lawhorne in its Opposition." On January 14, 1991, Lawhorne requested that CAM produce Bozeman for cross-examination at hearing. Although CAM objected to producing Bozeman, the ALJ expressly ordered CAM to do so. *See Memorandum Opinion and Order*, FCC 91M-229, released January 21, 1991. However, the hearing on January 22, 1991 lasted only a few minutes. After learning that CAM had, in effect, failed to exchange *any* probative written evidence on the designated site availability issue, and upon denying CAM's request to develop any such evidence orally, the ALJ summarily dismissed CAM's application and terminated the proceeding. His rulings were confirmed in an *Order* which concurrently granted Lawhorne's application. *See Memorandum Opinion and Order*, FCC 91M-267, released January 24, 1991. CAM appealed its dismissal to the Board on January 31, 1991.

11. In our *Memorandum Opinion and Order*, 6 FCC Rcd 1864, 1865-66 (Rev. Bd. 1991) (*MO&O)*, the Board vacated the "dismissal" of CAM's application, noting (footnotes omitted):

> We have reviewed the facts and circumstances underlying the dismissal of CAM's application. As we see it, the operative dispute between CAM and the ALJ may distill down to form rather than substance. Although it may be that the actions of CAM were not of the egregious and prejudicial character surveyed by the court in *Comuni-Centre Broadcasting, Inc. v. FCC*, 856 F.2d 1551 (D.C. Cir. 1988), CAM's utter failure to present a written case on the outstanding site availability issue would appear to have given the ALJ little legal alternative but to find CAM unqualified on the merits of the designated site issue. We fully recognize that Lawhorne had previously withdrawn its own private opposition to CAM's request for summary decision on that very same issue. But, after considering all of the pleadings, the ALJ himself was not persuaded that no substantial and material questions of fact remained unanswered, and he denied summary decision on the site issue, a matter quite within the ALJ's routine discretion. *See* 47 CFR § 1.251. Similarly within the ALJ's routine discretion was his prehearing order here for the parties to present their substantive evidence in written exhibits, prior *to* the actual hearing. *See Cellular Mobile Systems of Pennsylvania, Inc. v. FCC*, 782 F.2d 182, 197-98 (D.C. Cir. 1985) (ALJs have "broad discretion" to regulate hearing). Consequently, when CAM's written exhibit failed altogether to address the outstanding site availability issue, its request to present instead oral evidence at hearing was in rather direct conflict with the ALJ's governing order to the parties to submit their evidence *in advance* and *in writing*.
>
> To expedite its frequently lengthy comparative licensing proceedings, the Commission explicitly authorized its ALJs "to require submission of written evidence . . . [to] avoid unnecessarily prolonging hearings due to taking of oral testimony . . . ." *Adjudicatory Re-regulation Proposals*, 58 FCC 2d 865, 866 (1976); *see also* 47 CFR Section 1.248(d). In failing to present a meaningful direct written case on its site availability issue, CAM -- through neglect, misunderstanding, or otherwise -- now seems unavoidably in default on a very basic qualifying matter. While the ALJ, perhaps, might better have "denied" CAM's application on the merits of the site issue by announcing a total failure of proof, *see, e.g., Victorson Group, Inc.*, FCC 91R-26, adopted March 15, 1991 at paras. 17-21, we find that any error in his "dismissal" was effectively harmless under these facts. On the strict basis of the record before us, CAM seems, *prima facie*, subject to virtually immediate disqualification on the merits. Out of an abundance of caution, however, the Board will, as a procedural matter, vacate the "dismissal" of CAM and remand this matter to the ALJ for disposition in a manner consistent with the Board's foregoing discussion. *See Pan American Broadcasting Co.*, 89 FCC 2d 167 (Rev. Bd. 1982).

INITIAL DECISION

12. On July 5, 1991, the ALJ released his I.D., finding CAM disqualified on the tower site issues alone. The ALJ held (6 FCC Rcd at 4183-84):

> On January 8, 1991, CAM did not exchange evidence for its designated antenna site. Because all parties were ordered on August 1, 1990 to submit their evidence in writing on January 8, 1991, CAM failed to meet its burden and it is unqualified. The only other applicant, Lawhorne, is qualified and his application will be granted.
>
> On April 18, 1991, CAM requested leave to supplement its case or for other relief on the antenna site issue. That request will be denied because CAM has not established any equitable or legal justification for now permitting it to file evidence on issue 1. First, CAM argues that it filed site issue evidence on January 8, 1991 in "abbreviated form." That argument is dishonest as Lawhorne points out. CAM

> submitted FAA approval of a site on January 8, 1991 but there was no FAA issue and the site issue was whether CAM had reasonable assurance for an antenna site on which it could locate its tower. *See Memorandum Opinion and Order*, FCC 90M-2335, released August 2, 1991. The second argument CAM makes is that on the exchange date a motion for summary decision was pending and CAM implies that it believed it need not file its hearing testimony while that request was pending. The second argument is, of course, inconsistent with CAM's first argument that it filed evidence on the issue. Thus, it too is disingenuous under the circumstances. Moreover, CAM did not request an extension of time to file its exhibits. CAM argues that the summary decision should have been granted and in support of that claim it points out that the opposition was withdrawn. Whether to grant requests for summary decision or not is a matter solely within the discretion of the presiding officer. In this case, Lawhorne, in its opposition, argued that CAM had failed to fully explain how the error was made and whether CAM's behavior on the issue exhibited extreme carelessness. The CAM motion was considered on January 7, 1991 and denied for the reasons given by Lawhorne. *Order*, FCC 91M-77, released January 9, 1991. Aside from the issue about reasonable assurance for CAM's site, there were pending issues about CAM's character: whether CAM threatened Lawhorne with a motion to enlarge unless he settled and whether CAM falsely certified and misrepresented facts about its finances. It should be apparent to CAM that any factual questions under these circumstances would best be resolved after the credibility and demeanor of CAM's principal could be fully tested. In any event, the order denying the motion for summary decision was issued on January 7 and released on January 9, 1991. CAM made no effort to file its testimony during the thirteen days before the hearing that followed denial of its request for summary decision.
>
> CAM's request is in most respects dishonest and argues with the presiding officer's judgment. It fails to establish any equitable reason for allowing CAM to file at this late date . . . .

13. On October 9, 1991, CAM filed a Petition for Leave to Amend with the Board, claiming that the alleged Bozeman site "would no longer be available" to it (Bozeman advised CAM by letter that the site had been sold, and observed that "I presume that the FM radio station is a dead issue . . . ."), and proposing a new transmitter site. Both Lawhorne and the Commission's Mass Media Bureau oppose CAM's attempt to amend because, *inter alia*, CAM never possessed "reasonable assurance" of its initial site.

DISCUSSION: CAM TOWER SITE

14. We hold that the ALJ reasonably acted within the broad discretion vested in him in the conduct of hearing proceedings and properly denied CAM's application for its failure to meet its burdens under the tower site issues. *See* 47 CFR § 1.243; *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986). As the Board previously observed in its *MO & O*, 6 FCC Rcd at 1865: "CAM's utter failure to present a written case on the outstanding site availability issue would appear to have given the ALJ little legal alternative but to find CAM unqualfied . . . ." Further, although specifically ordered by the ALJ to submit a direct written case, "CAM's written exhibit failed altogether . . . ." *Id.*[1] The Board must determine only whether the ALJ committed substantive or procedural error in conducting the case and applying the law. Here, CAM's utter and undeniable failure to adequately meet the serious basic qualifications issue as to its tower site with a preponderance of its own evidence results in an absolute failure of proof at hearing by CAM. Such a delict must be deemed legally fatal to its application. *Victorson Group, Inc.*, 6 FCC Rcd 1697, 1701 (Rev. Bd. 1991).

15. As to CAM's October 9, 1991 Petition for Leave to Amend to specify a new tower site (because of loss of the Bozeman site), we will deny the Petition. Because CAM has been disqualified under its previously-designated tower site issue, it has not demonstrated that it had "reasonable assurance" of its original site and it cannot now amend to a different site. *South Florida Broadcasting Co.*, 99 FCC 2d 840, 845 n. 12 (Rev. Bd. 1984); *Classic Vision, Inc.*, 104 FCC 2d 1271, 1273 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 2376 (1987); *Port Huron Family Radio, Inc.*, 4 FCC Rcd 2532, 2535 (Rev. Bd. 1989) (subsequent history omitted); *REM Malloy Broadcasting*, 6 FCC Rcd 5843, 5846 (Rev. Bd. 1991).

CAM's MOTION TO REOPEN AND ENLARGE ISSUES

16. On September 4, 1991, CAM filed a Motion to Reopen the Record and to Enlarge the Issues, claiming that (1) Lawhorne, the Mayor of Sylvester, Georgia, had arrest warrants issued against him in July 1991 for having city employees (or inmates sentenced to community service work) perform services for his private benefit; (2) each charge was a felony; (3) Lawhorne did not disclose this information to the Commission; and (4) this failure must result in the reopening of the record here and the addition of "a reporting issue," pursuant to 47 CFR § 1.65. CAM Motion at para. 10.

17. In opposition, Lawhorne claims that (1) he was not intentionally withholding any relevant information from the Commission; (2) applicants are required to provide information only on pending adjudications of relevant misconduct; (3) the Commission will not take cognizance of non-FCC misconduct involving alleged criminal activity unless it is adjudicated, or if a failure to disclose concerns a conviction, an indictment, or a pending case involving relevant misconduct that is before a court or administrative body; (4) here there has been no adjudication of any of the charges to which CAM refers; there has been no indictment, only an arrest. "Thus, at this early date, Lawhorne did not have to amend his application to report the charges because there has been no adjudication and no matter pending before any court such as an indictment;" (5) in the modification of its *Policy Regarding Character Qualifications*, 5 FCC Rcd 3252 (1990), the Commission has clarified its earlier position that it will only consider adjudications involving fraudulent representations to government bodies, criminal misconduct involving false statements or dishonesty, and broadcast-related antitrust violations, to an approach that now considers any conviction for misconduct constituting a felony; (6) while Lawhorne acknowledges that an arrest is a serious matter, nothing that CAM has alleged has

ripened to such a point that a Section 1.65 amendment was required, and CAM has not made a *prima facie* showing of a pattern of repeated reporting violations, nor for significant carelessness, inattention, or deliberate concealment of present decisional significance; (7) FCC Form 301 does not require an applicant to report an arrest, and in the absence of an indictment for the kind of violations set forth in FCC Form 301, Section II, Question 12(a), there is no matter "pending in any court or administrative body" (involving the matters referred to in question 12(a)); (8) since no indictment (felony) has been returned and no accusation (misdemeanor) has been filed, it cannot be maintained that there is a criminal case pending before any court, the substance of which should have been reported pursuant to Section 1.65 of the Rules and Questions 12(a) and 12(b) of FCC Form 301; and (9) CAM has made no showing that Lawhorne is guilty of an intent to conceal.

DISCUSSION

18. The Board finds that CAM has failed to make the requisite showing necessary to reopen the record here to add a "reporting issue." As the Commission noted in *Washoe Shoshone Broadcasting*, 5 FCC Rcd 5561 (1990):

> It is well established that, to justify a reopening of the record, a petitioner must show unusual or compelling circumstances. *WEBR, Inc. v. FCC*, 420 F.2d 158 (D.C. Cir. 1969); *Kidd v. FCC*, 302 F.2d 873 (D.C. Cir. 1962); *Southeast Arkansas Radio, Inc.*, 61 FCC 2d 72, 74 (1976). A petition to reopen must be supported by a showing that the . . . new evidence, if true, would affect the ultimate disposition of the proceeding. *Southeast Arkansas Radio, Inc., supra.*

See Kaye-Smith Enterprises, 98 FCC 2d 675, 686 (Rev. Bd. 1984) ("the requisite showing for reopening the record [is that] the petition must be supported by newly discovered evidence; . . . and the new evidence must, if true, affect a basic part of the decision"). In a substantially similar situation, the Board recently declined to add a 47 CFR § 1.65 "reporting issue" where an applicant principal had failed to disclose that a felony complaint charge (solicitation of perjury) had been lodged against him. *Coast TV*, 5 FCC Rcd 6720 (Rev. Bd. 1990). We there held (*id.*, at 6722-6723):

> We will not add the requested issues. In its *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986) . . . the Commission stated its concern with "misconduct which demonstrates the proclivity of an applicant or licensee to deal truthfully with the Commission and to comply with our rules and policies." 102 FCC 2d at 1190-91. The Commission there held that it would consider only adjudications involving fraudulent representations to government bodies, criminal misconduct involving false statements or dishonesty, and broadcast-related antitrust violations. *Id.*, at 1195-97, 1200-1203. In a modification of its policies, *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252 (1990), the Commission broadened its approach to consider any conviction for misconduct constituting a felony, and further noted that it "retain[ed] the discretion to consider serious misdemeanor convictions in appropriate or compelling cases, particularly where there is a pattern of such convictions." *Id.*, at 3252, 3254, n. 3. While the original felony charge of solicitation of perjury would appear to satisfy the Commission's test of criminal misconduct involving false statements or dishonesty, that count has now been dismissed (apparently in exchange for a no contest plea on a misdemeanor charge). With regard to the latter charge, there is no evidence before us that this incident was part of a pattern of criminal behavior. Moreover, there is no Commission precedent yet on what constitutes "appropriate or compelling" circumstances requiring further examination. Though Green has pleaded no contest to a serious misdemeanor, we will refrain from further action in this case of first impression, pending future Commission guidance. As to Mission's initial failure to timely report the filing of criminal charges against Green, Coast has not made a *prima facie* showing of a pattern of repeated violations or other significant carelessness or inattention, deliberate concealment, or present decisional significance. *See Merrimack Valley Broadcasting, Inc.*, 99 FCC 2d 680, 683 n. 9 (1984).

19. The Board finds that Lawhorne was not required to report the arrest under *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986) ("*1986 Character Policy Statement*"), *recon. granted in part, denied in part*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom. National Association for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987); *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252, 3253 (1990) ("*1990 Character Policy Statement*"); *recon. granted in part*, 6 FCC Rcd 3448, 3449 (1991) ("*1991 Character Reconsideration Order*"); *partial stay granted*, 6 FCC Rcd 4787 (1991). Thus, CAM has failed to make their *prima facie* showing that would warrant further consideration here. *See Citizens for Jazz on WRVR v.FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985); *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1562 (D.C. Cir. 1988); *see also Priscilla L. Schwier*, 4 FCC Rcd 2659, 2660 (1990) (no issue added where movant failed to make *"prima facie* case"). Additionally, it is undisputed that on November 13, 1991, the District Attorney for the Tifton Judicial District (Georgia) informed Lawhorne that all the warrants have been dismissed (without prejudice, and subject to the taking of the warrants by a grand jury, pending further review). *See* Lawhorne Statement of Clarification filed November 25, 1991. Thus, the record in this proceeding will not be reopened and the issues will not be enlarged. Nevertheless, we note that should this matter be ultimately resolved adversely with respect to Lawhorne, appropriate subsequent steps may be taken at that time. *Weyburn Broadcasting Limited Partnership*, 5 FCC Rcd 861, 863 (Rev. Bd. 1990) (subsequent history omitted).

CONCLUSIONS

20. CAM has filed no other exceptions to Lawhorne's application. The ALJ determined that CAM is unqualified and that Lawhorne, as the only remaining qualified applicant, would receive the construction permit at contest. We have affirmed the ALJ in all material respects; thus. Lawhorne's application will be granted.

21. ACCORDINGLY, IT IS ORDERED. That the Petition for Leave to Amend filed by CAM-Broadcasting, Inc., on February 21, 1991, IS GRANTED, and the attached amendment IS ACCEPTED; and,

22. IT IS FURTHER ORDERED, That the Motion to Reopen the Record and to Enlarge the Issues filed by CAM-Broadcasting, Inc. on September 4, 1991, IS DENIED; and,

23. IT IS FURTHER ORDERED. That the Petition for Leave to Amend filed by CAM-Broadcasting, Inc. on September 11, 1991, to the extent that it reports loss of its original transmitter site, IS GRANTED. and the attached amendment, as limited above, IS ACCEPTED; and,

24. IT IS FURTHER ORDERED, That the Petition for Leave to Amend filed by CAM-Broadcasting, Inc, on October 9, 1991, IS DENIED; and,

25. IT IS FURTHER ORDERED. That the Request for Leave to File Pleading (a "Statement of Clarification") filed by Thomas W. Lawhorne on November 5, 1991, IS GRANTED, and the Statement of Clarification of the same date IS ACCEPTED; and,

26. IT IS FURTHER ORDERED. That the application of CAM-Broadcasting, Inc. (File No. BPH-880505OJ) IS DENIED, and the application of Thomas W. Lawhorne, for a new Class A FM facility at Sylvester, Georgia (File No. BPH-880505OA) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTE

[1] As explicated, CAM attempted only to present "oral" testimony. We note that in its recent *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases,* 6 FCC Rcd 157, 162 (1990) (footnote omitted), the Commission has now declared that:

> We will make it clear that ALJs should permit oral testimony and cross examination only where material issues of decisional fact cannot adequately be resolved without oral evidentiary hearing procedures or the public interest otherwise requires oral evidentiary proceedings. Witnesses should not be requested for cross-examination unless there is a legitimate expectation that some part of their direct testimony, as reflected in exhibits, is subject to a question of substantial decisional significance.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-142

In re Applications of

ALGREG CELLULAR ENGINEERING *et al.* — File No. 10607-CL-P-307-A-89 *et al.*

For Facilities in the Domestic
Public Cellular Telecommunications
Radio Service on Frequency Block A,
in Market 307, Alabama 1 - Franklin

MEMORANDUM OPINION AND ORDER

Adopted: December 18, 1991; Released: January 2, 1992

By the Review Board: MARINO (Chairman), and ESBENSEN. Board Member BLUMENTHAL concurring in result.

1. On October 11, 1991, ZDT Partnership (ZDT) filed a petition, pursuant to 47 CFR § 1.106, seeking reconsideration of our *Memorandum Opinion and Order*, 6 FCC Rcd 5299 (Rev. Bd. 1991), which denied ZDT's appeal based on its claim of an absolute right to intervene in the revocation portion of this proceeding. Opposing and commenting pleadings were filed by the other parties to the case on October 22, and November 1, 1991. We hereby deny ZDT's petition which is "procedurally deficient." *Cf. Ronald Sorenson*, FCC 91-371, released November 21, 1991.

2. 47 CFR § 1.106, and other Commission precedent, require that a person seeking rehearing based upon new factual or legal matters must show that the new information could not have been earlier discovered through the exercise of ordinary diligence. The Court has specifically upheld this Commission requirement because "[o]rderliness, expedition and finality in the adjudicatory process are appropriate weights in the scale, as reflecting a public policy which has authentic claims of its own." *Valley Telecasting Co. v. FCC*, 336 F.2d 914, 917 (D.C. Cir. 1965). Similar considerations have been enforced against belated petitions to intervene. *See Spanish International Broadcasting Co. v. FCC*, 385 F.2d 615 (D.C. Cir. 1967).

3. At earlier stages of this proceeding, ZDT (a) in its petition to intervene before the presiding Administrative Law Judge, and (b) on appeal to the Board, argued that it had an absolute right to intervene in the revocation portion of the case. The Board held that the statute and relevant rules "do not provide for intervention as a matter of right," 6 FCC Rcd at 5300, para. 9, and that ZDT could not be allowed to intervene as a matter of discretion without the special showing required by controlling Commission precedent, citing *Victor Muscat, et al*, 31 FCC 2d 620, 621 (1971). *Id.*

4. On reconsideration, ZDT now argues that it should have been allowed to intervene as a matter of discretion, without the required special showing, because other parties have been allowed to intervene in the proceeding and none have "made any 'special showing' which ZDT is being required to make to justify its intervention in the revocation proceedings." Petition, p. 2. ZDT further argues that: "It is black letter law that similarly situated parties must be treated in a similar manner and that in requiring ZDT to make such a showing is treating ZDT unfairly in violation of well established principle of administrative law." Petition, p. 3.

5. Despite the Commission two-decade-old requirement of a special showing to intervene in a revocation proceeding, ZDT has not attempted to explain why its present arguments were not advanced before the ALJ or an appeal to the Board. On the contrary, its earlier pleadings relied on the claim of an absolute right to intervene. Nor has ZDT made a persuasive showing to support its new claim that it is similarly situated to other parties who have been allowed to intervene (*e.g.*, although this point has not been fully briefed, it appears that the other parties may have participated in a lengthy Commission investigation prior to designation for hearing. ZDT did not.) These patent procedural deficiencies in ZDT's petition make it unnecessary to reach the more difficult question of whether the Board is authorized to ignore a specific Commission requirement because other members of the Commission staff may have overlooked the requirement in allegedly comparable cases. *But see Horne Industries, Inc.*, 91 FCC 2d 1193, 1194 (Rev. Bd. 1982) (Board may not change "old [Commission] policy").

6. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed October 11, 1991 by ZDT Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-203

In re Applications of

KENNEDY BROADCASTING, INC.	File No. BPH-900125MQ
HBA BROADCASTING, INC.	File No. BPH-900125MT
MJR BROADCASTING LTD PARTNERSHIP	File No. BPH-900125MV
P.V.R. COMMUNICATIONS, L.P.	File No. BPH-900125MX
LITTLE RIVER COMMUNICATIONS GROUP, INC.	File No. BPH-900125MY

For Construction Permit for
New FM Station, Channel 299C2,
Martinez, Georgia

MEMORANDUM OPINION AND ORDER

Adopted: December 18, 1991; Released: January 2, 1992

By the Review Board: MARINO (Chairman), ESBENSEN, and GREENE.

1. Before the Review Board is a Petition for Reconsideration and Request for Certification to the Commission of our *Memorandum Opinion and Order*, 6 FCC Rcd 6489 (Rev. Bd. 1991), filed by Kennedy Broadcasting, Inc. (Kennedy), on December 6, 1991. In that *Order*, the Board acted on an "appeal" filed by HBA Broadcasting, Inc. (HBA) which sought reinstatement of its application in this proceeding. HBA, it will be recalled, was dismissed by the Presiding Officer for failure to timely tender its required hearing fee.

2. In our *Order*, we held (*id*., at para. 2):

> HBA is before the wrong forum. In the Commission's *Proposals to Reform the. .. Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 3403, 3409 (1991), applicants were directed to file "[a]ny requests for reconsideration of the dismissal of applications for fee defects . . . [with] the Commission's Managing Director." *Id*., at Appendix A. In light of the foregoing, HBA's Appeal will be referred to the Commission's Managing Director. *See also CSJ Investments, Inc*., 5 FCC Rcd 7653 (1990).

3. It is not HBA that seeks reconsideration before the Board; rather, a competing applicant; Kennedy, claims that the Managing Director has yet to act and urges that the Board promptly resolve the matter or certify the proceeding to the Commission.

4. Kennedy's Petition will not be entertained and will be dismissed. *See* 47 CFR § 1.102(b)(2) ("Petitions for reconsideration of interlocutory actions will not be entertained"); 47 CFR § 1.106(a)(1) ("Petitions for Reconsideration of [non-final] interlocutory actions will not be entertained"); and, 47 CFR § 1.291(c)(3) ("Petitions requesting reconsideration of an interlocutory ruling made by . . . the Review Board . . . will not be entertained"); *Roxanne Givens*, 5 FCC Rcd 7010 (Rev. Bd. 1990); *REM Malloy Broadcasting*, 6 FCC Rcd 6497 (Rev. Bd. 1991).

5. ACCORDINGLY, IT IS ORDERED, That the Request for Extension of Time filed by HBA Broadcasting, Inc., on December 16, 1991, IS DISMISSED as moot; and,

6. IT IS FURTHER ORDERED, That the Petition for Reconsideration and Request for Certification to the Commission, filed December 6, 1991, by Kennedy Broadcasting, Inc., IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-190

In re Application of

JUDITH O. and LARRY R. ORKUS — File No. BPH-900510MF

For Construction Permit for
New FM Station, Channel 300A,
Port Matilda, Pennsylvania

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1991; Released: January 2, 1992

By the Review Board: BLUMENTHAL, ESBENSEN, and GREENE.

1. Before the Review Board are: a Joint Request For Approval of Settlement Agreements, filed October 18, 1991 (and Supplemented October 28 and November 22, 1991), by Phyllis J. Thaler (Thaler), Port Matilda FM Limited Partnership (PMFMLP), and Judith O. and Larry R. Orkus (Orkus); and a Contingent Petition For Leave To Amend, filed October 18, 1991, by Orkus and STS Broadcasting Limited Partnership (STS). The agreement and amendment contemplate: (1) a merger of Thaler and PMFMLP into a new entity, STS; (2) the substitution of STS for Orkus, in the Orkus application: (3) the withdrawal of principals, Judith and Larry Orkus, from their application in return for partial reimbursement of expenses incurred in prosecuting the application; and (4) amendment of the Orkus application to substitute a new engineering proposal. Comments in support were filed by the Mass Media Bureau on October 31, 1991. For the reasons set forth, *infra*, we will approve the settlement agreements and accept the amendment.

BACKGROUND

2. Thaler, PMFMLP, and Orkus are three of the seven applicants that originally applied for the instant facility. Joint Request at 2. Prior to the designation of the applications for hearing, Thaler, a sole proprietor, and PMFMLP, a limited partnership, agreed to merge and form a joint applicant, STS, which would be substituted as the applicant under the Thaler application. *Id.* STS then reached an agreement with Orkus, whereby Orkus would dismiss its application in return for monetary consideration. *Id.* Those requests for approval were filed on July 9, and July 31, 1991, respectively, but the Commission took no action because the latter agreement had been filed between the adoption and the release dates of the *Hearing Designation Order*, 6 FCC Rcd 4676 (1991) (*HDO*). Joint Request at 3. The *HDO* designated the applications of PMFMLP and Orkus (and three others) for hearing, but dismissed Thaler's application under the Commission's "hard look" processing procedures for FM applications[1] because it violated an agreement between the United States and Canada (U.S. Canadian Agreement prescribing power limitations for domestic stations located within 320 kilometers of the Canadian border. *Id.* at 4676 Thaler timely filed a petition for reconsideration of he dismissal. Joint Request at 3. Thereafter, the requests wer referred to presiding Administrative Law Judge Walter C Miller (ALJ); but because the Thaler application was no before him, he was unable to grant the settlement a originally proposed. By *Memorandum Opinion and Order* FCC 91M-2801, released September 12, 1991, he dismissed all of the designated applications, save that o Orkus whose application he granted, and terminated the proceeding. He reported that only Orkus had paid it hearing fee, filed its Notice of Appearance, and proffered its Integration and Diversification Statement on the du date. *Id.*

REVISED AGREEMENT

3. Following the ALJ's actions, the parties revised th agreements and prepared an amendment to accommodate the new circumstances in the wake of the *HDO*. Thus under the amendment, STS will now be substituted fo Orkus under the Orkus application, and will utiliz Thaler's engineering proposal. Judith and Larry Orku propose to withdraw from the application for a cash payment of no more than $20,880, a sum Orkus repre sents is less than its legitimate and prudent expense incurred in this proceeding. Joint Request at n.2. Orkus accompanying documentation establishes total expenses o $25,986.74. Supplement, filed November 22, 1991, at 2 STS will consist of Ms. Thaler, holding a 50% voting and equity interest as one of its general partners; Jeane V Singer, now general partner of PMFMLP, holding the remaining 50% voting interest as the other general part ner, and a 26% equity interest overall; and Steven S Seltzer, currently the limited partner of PMFMLP, hold ing the final 24% equity in STS as a limited partner. I regard to the new (Thaler's) engineering proposal, the parties assert that Thaler's application was dismissed be cause its proposed Effective Radiated Power (ERP) of 5. kW had not been cleared by Canada when filed, but the instant FM channel has now been cleared for up to 2 kW ERP.

4. In supporting the amendment, the Bureau contend there is no bar to a grant to STS. Thaler's character is no implicated since her application was dismissed for tech nical noncompliance with the U.S.-Canadian Agreement PMFMLP's dismissal occurred only because it did not pa its hearing fee after its merger with Thaler (which did pa its hearing fee); and there is no violation of the Commis sion's policy against third-party buy-outs established b *Rebecca Radio of Marco*, 5 FCC Rcd 937 (1990), *recon denied*, 5 FCC Rcd 2913, since STS is composed of tw applicants that have sought the instant facility from it inception. As for the engineering revision, the Burea reports that the Canadian government has concurred wit the use of a higher power by the station on the instan frequency and that the Thaler technical proposal no long er violates the U.S.-Canadian Agreement. The Burea further represents that its engineering staff has reviewe the engineering amendment and determined that th amendment complies with all of the Commission's tech nical requirements. Finally, the Bureau agrees with th

settling applicants that grant of the joint petition and approval of the settlement agreements, as modified, would serve the public interest.

5. *Discussion.* Agreements for removing application conflicts are governed by Section 73.3525 of the Commission's Rules, 47 CFR § 73.3525. In compliance with that rule, the parties have submitted copies of their settlement agreements, as well as the appropriate declarations under penalty of perjury that their applications were not filed for purposes of reaching the settlement and that the agreements are in the public interest because they will hasten a new FM service to Port Matilda. In addition, Orkus has set forth an itemized accounting of the expenses for which it seeks reimbursement, such accounting reflecting that the expenses are more than the amount Orkus will be recovering.[2]

6. As for the amendment facilitating the settlement, Section 73.3522(b) of the Rules, 47 CFR § 73.3522(b), requires that postdesignation amendments be supported by a showing of good cause (*i.e.*, due diligence; involuntariness; no addition of parties or enlargement of issues; no disruption; no prejudice to other parties; and no comparative advantage). *See generally Erwin O. Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970). The parties here have acted with diligence. They filed their amendment promptly following the execution of revised settlement agreements necessitated by the *HDO*. Insofar as the amendment was dictated by the *HDO*, the amendment cannot be deemed voluntary. Additionally, the amendment would not require the addition of parties or the enlargement of issues since the STS principals consist only of principals of the two merging applicants, Thaler and PMFMLP. Nor would the amendment be disruptive, unfairly prejudicial to other parties, or confer any comparative advantage since it would facilitate an immediate termination to the proceeding. In light of the foregoing, we find no impediment to the amicable settlement of this proceeding. *See Lamar Communications, Inc.*, FCC 91I-075, released November 18, 1991 (approval of settlement agreement and acceptance of amendment permitting substitution of new corporation as applicant and proposed permittee, and allowing change of transmitter site to a tower previously proposed by one of the dismissing applicants); *see also Marlin Broadcasting of Central Florida, Inc.*, 3 FCC Rcd 6965 (Rev. Bd. 1988) (accepting amendment reflecting merger agreement and substitution of dismissing applicant's engineering proposal).

7. ACCORDINGLY, IT IS ORDERED THAT, The Contingent Petition For Leave To Amend, filed October 18, 1991 by Judith O. and Larry R. Orkus and STS Broadcasting Limited Partnership IS GRANTED, and the amendment substituting STS Broadcasting Limited Partnership as the applicant in the Orkus application and the new engineering proposal IS ACCEPTED; and

8. IT IS FURTHER ORDERED, That The Joint Request For Approval of Settlement Agreements, filed October 18, 1991, as supplemented on October 28, and November, 22 1991, by Phyllis J. Thaler, Port Matilda FM Limited Partnership, and Judith O. and Larry R. Orkus IS GRANTED, the attached Agreements ARE APPROVED; and the application of STS Broadcasting Limited Partnership (formerly Judith O. and Larry R. Orkus) (File No. BPH-90051OMF) IS GRANTED.[3]

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] *Report and Order* (Dkt. No. 84-750), 50 Fed. Reg. 19945 (1985), *recon. denied*, 50 Fed. Reg. 43157 (1985). (This *Hard Look Order* is reprinted in 58 RR 2d 776 (1985)).

[2] Our disposition should not be construed as determining whether settlement agreements resubmitted after July 31, 1991, in direct consequence to the Commission's failure to entertain them earlier, are subject to the rule changes, effective August 1, 1991, limiting payments to legitimate and prudent out-of-pocket expenses. *Settlement Agreements Among Applicants For Construction Permits*, 6 FCC Rcd 85 (1990), *modified*, 6 FCC Rcd 2901 (1991).

[3] In light of our disposition, Thaler's pending petition for reconsideration is subject to dismissal.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 3383

Revisions to Tariff F.C.C. No. 12

ERRATUM

Released: January 2, 1992

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On December 19, 1991 the Common Carrier Bureau adopted and released an Order in the above-referenced proceeding (DA 91-1476). This Order corrects paragraph 1 of the December 19 Order as follows:

> American Telephone and Telegraph Company (AT&T) has filed Transmittal 3383 to introduce revisions to Virtual Telecommunications Network Service (VTNS) Option 86 under which AT&T provides voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. The revisions would correct an inadvertent omission in the tariff. This transmittal is scheduled to take effect December 20, 1991.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-411

Amendment of Sections of Part 22
of the Commission's Rules in the
Matter of Airborne use of
Cellular Telephones and the Use of
Cell Enhancers in the Domestic
Public Cellular Radio Service.

REPORT AND ORDER

Adopted: December 12, 1991; Released: December 30, 1991

By the Commission:

I. INTRODUCTION

1. On September 2, 1988, we released a Notice of Proposed Rule Making (Notice)[1] seeking comments on proposed rules to prohibit the airborne use of cellular telephones and to allow the use of cellular "enhancers." We received 19 comments and six reply comments filed by engineering consultants, product manufacturers, telecommunication corporations, and trade associations.[2] In addition, the Commission recently received correspondence from the Federal Aviation Administration (FAA) concerning the use of cellular telephones in aircraft.[3] After carefully considering the FAA's position and the comments[4] submitted in this proceeding, we are adopting rules to prohibit the use of cellular telephones in airborne aircraft. We will, however, permit the on-ground use of cellular telephones, subject to airline or FAA policies or regulations, and the installation of cellular telephones in aircraft. Furthermore, we will allow for the authorization of cell enhancers or repeaters on a regular non-developmental basis.

II. CELLULAR TELEPHONES IN AIRCRAFT

A. Background

2. To satisfy the public radio-telephone needs in the 1970's, the Commission allocated spectrum for air-ground service.[5] Subsequently, the Commission allocated spectrum for the cellular radio service. *See, e.g., Cellular Communications Systems*, 86 FCC 2d 469 (1981), *modified*, 89 FCC 2d 58 (1982) (Reconsideration Order), *further modified*, 90 FCC 2d 571 (1982) (Further Reconsideration Order), *appeal dismissed sub nom. U.S. v. FCC*, No. 82-1526 (D.C. Cir. March 3, 1983). As consumer demand for cellular service grew, demand for variants of mobile service developed, *e.g.*, authority to use cellular telephones in airplanes, helicopters, balloons and other airborne vehicles.[6] In addition, the FAA contacted the Commission on several occasions requesting an interpretation of the Commission's rules concerning the use of cellular telephones in aircraft. In an effort to provide guidance concerning airborne use of cellular telephones under our rules, the staff issued a Public Notice (Mimeo No. 0200) on October 11, 1984, stating that "[t]here are no cellular frequencies available for air-ground service, and persons owning, installing, or operating airborne cellular units will be subject to enforcement action." This Rule Making was initiated to codify this policy and to clarify rules concerning the use of cellular telephones in aircraft.[7]

3. Specifically, the Notice proposed amending Section 22.911 of the rules, "Permissible communications," to state that cellular mobile stations or portable units may not be installed or operated in aircraft, balloons or any other vehicle capable of airborne operation. The prohibition against the use of cellular telephones in aircraft, the Notice explained, was based on the Commission's concern that such use could cause serious interference to transmissions at other cell locations within the system and to cellular systems in adjacent markets.

B. Discussion

4. The commenting parties distinguish between use of cellular telephones in aircraft on the ground and use of such telephones in airborne aircraft. They overwhelmingly agree that the use of cellular telephones in airborne aircraft could cause interference to cellular operations in one or more systems due to the greatly increased transmitting range of such cellular units. However, most parties support the use of cellular telephones while the aircraft is on the ground. They point out that cellular telephones used in aircraft on the ground have the same transmitting range as other ground-based cellular telephones and therefore do not create a long range interference risk. They argue that commercial airline passengers who are faced with substantial ground delays after boarding their flights should be permitted to use their portable cellular telephones for business and personal purposes as long as the aircraft remains on the ground.

5. The key technical feature of the cellular radio service is frequency reuse, *i.e.*, using the same frequency several times among different cells within a market. If a cellular telephone is used in an airborne aircraft, it will have a much greater transmitting range than a land-based cellular telephone and its signal will be received at a multiplicity of cell locations within the market, causing harmful operational interference. Furthermore, because a cellular telephone is capable of operating on all of the assigned cellular frequencies, serious interference could occur to cellular systems in other markets as well. We agree that the need for noninterference in all cellular transmissions outweighs the benefits that would be realized by allowing the public to use cellular service in airborne aircraft.[8] Therefore, as proposed in the Notice, we will codify our present policy and amend Section 22.911 to prohibit the use of cellular telephones in airborne aircraft. *See* Appendix B.

6. On November 27, 1989, the Associate Administrator for Airways Facilities at the FAA sent a letter to the FCC, stating that the FAA objected to the use of cellular telephones in aircraft whether the aircraft is on the ground or in the air.[9] He stated that cellular phones may interfere with aircraft systems.[10]

7. On September 19, 1991, the Associate Administrator filed a second letter stating that the FAA had reassessed its position and no longer supports a total ban on the use of cellular phones aboard aircraft that are on the ground.

Instead, the FAA is developing operational guidelines "to restrict cellular telephones to use at the gate and during an extended wait on the ground if authorized by the captain."

8. The record generally supports a finding that there are public interest benefits to allowing the use of cellular telephones in aircraft while on the ground. However, the FAA has joint jurisdiction with the FCC regarding the use of telecommunications devices on airplanes. Because the FAA has raised concerns that cellular telephones may, under certain circumstances, cause interference with aircraft systems and there is a need for further testing in this area to assess this potential risk, we will defer to the FAA on aircraft operations to establish regulations for use of cellular telephones on aircraft on the ground.[11] The FAA is addressing this issue by developing operational guidelines to restrict cellular telephones to use at the gate and during extended waits on the ground when authorized by the captain. We applaud these efforts to establish reasonable guidelines to protect airline safety while permitting some uses of cellular telephones on aircraft while on the ground.

9. In addition, the majority of the commenters state that we should permit telephones to be installed on aircraft provided that these telephones are used only when the aircraft is on the ground. These parties indicate that there are a number of legitimate reasons why a cellular telephone may be installed in a private aircraft. For example, CTIA indicates that cellular telephones installed in helicopters and other aircraft which land in areas where public telephone facilities are not available could be used for ground-based communications by rescue services, news teams, businesses and others.

10. COM/NAV and the National Telephone Cooperative Association support the Commission's proposal to prohibit the installation of cellular units on aircraft because an overall ban is the only way to ensure that cellular telephones are not used in the air. Furthermore, COM NAV believes that a ban is not burdensome because alternative means of communication are available, both in aircraft and in airport facilities.

11. The Notice proposed to prohibit the installation of mobile stations or portable units in aircraft. However, no information or evidence has been presented showing that the installation of cellular telephones in aircraft would cause interference to cellular transmissions.[12] Moreover, the record indicates that cellular telephones may be particularly useful in private aircraft and that there is a legitimate need to have cellular telephones installed in such aircraft. While we share COMNAV's concern that cellular telephones should not be used in an aircraft that is airborne, we have concluded, as discussed above, that cellular telephones may be used on the ground subject to FAA regulations. Thus, a general prohibition on the installation of cellular telephones in aircraft is overreaching. Cellular telephone users who willfully or repeatedly violate our rules prohibiting the airborne use of cellular telephones are subject to strict remedial action which includes monetary forfeitures (*see* Section 503 of the Act, 47 U.S.C. Section 503) in addition to action by the FAA.[13] We find this an adequate means to limit the kind of conduct about which COMNAV is concerned.

12. Accordingly, we also add language to our rules that will generally allow the installation of cellular mobile telephones aboard aircraft. *See* Appendix B. Where telephones are installed, however, we will require that a notice be posted adjacent to the telephones stating tha "The use of cellular telephones while this aircraft is ai borne is prohibited by FCC rules and the violation of thi rule could result in suspension of service and/or a fin The use of cellular telephones while this aircraft is on th ground is subject to FAA regulations."[14] We believe tha this notice is necessary to inform all cellular telephon users aboard aircraft that the use of cellular telephone while airborne is prohibited. Finally, Section 22.911(a)(will require that all cellular telephones on board aircraf including portable installed units, must be turned off onc the aircraft is airborne. We believe that the public interes requires this limitation to assure that no incoming tele phone calls are received. Incoming telephone calls coul cause the mobile unit to transmit automatically, thereb creating the same interference as if the calls originated i the airborne aircraft. Moreover, any call permissibly un derway during periods on the the ground must be termi nated once the aircraft is airborne. Of course, the airline pilot or FAA may require a customer to cease using cellular telephone at any earlier point in accordance wit their own policies.

13. We emphasize that the rules which we adopt toda with regard to the use of cellular telephones on boar aircraft are subject to FAA guidelines. Therefore, neithe cellular carriers nor their subscribers can demand to us cellular service aboard aircraft if the FAA has proscribe such use, and any use is specifically subject to all FA regulations.

III. CELL ENHANCERS

A. Background

14. The Notice also proposed rules that would allow th routine licensing of cell "enhancers" or "boosters," de vices that receive, amplify and retransmit the signals of particular cell site and its mobile units to and from area of poor coverage. Cell enhancers, commonly used unde developmental authority since 1985, have proven to be cost effective alternative to adding one or more new ce sites to correct problems of poor coverage, thus avoidin the need to reconfigure existing cells. Because the device have proven successful in solving problems of poor co erage without any documented cases of interference, w believed that it would be in the public interest to ado new rules governing their use.

B. Discussion

15. The commenters overwhelmingly support the Com mission's proposal to allow the use of cell enhancers on regular basis rather than pursuant to developmental au thority. They agree that these devices offer an economic means of improving service to licensees' existing covera areas and they suggest that the Commission permit th use of all cell enhancers, consistent with the technic requirements adopted for the cellular service in *Amen ment of Parts 2 and 22 of the Commission's Rules to Perm Liberalization of Technology and Auxiliary Servi Offerings in the Domestic Public Cellular Radio Telecon munications Service*, 3 FCC Rcd 7033 (1988) ("*Auxilia Cellular Services Order*"), *recon.*, 5 FCC Rcd 1138 (1990)

16. Subsequent to the release of the Notice, we adopte new rules which allow cellular licensees the option utilizing new and innovative technologies in the provisio of cellular service. In the *Auxiliary Cellular Services Orde*

3 FCC Rcd at 7034, we stated that the cellular industry will be able to use spectrum more efficiently and provide better service to subscribers through the use of nonconventional equipment. In accordance with the requirements of Section 22.930, adopted in our *Auxiliary Cellular Services Order*,[15] a cellular licensee may currently use cell enhancers not subject to the restrictions specified in our Notice.

17. Accordingly, in view of our flexible cellular rules, the use of cell enhancers will not be limited to the restrictions proposed in our Notice. Rather, cell enhancers will be subject to the same technical limitations specified in Section 22.930 (c) of the rules. Therefore, cell enhancers will be subject to the height-power limitations provided in Sections 22.904 and 22.905. In addition, the emission requirements of Section 22.907 will apply, but only to the extent that those emissions fall outside the specific cellular frequency bands licensed to the operator, i.e., band A or band B. Because cell enhancers may now operate at the same power limits as regular cell site transmitters, they will be used both to fill in areas of poor coverage associated with an existing cell site and as a more economical way to increase coverage in new locations.[16] In view of this broader application of these devices, a more apt descriptive definition is necessary. Accordingly, we will name them "cellular repeaters." *See* Appendix B.

18. All cellular repeaters must be type-accepted before being used.[17] Applications for type-acceptance should be filed pursuant to Parts 2 and 22 of the rules, and should include a report of measurements pertaining to frequency range, maximum output power and modulation techniques. For those cellular repeaters utilizing linear amplifiers, the application for type-acceptance must contain test data demonstrating that any third order intermodulation products remain within the limits prescribed by Section 22.907 of the rules.

19. Applications for cellular repeaters will be considered on the same basis as applications for conventional cell site transmitters. Licensees proposing to operate a cellular repeater where the 39 dBu contour[18] does not extend beyond the authorized Cellular Geographic Service Area (CGSA) may notify the Commission by filing FCC Form 489, pursuant to the requirements of Section 22.117(b) of the rules. Licensees proposing to use a cellular repeater where the 39 dBu contour extends beyond the authorized CGSA must file an FCC Form 401 application and obtain prior Commission authorization before commencing operation.[19] The information accompanying each application should be identical to the information submitted when applying for a conventional cell site facility, with an additional exhibit indicating that the application is for a cellular repeater. Filing fees are identical to an application for a cell site in accordance with Section 1.1105 of the Commission's rules.

20. In our Notice we proposed that any licensee using a cellular repeater notify all other carriers operating within the same Metropolitan Statistical Area (MSA), New England County Metropolitan Area (NECMA) or Rural Service Area (RSA), specifying the use and location of the repeater. A number of commenters opposed this requirement, claiming that it would be disadvantageous to disclose such information to their competitors. Because cellular repeaters must be type-accepted and are subject to the same power and emission limitations as standard cellular base stations, we find no reason to treat a cell repeater differently than a regular cellular base station. Therefore we will not require this notification. However, cellular repeaters will be subject to the standard frequency coordination procedures described in Section 22.902(d) of the rules.

21. Finally, we note that on May 24, 1988, the staff issued a Public Notice (Report No. CL-88-113) stating that all current developmental authorizations for cell enhancers, all of which are for service within existing CGSAs, would be extended until the Commission developed standards for their use on a non-developmental basis. Existing developmental authorizations for cellular repeaters will expire one year from the effective date of this *Report and Order*. There will be no grandfathering, so that all such equipment must be replaced with type-accepted cellular repeaters and licensees must submit an FCC Form 489 to obtain permanent authorization for their equipment, as required by Section 22.117 of our rules.

IV. CONCLUSION

22. The rules adopted in this *Report and Order* codify our present policy prohibiting the use of cellular telephones on board airborne aircraft. In addition, the new rules permit the on-ground use and installation of cellular telephones in aircraft subject to FAA rules and guidelines. Finally, consistent with the Commission's decision in the *Auxiliary Cellular Service Order*, we are adopting rules governing the use of cellular repeaters.

V. ORDERING CLAUSES

23. Authority for the rule changes adopted herein is contained in Sections 1, 4(i) and (j), and 303(r) of the Communications Act of 1934, as amended. 47 U.S.C. Sections 151, 154(i), 154(j) and 303(r).

24. Accordingly, IT IS ORDERED that Part 22 of the Commission's rules IS HEREBY AMENDED as set forth in Appendix B below.

25. IT IS FURTHER ORDERED that the rule changes made herein WILL BECOME EFFECTIVE 60 days from the date of publication in the Federal Register.

26. For further information, contact Michael Ferrante ((202) 653-5560) or Dan Abeyta ((202) 632-6450), Mobile Services Division, Common Carrier Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parties Commenting on Notice of Proposed Rule Making

ALLTEL Mobile Communications, Inc. (ALLTEL)

Antenna Specialists Co.

ASTRONET Corporation (ASTRONET)

Bell Atlantic Mobile Systems, Inc. (Bell Atlantic)

BellSouth Corporation
Cellular Telecommunications Industry Association (CTIA)
COM/NAV Marine, Inc. (COM/NAV)
GTE Corporation
McCaw Cellular Communications, Inc. (McCaw)
National Business Aircraft Association
National Telephone Cooperative Association (NTCA)
NYNEX Mobile Communications Company
PacTel Cellular (PacTel)
Providence Journal Telecommunications, Inc. (Providence)
Peninsula Engineering Group, Inc. (Peninsula Engineering Group)
Southwestern Bell Mobile Systems, Inc. (Southwestern Bell)
Telecommunications Industry Association
Telocator
U S West NewVector Group, Inc. (NewVector)

Reply Comments

Cellular Telecommunications Industry Association
GTE Corporation
McCaw Cellular Communications, Inc.
NYNEX Mobile Communications Company
Southwestern Bell Mobile Systems, Inc.
Telocator

Additional Parties Commenting on FAA Letter of November 27, 1989

Air Transport Association
Aloha Airlines
American Airlines
Cincinnati Microwave Communications
Delta Air Lines, Inc.
Eastern Airlines
General Cellular Corporation
International Air Transport Association
Northwestern Airlines
Pan Am World Airways
Rollins, Inc.
Sky Cell Corporation
TWA
Air Transport Association of America
Federal Aviation Administration
Aircraft Owners and Pilots Association
Airline Pilot Association

APPENDIX B
AMENDED RULES SECTION

Title 47, Part 22 of the Code of Federal Regulations is amended as follows:

Part 22 - Public Mobile Service

1. The authority citation for Part 22 continues to read as follows:

Authority: Sections 4, 303, 48 Stat., as amended, 1066, 1082; (47 U.S.C. 154, 303).

2. Section 22.2 is amended by adding a new definition in alphabetical order to read as follows:

Section 22.2 Definitions.

* * * * *

Cellular Repeater. A fixed station in the Domestic Public Cellular Radio Telecommunications Service which retransmits the transmissions of a particular cell site, with or without frequency translation.

* * * * *

3. Section 22.904 is revised to read as follows:

Section 22.904 Power limitations.

Stations in this service shall not be permitted to exceed the effective radiated power indicated below.

	Watts (ERP)
Base stations	500
Mobile stations	7
Auxiliary test stations	7
Cellular Repeaters	500

4. Section 22.911 is amended by adding paragraph (a)(1) to read as follows:

Section 22.911 Permissible communications.

(a) * * *

(1) Cellular telephones shall not be operated in airplanes, balloons or any other aircraft capable of airborne operation while airborne. Once the aircraft is airborne all cellular telephones on board such vehicles must be turned off. The term "airborne" means the aircraft is no touching the ground. Cellular telephones may be installed in aircraft. A cellular telephone which is installed in an aircraft must contain a posted notice which reads: "The use of cellular telephones while this aircraft is airborne is prohibited by FCC rules, and the violation of this rule could result in suspension of service and/or a fine. The use of cellular telephones while this aircraft is on the ground is subject to FAA regulations."

* * * * *

5. Section 22.912 is amended by adding new paragraph (c) to read as follows:

Section 22.912 Responsibility for operational control and maintenance of mobile stations.

* * * * *

(c) A cellular carrier may either refuse or terminate service to a subscriber, in accordance with any applicable local requirements for timely notification, for using a cellular telephone in an airborne aircraft in violation of Section 22.911(a)(1).

6. Section 22.930 is amended by adding a last sentence to paragraph (d) to read as follows:

Section 22.930 Special provisions for alternative cellular technologies and auxiliary services.

* * * * *

(d) * * * For purposes of this paragraph, cellular repeaters will be treated as a cellular facility.

APPENDIX C

FINAL REGULATORY FLEXIBILITY ANALYSIS

I. Need and purpose of this action:

With respect to the use of cellular units in aircraft, the rule adopted clarifies our policy in this area and prevents a potential interference source. As for the use of cell repeaters, our objective is to facilitate the rapid introduction of advanced cellular technologies in the Domestic Public Cellular Radio Telecommunications Service.

II. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

No comments were raised in response to the Initial Regulatory Flexibility Analysis. Several parties suggested modification or clarifications to the proposals set forth in the Notice. As a result of these comments, we have adjusted our proposals as appropriate.

III. Significant alternatives considered:

The regulatory burdens we have retained are necessary to carry out our duties under the Communications Act of 1934, as amended. We will continue to examine alternatives in the future with the objective of eliminating unnecessary regulations and minimizing any significant economic impact on small entities. A copy of the Report and Order shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

FOOTNOTES

[1] *Amendment of Sections of Part 22 of the Commission's Rules in the Matter of Airborne Use of Cellular Units and the Use of Cell Enhancers in the Domestic Public Cellular Radio Service, Notice of Proposed Rulemaking,* 3 FCC Rcd 5265 (1988). Late-filed pleadings, and motions for acceptance thereof, were filed by the National Business Aircraft Association and NYNEX Mobile Communications Company. These motions were unopposed and we grant them in the interest of obtaining a complete record upon which to base our decisions in this proceeding.

[2] *See* Appendix A for a listing of commenters and abbreviations used herein.

[3] Letters from Associate Administrator for Airways Facilities, FAA, to Chief, Mobile Services Division, Common Carrier Bureau (November 27, 1989 and September 19, 1991). The public was made aware that the FAA had corresponded with the FCC concerning the use of cellular telephones in aircraft and several parties filed comments in response to the FAA's first letter. *See* Public Notice, "Notice to File Comments on FAA Concerns Regarding the Use Of Cellular Telephones in Aircraft" (December 18, 1989).

[4] Although not all comments are discussed in this R&O, we have analyzed all of the arguments contained in the comments filed in this Rule Making proceeding.

[5] Section 22.509(b)(2) of the Commission's rules specifically limits the operation of airborne mobile stations governed by Part 22 to the frequencies listed in Section 22.521. Section 22.521 also specifies the operating parameters of the air-ground radiotelephone service for common carriers, which utilizes certain frequencies in the 454 MHz band. Air-ground radiotelephone service provides a public radio service between a base station and airborne mobile stations.

[6] In an effort to satisfy the public's radiotelephone needs, the Commisison recently adopted rules establishing an air-ground radiotelephone service that operates in the 849-851/894-896 MHz frequency bands. *See* Amendment of the Commisison's Rules Relative to Allocation of the 849-851/894-896 MHz Bands, 5 FCC Rcd 3861 (1990), *recon.*, 6 FCC Rcd 4582(1991). This service is capable of operating while the aircraft is airborne or on the ground.

[7] The Notice stated that we would continue to follow the guidelines set forth in the October 11, 1984 Public Notice pending the conclusion of this Rule Making proceeding.

[8] We point out that Section 22.210 of our rules provides that during periods of emergencies, i.e., when normal communication facilities are disrupted as a result of hurricane, flood, earthquake, or similar disaster, a licensee of any station in the Public Mobile Services may utilize that station for emergency communication service provided it complies with the requirements of Sections 22.210(a)-(e).

[9] Letter from Associate Administrator for Airways Facilities, FAA, to Chief, Common Carrier Bureau (November 27, 1989).

[10] On December 18, 1989 the Commission issued a Public Notice soliciting comments on the FAA letter. We received 23 comments and 5 reply comments. Twelve parties favor the on-ground use of cellular telephones in aircraft, arguing that the FAA position is not based on empirical evidence. Eleven comments were received from various airlines and aviation associations, all supporting the views expressed in the FAA letter.

[11] We note that Section 91.19 of the FAA's rules already governs the operation of all portable electronic devices on aircraft. 14 C.F.R. Section 91.19 This rule provides in pertinent part that the operation of any portable electronic device is not allowed on any United States registered aircraft unless the air carrier or commercial operator in the case of commercial aircraft or the pilot in command in the case of other aircraft determines that the use of such devices will not cause interference with the navigation or communication systems on the aircraft on which the devices are to be used.

[12] In addition, no evidence was presented showing that the installation and use of cellular telephones in aircraft might interfere with the air-to-ground radiotelephone system installed in the same aircraft because cellular service and air-to-ground radiotelephone service operate on different frequencies.

[13] We note that a section 503 forfeiture proceeding against a non-licensee or non-applicant can only be initiated for a second violation, after issuance of a citation in connection with a first violation. 47 U.S.C. § 503(b)(5). *See also* Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991).

[14] *See* Section 22.911(a)(1) of the rules. In order to discourage violations of this rule, we adopt a new rule section that provides: "A cellular carrier may either refuse or terminate service to a subscriber, in accordance with any applicable local requirements for timely notification, for using a cellular telephone in an airborne aircraft . . . ." *See* Section 22.912(c). Violations of this rule are also punishable under Section 502 of the Act.

[15] Section 22.930 specifies the application filing procedures and requirements concerning the use of devices employing new technologies and nonconventional equipment in the cellular radio service.

[16] A number of commenters in our Notice request that the Commission act as expeditiously as possible to initiate an additional Rule Making proceeding to address the use of high-powered cell enhancers. However, the adoption of the *Auxiliary Cellular Services Order* obviates the need for such a proceeding. Accordingly, this request is dismissed as moot.

[17] Several parties recommend that the Commission adopt rules allowing cell repeaters to be eligible for authorization through the notification procedures specified in Section 2.975 of the rules. We will adhere, however, to the authorization requirements for nonconventional equipment operating under Section 22.930 because of our need to identify equipment that may cause interference. As noted in *Auxiliary Cellular Services Order, supra,* type-acceptance will also serve to prevent the use and marketing of illegal equipment in the cellular radio service.

[18] The 39 dBu figure set forth in Section 22.903 of the rules refers to the electric field strength by which a carrier's service area is defined. We recently released a Further Notice of Proposed Rule Making which addresses the issue of whether 39 dBu contours should continue to be used to represent reliable cellular coverage. *See* Rules for Unserved Areas (Further Notice of Proposed Rule Making), Mimeo # FCC 91-311, adopted September 30, 1991. Therefore, the rules that we adopt today will remain in effect pending the final decision in that proceeding.

[19] Section 22.930(d) states that the 39 dBu contours of auxiliary service facilities will not be considered when demonstrating the 75 percent coverage requirement specified in Section 22.903. We will, however, modify Section 22.930 to allow the 39 dBu contour of a cell repeater, as calculated according to Section 22.903 of the rules, to be considered as part of a cellular system's coverage area, in the same way we consider conventional cell transmitters. *See* Section 22.903(d) in Appendix B.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-479

In the Matter of

Quests, Inc.
Linesville, Pennsylvania

Licensee of Radio Station
WAST(AM), Ashtabula, Ohio

Order to Show Cause Why the
License of Station WAST(AM)
Ashtabula, Ohio, Should
Not Be Revoked

MEMORANDUM OPINION AND ORDER

Adopted: December 20, 1991; Released: December 30, 1991

By the Chief, Mass Media Bureau:

1. The Chief, Mass Media Bureau, has for consideration a Petition for Reconsideration (hereinafter, "petition") of the Bureau's *ORDER OF REVOCATION*, 6 FCC Rcd 3385 (1991) (hereinafter, *"ORDER"*), filed by Phillip J. Cantagallo (hereinafter, "Cantagallo") on July 10, 1991.[1]

BACKGROUND

2. The *ORDER* revoked the license of Quests, Inc. (hereinafter, "Quests") for station WAST(AM), Ashtabula, Ohio. The licensee failed to file a written notice of appearance and did not appear at the prehearing conference. Thus, it failed to participate in the proceeding and waived its right to a hearing scheduled pursuant to the *ORDER TO SHOW CAUSE AND HEARING DESIGNATION ORDER*, 5 FCC Rcd 6599 (1990). The revocation was predicated on the facts that: following a denial by the Commission of a request for continued silence authority, the station has been off the air since May 30, 1984, without permission and has not turned in its license as required by Sections 73.1740(a)(4) and 73.1750 of the Commission's Rules; the licensee does not maintain an address in Ashtabula; and, the licensee no longer possesses the station's real or broadcast related property and is incapable of operation.

3. The *ORDER* also dismissed as moot an Application for Consent to Assignment of Broadcast Station License (File No. BAL-901113ED) (hereinafter, "assignment application"), filed November 13, 1990. The assignment application proposes the transfer of WAST(AM) from the major stockholder of Quests, Arthur W. Cervi, Sr., to Cantagallo. Cantagallo holds 65% of the stock of WAQI, Inc., which holds 44% of the stock in Quests. In dismissing the assignment application, the *ORDER* acknowledged that the proposed assignee claimed that the minority stockholders have been blameless in the matter of any FCC violations and that the assignor lacks the resources and desire to put the station back on the air. However, the *ORDER* noted that Cervi has furnished no written statement in mitigation or even explanation of the violations and that no information was submitted indicating that the minority stockholders would be capable of returning the station to the air.

4. Cantagallo submits that, with one exception, the facts underlying this proceeding are undisputed. As to the one exception, Cantagallo asserts that the Bureau's finding that "no information was submitted indicating that the minority stockholders would be capable of returning the station to the air" is a gross error of fact. Cantagallo asserts that there historically has been serious discord between Quests' majority stockholder Cervi and its minority stockholders, whom he represents. He then provides a history of the minority stockholders' past efforts to obtain relief from the Commission and to be permitted to take action to return the station to the air, up to and including the November 13, 1990, assignment application. In light of his showing, Cantagallo asserts that the Bureau erred when it dismissed the assignment application on the grounds that the minority stockholders had not demonstrated the ability to return the station to the air. He also asserts that the minority stockholders should not be held to account for Quests' violations of Sections 73.1740(a) and/or 73.1750 of the Commission's Rules relating to WAST's unauthorized silence, since they lacked the necessary control over the licensee. Finally, he states that restoration of the license and its assignment to the minority stockholders is in the public interest since it will ensure that service is restored.

DISCUSSION

5. Cantagallo argues that he has standing as the proposed assignee. We agree. Since he was adversely affected in his capacity as the proposed assignee, by the *ORDER*'s dismissal of the assignment application, he is an interested person and, as such, has standing. Section 1.106(b)(1) of the Commission's Rules.

6. Section 1.106(c) of the Commission's Rules provides that a petition for reconsideration will be entertained only if it relies on newly discovered facts or if consideration of the facts relied on is in the public interest. The Bureau has carefully reviewed Cantagallo's petition and concludes that it does not satisfy the Rule's requirements. Specifically, Cantagallo has provided no newly discovered facts or public interest considerations relative to the revocation of Quests' license. Rather, Cantagallo's petition focuses almost exclusively on his desire to have Quests' license assigned to the minority stockholders. Thus, reconsideration of the revocation of Quests' license is unwarranted.

7. Reconsideration of the dismissal of the assignment application is also unwarranted. Critical to the disposition of Cantagallo's request to have the license assigned to the minority stockholders "is the recognized policy of the

---

[1] In his petition, Cantagallo requests withdrawal of his June 12, 1991, informal request for reconsideration. The request is granted.

Commission that assignment of [a] broadcast authorization will not be considered until the Commission has determined that the assignor has not forfeited his authorization." *Jefferson Radio Inc., v. FCC,* 2 RR 2d 2090, 2092, 340 F.2d 781, 783 (D.C. Cir. 1964). A solid line of cases affirms the doctrine that a licensee found unqualified cannot assign its license. *See, Stereo Broadcasters, Inc.,* 74 FCC 2d 543 (1979), *aff'd Stereo Broadcasters, Inc. v FCC,* 652 F.2d 1026, 49 RR 2d 781 (D.C. Cir. 1981) and cases cited therein. In the instant case, Quests' license was revoked. Accordingly, there was nothing to assign and the *ORDER* properly dismissed the assignment application as moot. Finally, to the extent that the *ORDER* discussed the failure of the minority stockholders to demonstrate their ability to return the station to the air, those comments were dicta. Therefore, Cantagallo's argument that the Bureau erred in its finding about the minority shareholders is irrelevant.

8. ACCORDINGLY, pursuant to Section 1.106(j) of the Commission's Rules, IT IS ORDERED that the Petition for Reconsideration filed by Phillip J. Cantagallo, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 3387

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: December 19, 1991; Released: December 19, 1991

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 3387 to modify Virtual Telecommunications Network Service (VTNS) Option 15 under which AT&T provides voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. Transmittal 3387 clarifies that any agreement between AT&T and the customer to reduce data transmission capabilities to less than 80 percent of their initial level must be filed in the tariff. *See* AT&T Transmittal No. 3387 at 1, 3. The transmittal is scheduled to take effect December 20, 1991.

2. MCI Telecommunications Corporation filed a petition to reject these modifications to Option 15, on August 27, 1991; AT&T filed a reply on September 3, 1991.

3. MCI claims that the Commission, at its meeting on August 1, 1991, found that because the lack of 800 number portability remains a barrier to full competition in 800 services, AT&T should be precluded from bundling 800 services with other services in these Tariff 12 contracts. MCI Petition at 2. MCI asserts that the proposed modifications in Transmittal 3387 were not pending as of August 1, 1991. *Id.* Accordingly, says MCI, Transmittal 3387, which modifies a Tariff 12 option that contains bundled inbound calling, should be rejected. *Id.* at 2-6.

4. AT&T replies that the modifications in Transmittal 3387 clarify that any agreement between AT&T and the customer to reduce data transmission capabilities must be filed in the tariff. AT&T Reply at 1-2. Moreover, says AT&T, these changes are merely ministerial corrections that do not affect inbound transmission capabilities and, therefore, should be permitted to take effect. *Id.* at 4-5.

5. The Common Carrier Bureau has reviewed AT&T Transmittal No. 3387, the petition filed by MCI and AT&T's reply. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

6. Accordingly, IT IS ORDERED that the petition to reject, or to suspend and investigate. American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3387 filed by MCI Telecommunications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone
and Telegraph Company

Revisions to Tariff F.C.C. No. 12

Transmittal No. 3383

ORDER

Adopted: December 19, 1991; Released: December 19, 1991

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 3383 to introduce Virtual Telecommunications Network Service (VTNS) Option 86 under which AT&T provides voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. This transmittal is scheduled to take effect December 20, 1991.

2. MCI Telecommunications Corporation filed a petition to reject these modifications to Option 86, Transmittal 3383, on August 28, 1991. AT&T filed a reply on September 3, 1991.

3. MCI claims that the Commission, at its meeting on August 1, 1991, found that because the lack of 800 number portability remains a barrier to full competition in 800 services, AT&T should be precluded from bundling 800 services with other services in these Tariff 12 contracts. MCI Petition at 2. MCI asserts that the proposed modifications in Transmittal 3383 were not pending as of August 1, 1991. *Id.* Accordingly, says MCI, Transmittal 3383, which modifies a Tariff 12 option that contains bundled inbound calling, should be rejected. *Id.* at 2-6.

4. AT&T replies that the modifications in Transmittal 3383 correct the inadvertent omission of 9.6 kbps and below data transmission capabilities from the data transmission capabilities/voice transmission capabilities (DTC/VTC) pricing plan. AT&T Reply at 1. Moreover, says AT&T, these changes are merely ministerial corrections that do not affect inbound transmission capabilities and, therefore, should be permitted to take effect. *Id.* at 4. Consequently, says AT&T, these revisions should be permitted to take effect. *Id.* at 4-5.

5. The Common Carrier Bureau has reviewed AT&T Transmittal No. 3383, the petition filed by MCI, and AT&T's reply. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to warrant rejection, or that an investigation is warranted at this time.

6. Accordingly, IT IS ORDERED that the petition to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3383 filed by MCI Telecommunications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 3375

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: December 19, 1991; Released: December 19, 1991

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 3375 to modify Virtual Telecommunications Network Service (VTNS) Option 36. VTNS modified Option 36 is described as a generally available offering designed and engineered for voice and data communications service among stations in the U.S., Puerto Rico, the U.S. Virgin Islands, and specific international locations. The revisions to Option 36: add data transmission capabilities (DTCs) at additional speeds; allow customers to place calls using Type I authorization codes; modify the rate schedules to provide for calls placed with a Type I authorization code, and modify the calling matrix to reflect the new calling capability; decrease the basic charge from $1,010,981 per month to $996,171 per month, and reduce the basic charge by $307,000 for the first full month of service following December 14, 1991 or for the first full month of service following the initial service when Option 36 is ordered prior to April 30, 1992 with an initial service date not later than July 30, 1992; modify the international usage volume pricing plan; modify the domestic DTC and voice transmission capability (VTC) volume pricing plan; modify the change charge provisions; modify the outage credit units; and make certain textual changes. *See* AT&T Transmittal No. 3375 Description and Justification (D&J) at 2-5. Transmittal 3375 is scheduled to take effect on December 12, 1991.

2. MCI Telecommunications Corporation (MCI) filed a petition to reject modified Option 36, and US Sprint Communications Company Limited Partnership (Sprint), Williams Telecommunications Group, Inc. (Williams), and Competitive Telecommunications Association (CompTel) filed petitions to reject or suspend and investigate modified Option 36 on September 3, 1991. AT&T filed a reply on September 12, 1991.

3. Petitioners argue that the Commission's action in CC Docket 90-132,[1] prohibits the Commission from accepting the revisions to Option 36.[2] In the *Interexchange Order*, the Commission determined that, pending 800 number portability, 800 or inbound services cannot be legally bundled with other services, but "grandfathered" existing options. *Interexchange Order* at para. 149. Petitioners argue that the Commission intended to grandfather only those options on file as of August 1. MCI Petition at 4; Sprint Petition at 4-5; Williams Petition at 3; CompTel Petition at 2. The petitioners contend that the proposed revisions substantially alter Option 36, which they assert establishes that AT&T is using revisions as a way of avoiding the 800 bundling restriction. *See* MCI Petition at 3; Sprint Petition at 1; Williams Petition at 3; CompTel Petition at 1. Sprint and Williams allege that these modifications expand the scope of 800 service bundling in Option 36 and should not be permitted. *See* Sprint Petition at 2-3; Williams Petition at 3.

4. MCI argues that any modification of a Tariff 12 service arrangement must be viewed as changing the core offering. MCI Petition at 3. Therefore, says MCI, since these revisions would alter an existing Tariff 12 core offering that bundles inbound calling, Transmittal 3375 must be summarily rejected because it would conflict with the August 1 prohibition. *Id.* at 3-4. CompTel insists that these modifications are objectionable because they are material. CompTel Petition at 1.

5. Sprint asserts that the changes in Transmittal 3375 are not being made to serve the current customer but to make this offering more attractive to other customers and thereby avoiding the Commission's prohibition on bundling of inbound service. Sprint Petition at 2-4. Sprint insists that if the Commission continues to permit AT&T to revise existing "grandfathered" options with an inbound component the grandfathering provision will be rendered more loophole than rule. *See* Sprint Petition at 3.

6. Williams argues that AT&T has failed to demonstrate that modified Option 36 is an integrated service package that is "unlike" its component services and thus has failed to justify the discrimination between this option and AT&T's other services. Williams Petition at 5-7. Williams asserts that even if Option 36 could qualify as an integrated service package, its rates vary without justification from other options under Tariff 12 and are thus discriminatory. *Id.* at 7-9. Williams further alleges Tariff 12 cannot be justified under the principles enunciated in the *Tariff 12 Remand* and *Sea-Land* decisions, claiming that those cases require that the tariff filing or contract provide sufficient information to ensure compliance with statutory antidiscrimination provisions. *Id.* at 9-13. Williams also insists that discounted prices, even if generally available, are not automatically reasonable under Section 202(a) of the Communications Act. *Id.* at 14-15.

7. AT&T replies that this filing makes no fundamental change to Option 36; the rate elements, rate structure and functionality remain essentially as originally filed. AT&T Reply at 1. AT&T also asserts that Transmittal 3375 makes no modifications whatever in the rates for any inbound capabilities. *Id.* at 2.

---

[1] Competition in the Interstate Interexchange Marketplace, Report and Order, 56 Fed. Reg. 55235 (Oct. 25, 1991), 6 FCC Rcd 5880 (1991) (*Interexchange Order)*.

[2] These petitions were filed prior to the release of the *Interexchange Order*. Consequently, the discussions in the petitions rely upon the Commission's News Release and statements made at the August 1 meeting. AT&T claims that such reliance is improper. Since the *Interexchange Order* has been released, we will not address AT&T's concerns that the petitioners' claims were "premature at best."

8. In response to the claims of Sprint and Williams that these revisions expand the scope of 800 bundling, AT&T asserts that these modifications make no change to rate schedules D or E, which apply for inbound calling, or any other change that affects inbound capabilities. *Id.* at 4. AT&T also argues that grandfathering involves a balancing of interests, and allowing these "routine" tariff revisions to become effective will in no way impede the Commission's Docket 90-132 policies. *Id.* at 5-6. Rather, says AT&T, it will prevent inequity to the initial Option 36 customer who has made a substantial investment in its VTNS network in reasonable reliance on the continued availability of tariff revisions. *Id.* at 6.

9. AT&T argues that petitioners repeat the same arguments they have raised since the inception of Tariff 12, alleging that Option 36 is unlawfully discriminatory. *Id.* AT&T asserts that these claims have been made before, without success, and should be rejected here as being patently without merit. *Id.* at 6-7.

10. The Commission's *Interexchange Order* precluded AT&T from including any inbound service in new Tariff 12 options until 800 numbers become portable, but "grandfathered" existing Tariff 12 options containing such service. *Interexchange Order* at para. 149. The Commission reasoned that, while this action would inconvenience customers who were in negotiations for Tariff 12 options, such customers would not have to reconfigure their existing service offerings, which existing customers would be required to do in the absence of the grandfathering provision. *Id.* at n. 237. On November 25, 1991, the Commission released an Order extending the grandfathering provision of the *Interexchange Order* to include the additional Tariff 12 options that had been filed with the Commission before September 1, 1991.[3]

11. The Common Carrier Bureau has reviewed AT&T Transmittal No. 3375, the revisions, and the appropriate pleadings. We conclude that this transmittal must be rejected because these revisions substantially change Option 36, which includes inbound service, and are therefore inconsistent with the Commission's decision in CC Docket 90-132 to prohibit any further bundling of inbound services in Tariff 12 Packages and in contract-based tariffs.[4]

12. Accordingly, IT IS ORDERED that American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3375, IS REJECTED.

13. IT IS FURTHER ORDERED that the petition to reject American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3375, filed by MCI Telecommunications Corporation, and the petitions to reject or suspend and investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3375, filed by US Sprint Communications Company Limited Partnership, Williams Telecommunications Group, Inc., and Competitive Telecommunications Association, ARE GRANTED to the extent indicated herein, and otherwise ARE DENIED.

14. IT IS FURTHER ORDERED that such revisions should be filed within five working days of the release of this Order to be effective on one day's notice. For this purpose, Special Permission No. 91-1091 is assigned and Sections 61.58 and 61.59 of the Commissions Rules, 47 C.F.R. §§ 61.58, 61.59, are waived.

15. IT IS FURTHER ORDERED that American Telephone and Telegraph Company SHALL ISSUE revisions to the tariff no later than 5 business days from the release of this Order removing the rejected material and reinstating currently effective material. These revisions shall be scheduled to become effective on not less than one day's notice.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

---

[3] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Memorandum Opinion and Order, FCC No. 91-390, Mimeo 38289, (released Nov. 25, 1991).

[4] *See Interexchange Order, supra,* note 1; *id.* The November 25 Order extended the grandfathering date to include Tariff 12 options filed immediately after the August 1 decision because of the unique circumstances underlying those new Tariff 12 options. Footnote 9 of the November 25 Order states: "Because AT&T did not file any additional Tariff 12 options after August 8, our concerns about the arbitrariness of alternative grandfathering dates are mitigated insofar as there will be no need to consider additional options." The Commission concluded that its limited extension of the grandfathering date "would allow only this small number of additional Tariff 12 options to become effective." November 25 Order at 3. While no additional Tariff 12 options had been filed after August 8, proposed modifications to existing options, such as Transmittal 3375, had been filed and were pending. By the November 25 Order, the Commission did not include the pending modifications filed after August 8 within the revised grandfathering provision.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 3396

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: December 20, 1991; Released: December 20, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 3396 to modify Virtual Telecommunications Network Service (VTNS) Option 28. VTNS modified Option 28 is described as a generally available offering designed and engineered for voice and data communications service among stations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. The revisions to Option 28: expands the calling capabilities to include Measured Ports; revises the Measured charges rate schedules to reflect calls using Measured Ports; modifies the Changes section to include Measured Ports; reduces the Basic Charge; removes a charge imposed on AT&T when Service Element installation is delayed; modifies the minimum Service Element requirements; and increases discount levels in the Data Transmission Capability Volume Pricing Plan. AT&T Transmittal No. 3396 Description and Justification (D&J) at 2-5. Transmittal 3396 is scheduled to take effect on December 21, 1991.

2. MCI Telecommunications Corporation (MCI) filed a petition to reject modified Option 28, and US Sprint Communications Company Limited Partnership (Sprint), Williams Telecommunications Group, Inc. (Williams), and Competitive Telecommunications Association (CompTel) filed petitions to reject or suspend and investigate modified Option 28 on September 10, 1991. AT&T filed a reply on September 19, 1991.

3. Petitioners argue that the Commission's action in CC Docket 90-132,[1] prohibits the Commission from accepting the revisions to Option 28.[2] Petitioners argue that the Commission intended to grandfather only those options on file as of August 1. MCI Petition at 4; Sprint Petition at 4-5; Williams Petition at 3; CompTel Petition at 2. The petitioners contend that the proposed revisions substantially alter Option 28, which they assert establishes that AT&T is using revisions as a way of avoiding the 800 bundling restriction. *See* MCI Petition at 3; Sprint Petition at 1; Williams Petition at 3; CompTel Petition at 1. Sprint and Williams allege that these modifications expand the scope of 800 service bundling in Option 28 and should not be permitted. *See* Sprint Petition at 2-3; Williams Petition at 3.

4. MCI argues that any modification of a Tariff 12 service arrangement must be viewed as changing the core offering. MCI Petition at 3. Therefore, says MCI, since these revisions would alter an existing Tariff 12 core offering that bundles inbound calling, Transmittal 3396 must be summarily rejected because it would conflict with the August 1 prohibition. *Id.* at 3-4. CompTel insists that these modifications are objectionable because they are material. CompTel Petition at 1.

5. Sprint asserts that the changes in Transmittal 3396 are not being made to serve the current customer but to make this offering more attractive to other customers, thereby avoiding the Commission's prohibition on bundling of inbound service. Sprint Petition at 2-4. Sprint insists that if the Commission continues to permit AT&T to revise existing "grandfathered" options with an inbound component the grandfathering provision will be rendered "more loophole than rule." *See* Sprint Petition at 3.

6. Williams argues that AT&T has failed to demonstrate that modified Option 36 is an integrated service package that is "unlike" its component services and thus has failed to justify the discrimination between this option and AT&T's other services. Williams Petition at 5-7. Williams asserts that even if Option 28 could qualify as an integrated service package, its rates vary without justification from other options under Tariff 12 and are thus discriminatory. *Id.* at 7-9. Williams further alleges Tariff 12 cannot be justified under the principles enunciated in the *Tariff 12 Remand* and *Sea-Land* decisions, claiming that those cases require that the tariff filing or contract provide sufficient information to ensure compliance with statutory antidiscrimination provisions. *Id.* at 9-13. Williams also insists that discounted prices, even if generally available, are not automatically reasonable under Section 202(a) of the Communications Act. *Id.* at 14-15.

7. AT&T replies that this filing makes no fundamental change to Option 28; the rate elements, rate structure and functionality remain essentially as originally filed. AT&T Reply at 1. AT&T also asserts that Transmittal 3396 makes no modifications whatever in the rates for any inbound capabilities. *Id.* at 2.

8. In response to the claims of Sprint and Williams that these revisions expand the scope of 800 bundling, AT&T asserts that these modifications make no change to rate schedules D or E, which apply for inbound calling, or any other change that affects inbound capabilities. *Id.* at 4. AT&T also argues that grandfathering involves a balancing of interests, and allowing these "routine" tariff revisions to become effective will in no way impede the Commission's Docket 90-132 policies. *Id.* at 5-6. Rather, says AT&T, it will prevent inequity to the initial Option 28

---

[1] Competition in the Interstate Interexchange Marketplace, Report and Order, 56 Fed. Reg. 55235 (Oct. 25, 1991), 6 FCC Rcd 5880 (1991) (*Interexchange Order*).

[2] These petitions were filed prior to the release of the *Interexchange Order*. Consequently, the discussions in the petitions rely upon the Commission's News Release and statements made at the August 1 meeting. AT&T claims that such reliance is improper. Since the *Interexchange Order* has been released, we will not address AT&T's concerns that the petitioners' claims were "premature at best."

customer who has made a substantial investment in its VTNS network in reasonable reliance on the continued availability of tariff revisions. *Id.* at 6.

9. AT&T argues that petitioners repeat the same arguments they have raised since the inception of Tariff 12, alleging that Option 28 is unlawfully discriminatory. *Id.* AT&T asserts that these claims have been made before, without success, and should be rejected here as being patently without merit. *Id.* at 6-7.

10. The Commission's *Interexchange Order* precluded AT&T from including any inbound service in new Tariff 12 options until 800 numbers become portable, but "grandfathered" existing Tariff 12 options containing such service. *Interexchange Order* at para. 149. The Commission reasoned that, while this action would inconvenience customers who were in negotiations for Tariff 12 options, such customers would not have to reconfigure their existing service offerings, which existing customers would be required to do in the absence of the grandfathering provision. *Id.* at n. 237. On November 25, 1991, the Commission released an Order extending the grandfathering provision of the *Interexchange Order* to include the additional Tariff 12 options that had been filed with the Commission before September 1, 1991.[3]

11. The Common Carrier Bureau has reviewed AT&T Transmittal No. 3396, the revisions, and the appropriate pleadings. We conclude that this transmittal must be rejected because these revisions substantially change Option 28, which includes inbound service, and are therefore inconsistent with the Commission's decision in CC Docket 90-132 to prohibit any further bundling of inbound services in Tariff 12 Packages and in contract-based tariffs.[4]

12. Accordingly, IT IS ORDERED that American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3396, IS REJECTED.

13. IT IS FURTHER ORDERED that the petition to reject American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3396, filed by MCI Telecommunications Corporation, and the petitions to reject or suspend and investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3396, filed by US Sprint Communications Company Limited Partnership, Williams Telecommunications Group, Inc., and Competitive Telecommunications Association, ARE GRANTED to the extent indicated herein, and otherwise ARE DENIED.

14. IT IS FURTHER ORDERED that such revisions should be filed within five working days of the release of this Order to be effective on one day's notice. For this purpose, Special Permission No. 91-1136 is assigned and Sections 61.58 and 61.59 of the Commissions Rules, 47 C.F.R. §§ 61.58, 61.59, are waived.

15. IT IS FURTHER ORDERED that American Telephone and Telegraph Company SHALL ISSUE revisions to the tariff no later than 5 business days from the release of this Order removing the rejected material and reinstating currently effective material. These revisions shall be scheduled to become effective on not less than one day's notice.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

---

[3] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Memorandum Opinion and Order, FCC No. 91-390, Mimeo 38289, (released Nov. 25, 1991).

[4] *See Interexchange Order, supra*, note 1; *id.*; *see also* American Telephone and Telegraph Company, Transmittal No. 3375, DA 91-1577 (released Dec. 19, 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-584

In re Applications of

EDWIN A. BERNSTEIN	File No. BPH-870330NC
RADIO CENTER MORICHES LIMITED PARTNERSHIP	File No. BPH-870331MV
DAKK, INC.	File No. BPH-870331ND
FRIENDSHIP COMMUNICATIONS, LTD.	File No. BPH-870415KS
HAMPTONS COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-870415KY

For Construction Permit for New FM
Station, Channel 241A,
Center Moriches, New York

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: December 20, 1991; Released: January 3, 1992

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

1. By *Memorandum Opinion and Order*, FCC 91R-105, released November 20, 1991, the Review Board designated the following issues for further hearing:

> (1) To determine whether DAKK has violated Section 1.65 of the Commission Rules, and whether any such violation reflected a deliberate attempt to conceal;
>
> (2) To determine whether DAKK lacked candor in its prosecution of this case or in pleadings filed in this proceeding.

2. In its *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157 (1990), *on reconsideration*, 6 FCC Rcd 3403 (1991), the Commission mandated that, in any case where the issues are enlarged to ascertain if the applicant has made misrepresentations to the Commission or engaged in other misconduct during the application process, a notice shall be given "after hearings on the enlarged issues, and upon a finding that the alleged misconduct occurred and warrants such a penalty, in addition to or in lieu of denying the application, the applicant may be liable for a forfeiture of up to the maximum statutory amount." 6 FCC Rcd at 164.

3. DAKK, Inc. is hereby notified pursuant to 47 CFR § 1.80(f)(1), that it may have violated 47 CFR § 1.117 (duty to submit truthful written statements and responses) and 47 CFR § 73.1015 (applicant shall not submit to the Commission any written statement consisting a misrepresentation or material omission bearing on any matter within the Commission's jurisdiction). DAKK's apparent forfeiture liability would be $20,000 for each such violation, *see generally Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), in lieu of, or in addition to, any other appropriate action.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

**Before the
Federal Communications Commission
Washington DC 20554**

In the Matter of

AT&T COMMUNICATIONS,
Complainant,

v. File No. E-90-02

ILLINOIS BELL TELEPHONE COMPANY,
INDIANA BELL TELEPHONE COMPANY,
MICHIGAN BELL TELEPHONE COMPANY,
OHIO BELL TELEPHONE COMPANY, and
WISCONSIN BELL, INC.,
Defendants.

ORDER

Adopted: December 26, 1991; Released: January 3, 1992

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On October 3, 1989, AT&T Communications (AT&T) filed the above-captioned complaint alleging that defendants' rates for 1988 were unjust and unreasonable in violation of 47 U.S.C. § 201(b). AT&T maintained defendants had overstated their interstate revenue requirements. On December 10, 1991, the parties filed a joint motion to dismiss the complaint. They state that they have reached a settlement which disposes of all issues in controversy in the complaint.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and authority delegated under 47 C.F.R. § 0.291, that the request for dismissal of the above-captioned complaint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington D. C. 20554

MM Docket No. 91-272

In the Matter of

Amendment of Section 73.202(b), RM-7326
Table of Allotments,
FM Broadcast Stations.
(Trinity, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 19, 1991; Released: January 6, 1992

By the Assistant Chief, Allocations Branch:

1. At the request of Roy E. Henderson, d/b/a Trinity Broadcasting Company ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making,* 6 FCC Rcd 5541 (1991), proposing the allotment of Channel 251A to Trinity, Texas, as that community's first local FM service. Petitioner subsequently filed a request for withdrawal of its petition for rule making. [1] No other expressions of interest were filed.

2. In accordance with Commission policy, we will grant petitioner's request for withdrawal of its rule making proposal.

3. Accordingly, IT IS ORDERED, That the petition for rule making of Roy E. Henderson, seeking the allotment of Channel 251A to Trinity, Texas (RM-7326), IS DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

---

[1] In accordance with Section 1.420(j) of the Commission's Rules, petitioner states that he has not been paid or promised any consideration, directly or indirectly, in exchange for the withdrawal of his expression of interest.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-361

In the Matter of

Amendment of Section 73.202(b), RM-7502
Table of Allotments,
FM Broadcast Stations.
(Houma and Chalmette,
Louisiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 19, 1991; Released: January 6, 1992

Comment Date: February 27, 1992
Reply Comment Date: March 13, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Guaranty Broadcasting Corporation ("petitioner"), licensee of Station KCIL(FM), Channel 298C1, Houma, Louisiana, requesting the reallotment of Channel 298C1 from Houma to Chalmette, Louisiana, as the community's first local transmission service, and the modification of Station KCIL(FM)'s license to specify Chalmette as its community of license. In addition, petitioner proposes the allotment of Channel 296A to Houma, Louisiana. Petitioner states that it will apply for Channel 298C1 at Chalmette and Channel 296A at Houma, Louisiana.

2. Petitioner seeks modification of Station KCIL(FM)'s license pursuant to the provisions of Section 1.420(i) of the Commission's Rules, which permits the licensee of an existing station to specify a higher class channel and/or a new community of license without affording other interested parties an opportunity to file competing expressions of interest.[1] Petitioner advises that the requested reallotment to Chalmette is mutually exclusive with the existing allotment of Channel 298C1 at Houma. Petitioner asserts that the adoption of its proposal will result in a preferential arrangement of allotments by bringing a first local transmission service to Chalmette while Houma would retain local aural transmission service from one FM and one AM station.[2] In support of its request, petitioner argues that the reallotment of Channel 298C1 to Chalmette would enable Station KCIL(FM) to serve more than 1,350,000 persons, while its current use at Houma provides service to 247,282 persons. In addition, petitioner states that the reallotment of Channel 298C1 to Chalmette would allow the allotment of Channel 296A to Houma, thereby permitting Houma to maintain two local FM services.[3]

3. Based on the information before us, we are unable to determine whether petitioner's proposal would result in a preferential arrangement of allotments. In this case, petitioner claims that its proposal would provide a first local broadcast service to Chalmette, and would not deprive Houma of local service. However, we note that Chalmette is located within the New Orleans Urbanized Area, and Houma is within the Houma Urbanized Area, as defined by the U.S. Census. We question whether Chalmette is deserving of a first FM service preference, or whether Chalmette should be credited with all of the aural services authorized to communities within the New Orleans Urbanized Area. Therefore, petitioner is requested to submit information sufficient to show that Chalmette is deserving of a first local preference.[4]

4. We note that petitioner asserts that its proposal would provide service to more persons if reallotted to Chalmette than it currently serves at Houma, as well as a second local FM service at Houma. However, we are concerned that loss of service to a segment of Houma's population could occur, as petitioner seeks to replace a Class C1 station at Houma with a Class A facility. Therefore, we request petitioner to submit information regarding any loss of service that would result from this proposal to those persons located within the existing service area of Station KCIL(FM), Channel 298C1, Houma. We also request information as to the extent that this loss area could eventually be compensated by the allotment of Channel 296A to Houma. In addition, we request petitioner to submit information concerning the populations and services available within the predicted gain areas of the proposed reallotment of Channel 298C1 to Chalmette. Finally, we request petitioner to submit any additional information as to the overall public interest benefits that would be advanced from the grant of this proposal.

5. Channel 298C1 can be reallotted from Houma, Louisiana, to Chalmette, Louisiana, in compliance with the minimum distance separation requirements with a site restriction of 6.1 kilometers (3.8 miles) west to accommodate petitioner's desired transmitter site. Channel 296A can be allotted to Houma with a site restriction of 11.9 kilometers (7.4 miles) south to avoid a short spacing to Station WHMD(FM), Channel 296A, Hammond, Louisiana.[5] As requested, we also propose to modify petitioner's license for Station KCIL(FM) to specify Chalmette as the station's community of license. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept expressions of interest in the use of Channel 298C1 at Chalmette or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

---

[1] *See Modification of FM and TV Authorizations to Specify a New Community of License ("Change of Community R&O")*, 4 FCC Rcd 4870 (1989), *recon. granted in part ("Change of Community MO&O")*, 5 FCC Rcd 7094 (1990).

[2] Petitioner submits that in addition to KCIL(FM), Houma is the community of license for KHOM(FM) and KJIN(AM).

[3] Petitioner also claims that the change in community could permit the allotment of a channel to Patterson or Amelia, Louisiana, as a first local transmission service. Petitioner does not express an interest in applying for a channel at either community. Therefore, we will not propose such an allotment.

[4] *See Change of Community MO&O*, supra.

[5] The coordinates for Channel 298C1 at Chalmette are North Latitude 29-55-11 and West Longitude 90-01-29. The coordinates for Channel 296A at Houma are North Latitude 29-29-30 and West Longitude 90-44-26.

6. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Houma, Louisiana	281C, 298C1	296A, 281C
Chalmette, Louisiana	--	298C1

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **February 27, 1992,** and reply comments on or before **March 13, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Carl R. Ramey, Esq.
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
(Counsel for petitioner)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is

directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-362

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Jourdanton, Texas)	RM-7873

NOTICE OF PROPOSED RULE MAKING

Adopted: December 19, 1991; Released: January 6, 1992

Comment Date: February 27, 1992
Reply Comment Date: March 13, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Seventh Day Christian Group ("petitioner") requesting the allotment of Channel 239A to Jourdanton, Texas, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. Petitioner states that Jourdanton is a community of "sufficient size and development" and is listed in the U.S. Census with a population of 3,220 persons.[1] In addition, petitioner notes that Jourdanton is the county seat of Atacosa County, Texas.

3. We believe the public interest would be served by the allotment of Channel 239A to Jourdanton, since it could provide the community with its first local FM service. Channel 239A can be allotted to Jourdanton in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2] Since Jourdanton is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence of the Mexican government has been solicited.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Jourdanton, Texas	--	239A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **February 27, 1992,** and reply comments on or before **March 13, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lee J. Peltzman, Esq.
Baraff, Koerner, Olender & Hochberg, P.C.
5335 Wisconsin Avenue, N.W.
Suite 300
Washington, D.C. 20015-2003
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

---

[1] According to the 1980 U.S. Census, Jourdanton is an incorporated community and has a population of 2,743 persons.

[2] The city reference coordinates for Channel 239A at Jourdanton are North Latitude 28-54-48 and West Longitude 98-32-36.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

> (a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)
>
> (b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.
>
> (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-363

In the Matter of

Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations. (Springdale, Arkansas) RM-7877

NOTICE OF PROPOSED RULE MAKING

Adopted: December 19, 1991; Released: January 6, 1992

Comment Date: February 27, 1992
Reply Comment Date: March 13, 1992

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed on behalf of Total Life Community Educational Foundation ("petitioner") seeking the allotment of UHF television Channel 57 to Springdale, Arkansas, as that community's first local television broadcast service. Petitioner stated its intention to apply for authority to construct and operate a television broadcast station on Channel 57, if allotted to Springdale, as requested.

2. Springdale (population 23,458),[1] in Washington County (population 100,494), is located approximately 230 kilometers (145 miles) northwest of Little Rock.

3. A staff review of the proposal has determined that Channel 57 can be allotted to Springdale consistent with the minimum distance separation requirements of Sections 74.610 and 73.698 of the Commission's Rules without the imposition of a site restriction.[2] Although the Commission has imposed a temporary freeze on new television allotments in certain metropolitan areas, the proposed allotment at Springdale is not affected thereby.[3]

4. We believe the public interest would be served by proposing the allotment of UHF Channel 57 to Springdale as that community's first local television broadcast service. Accordingly, we seek comments on the proposal to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, to include the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Springdale, Arkansas		57

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **February 27, 1992,** and reply comments on or before **March 13, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Ashton R. Hardy, Esq.
Bradford D. Carey, Esq.
Craig E. Frosch, Esq.
Walker, Bordelon, Hamlin,
Theriot and Hardy
701 South Peters Street
New Orleans, LA 70130

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been

---

[1] Population figures were taken from the 1980 U.S. Census.

[2] Coordinates used for Channel 57 are 36-11-00 and 94-08-18.

[3] *See Order, Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 52 Fed. Reg. 28346, published July 29, 1987. In this instance, the distance from Kansas City, Missouri (the closest of the 30 major markets affected by the freeze), is approximately 320 kilometers (199 miles) from Springdale, whereas a distance of 280.8 kilometers (174.5 miles) is required.

served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

> (a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)
>
> (b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.
>
> (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**Before the
Federal Communications Commission
Washington D. C. 20554**

MM Docket No. 91-250

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Gilmer, Texas)	RM-7461

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 20, 1991; Released: January 6, 1992

By the Assistant Chief, Allocations Branch:

1. At the request of Curtis Broadcasting Stations, Inc. ("petitioner"), licensee of Station KLSQ(FM), Channel 237A, Gilmer, Texas, the Commission has before it the *Notice of Proposed Rule Making,* 6 FCC Rcd 5075 (1991), proposing the substitution of Channel 237C3 for Channel 237A at Gilmer, and the modification of Station KLSQ(FM)'s license to specify operation on the higher powered channel. Petitioner filed comments stating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the interest would be served by the substitution of Channel 237C3 for Channel 237A at Gilmer, since it would provide the community with a wide coverage area FM service. Channel 237C3 can be allotted to Gilmer in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.2 kilometers (2.6 miles) southeast to accommodate petitioner's desired transmitter site.[1] As proposed, we will also modify petitioner's license for Station KLSQ(FM) to specify operation on Channel 237C3 in accordance with the provisions of Section 1.420(g) of the Commission' Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 20, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Gilmer, Texas	237C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Curtis Broadcasting Stations, Inc., for Station KLSQ(FM), Gilmer, Texas, IS MODIFIED to specify operation on Channel 237C3, in lieu of Channel 237A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

---

[1] The coordinates for Channel 237C3 at Gilmer are North Latitude 32-42-02 and West Longitude 94-55-14.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-364

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Nassawadox, Virginia)	RM-7780

NOTICE OF PROPOSED RULE MAKING

Adopted: December 20, 1991; Released: January 6, 1992

Comment Date: February 27, 1992
Reply Comment Date: March 13, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Tobacco Country Radio, Inc. ("petitioner"), requesting the allotment of Channel 222A to Nassawadox, Virginia, as the community's first local FM service. In order to accomplish the new allotment at Nassawadox, petitioner also requests the substitution of Channel 285A for Channel 269A at Kilmarnock, Virginia, and the modification of Station WKWI(FM)'s license to specify the alternate channel; and the substitution of Channel 269A for Channel 222A at Deltaville, Virginia, a vacant and unoccupied allotment for which one application is pending. Petitioner states that it will apply for the channel at Nassawadox and will also reimburse the licensee of Station WKWI(FM) for the reasonable costs associated with the change in channel at Kilmarnock. Comments in opposition were filed by Deltaville Communications ("Deltaville"), applicant for a new FM station on Channel 222A, Deltaville, Virginia. Petitioner and Sinclair TeleCable, Inc., licensee of Station WCDX(FM), Mechanicsville, Virginia, filed responsive comments to Deltaville's opposition.

2. Petitioner states that Nassawadox is a community on the eastern shore of Virginia and is listed in the 1980 U.S. Census with a population of 630 persons.[1] In addition, petitioner notes it proposed allotment would provide a new radio reception service to all of Northampton County, including Eastville, the county seat, which currently lacks a local radio transmission service.

3. Deltaville opposes the allotment of Channel 222A to Nassawadox because of the associated substitutions required to accommodate the new allotment. Deltaville notes that it is Commission policy not to make channel substitutions unless absolutely necessary. To this er Deltaville submits that Channel 250A or Channel 25 are alternate channels available to allot to Nassawad without the need to substitute channels in any oth community.[2]

4. We have confirmed that Channel 250A can be all ted to Nassawadox, Virginia. We believe the public int est would be served by proposing the allotment Channel 250A to Nassawadox, rather than Channel 222 with the associated substitutions. This channel could pr vide the community with its first local FM service. Cha nel 250A can be allotted to Nassawadox in complian with the Commission's minimum distance separation quirements without the imposition of a site restriction.[3]

5. Accordingly, we seek comments on the propos amendment of the FM Table of Allotments, Secti 73.202(b) of the Commission's Rules, for the commun listed below, to read as follows:

	Channel No.	
City	Present	Propos
Nassawadox, Virginia	--	25

6. The Commission's authority to institute rule maki proceedings, showings required. cut-off procedures, a filing requirements are contained in the attached Appe dix and are incorporated by reference herein. In partic lar, we note that a showing of continuing interest required by paragraph 2 of the Appendix before a cha nel will be allotted.

7. Interested parties may file comments on or befo **February 27, 1992,** and reply comments on or befo **March 13, 1992,** and are advised to read the Appendix f the proper procedures. Comments should be filed wi the Secretary, Federal Communications Commissio Washington, D.C. 20554. Additionally, a copy of su comments should be served on the petitioner, or its cou sel or consultant, as follows:

Stuart A. Shorenstein, Esq.
Lowenthal, Landau, Fischer,
Ziegler & Bring, P.C.
250 Park Avenue
New York, New York 10177
(Counsel for petitioner)

8. The Commission has determined that the relev provisions of the Regulatory Flexibility Act of 1980 not apply to rule making proceedings to amend the F Table of Allotments, Section 73.202(b) of the Comm sion's Rules. *See Certification That Sections 603 and 604 the Regulatory Flexibility Act Do Not Apply to Rule Mak to Amend Sections 73.202(b), 73.504 and 73.606(b) of Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceedi contact Pamela Blumenthal, Mass Media Bureau, (2 634-6530. For purposes of this restricted notice and co

---

[1] According to the 1980 U.S. Census, Nassawadox is an incorporated community and has a population of 564 persons.

[2] Other issues raised in Deltaville, Sinclair and petitioner's comments will be discussed, to the extent necessary, at a later stage of this proceeding.

[3] The coordinates for Channel 250A at Nassawadox are No Latitude 37-28-24 and West Longitude 75-51-30. We note petitioner's proposal would have required a 7.0 kilometer mile) site restriction north of the community.

ment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

> (a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)
>
> (b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.
>
> (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORP. File No. I-T-C-91-024

Application for authority to provide
cable restoration services between the
U.S. Mainland and Puerto Rico and the
U.S. Virgin Islands.

ORDER AND AUTHORIZATION

Adopted: December 24, 1991; Released: January 6, 1992

By the Chief, International Facilities Division:

1. The above-captioned application, filed by the Communications Satellite Corp. (Comsat), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels of communication between the Roaring Creek, Pennsylvania and Cayey, Puerto Rico earth stations, via INTELSAT Atlantic Ocean Region (AOR) satellites, for the provision of domestic cable restoration service during cable outages between the U.S. mainland, on the one hand, and Puerto Rico and the U.S. Virgin Islands, on the other hand.

2. The application was placed on public notice on November 15, 1990. Pan American Satellite (PAS) filed comments, requesting that the Commission delay grant of the application until: 1) Comsat files more information concerning its provision of domestic service; and 2) the Commission considers the policy implications of allowing Comsat and other U.S. international satellite facilities providers to offer domestic service. Comsat filed an Opposition to the Comments, noting that it only seeks authority to restore service during an outage of cable facilities used for the provision of international and domestic service. Thus, Comsat views the domestic service as "incendental and ancillary" and notes that PAS is already authorized to provide emergency restoration services[1] and domestic services on an ancillary basis.[2]

3. Upon consideration of Comsat's application and the pleading herein, we find that a grant of the application is required by the public convenience and necessity. Comsat notes that it would provide domestic cable restoration services for those cables that carry both international and domestic service. Since Comsat is already authorized to provide international cable restoration services, we find no compelling reason to require that domestic and international communications carried over the same cable be restored via different facilities. We disagree with PAS that Comsat's request is related to its pending request to provide satellite communications services via the INTELSAT system between the U.S. mainland and the U.S. Virgin Islands. [3] We emphasize that the use of INTELSAT facilities for domestic service is for cable restoration only. We also note that separate systems are not precluded from providing emergency restoration services for domestic cable.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-91-024 IS GRANTED, and Comsat is authorized to acquire from INTELSAT units of utilization in AOR satellites between the Roaring Creek, Pennsylvania and Cayey, Puerto Rico earth stations for the provision of domestic cable restoration service in the Caribbean region between the U.S. mainland, on the one hand, and Puerto Rico and the U.S. Virgin Islands, on the other hand.

5. IT IS FURTHER ORDERED that the authority granted herein only applies to those cable systems which provide international and domestic service.

6. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See Separate Systems Report and Order*, 101 FCC 2d 1046 (1985).

[2] *See Separate Systems First Reconsideration Order*, 61 RR 2d 649 (1986).

[3] *See* Application of Communications Satellite Corporation, File Nos. I-T-C-88-025 and I-T-C-88-027.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NETEXPRESS COMMUNICATIONS, INC. File No. I-T-C-91-129

Application for Authority to acquire
and operate facilities for private
line service between the U.S. and
Japan.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 24, 1991; Released: January 6, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended. IT IS HEREBY CERTIFIED that the present and future convenience and necessity require the provision of private line service to Japan by NetExpress Communications, Inc. (Net Express).

2. Accordingly, IT IS ORDERED that Application File No. I-T-C-91-129 IS GRANTED and NetExpress is authorized to:

a. lease and operate a one-half interest in two 56-64 Kbps digital circuits between the U.S. and Japan;

b. lease and operate necessary domestic connecting facilities; and

c. use said facilties to provide private line service between the U.S. and Japan.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between NetExpress and its correspondent in Japan and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington DC 20554

PUBLIC NOTICE

Released: January 6, 1992

ALLTEL SERVICE CORPORATION FILES PETITION FOR WAIVER OF THE COMMISSION'S PART 36 RULES REGARDING THE MODIFICATION OF STUDY AREA BOUNDARIES FOR ITS AFFILIATES ALLTEL OF OHIO & ELYRIA TELEPHONE COMPANY

PUBLIC COMMENT INVITED

On December 9, 1991, ALLTEL Service Corporation, on behalf of its operating affiliates, ALLTEL Ohio, Inc., and The Elyria Telephone Company, filed a petition for waiver of the definition of "study area" as set forth in Part 36, Subpart H, Appendix-Glossary of the Commission's Rules, as well as Sections 36.154(e)(1) and (2) and 36.125(f). This waiver would allow ALLTEL's affiliates to make the necessary adjustments to their study area boundaries as a result of a merger.

Parties may file comments on this petition no later than **January 30, 1992.** Replies should be filed by **February 14, 1992.** Comments should reference AAD 91-81. A copy of each pleading should be sent to Jacqueline Spindler, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and to Downtown Copy Center (DCC), 1114 21st Street, N.W., Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying in the Accounting and Audits public reference room, 2000 L Street, N.W. Room 812, Washington, D.C. Copies are also available from DCC.

For further information contact Jacqueline Spindler (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington DC 20554

In the Matter of

United Telephone Company
of Indiana and United Telephone
Company of Ohio

Request for Waiver of the
Commission's Equal Access
Implementation Plan for Independent
Telephone Companies

MEMORANDUM OPINION AND ORDER

Adopted: December 20, 1991; Released: December 27, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. On April 29, 1991, the United Telephone Company of Indiana and United Telephone Company of Ohio (United) filed a petition for reconsideration of the Order denying United's request for a waiver of the Commission's equal access implementation requirements.[1] Subsequently, United and MCI Telecommunications Corporation (MCI) filed a letter stating that United has accelerated its equal access conversion schedule, and that MCI no longer opposes United's petition for reconsideration. In view of the changed circumstances, in this order we grant United's petition for reconsideration, and waive the Commission's equal access requirements to permit United to implement its new conversion schedule.

II. BACKGROUND

2. In the *ITC Equal Access Order*, the Commission required the non-GTE independent telephone companies (ITCs) to convert their end offices to equal access only if certain conditions were present.[2] The Commission required these ITCs to convert end offices equipped with stored-program-controlled (SPC) switches within three years of a "reasonable request" for conversion to equal access by an interexchange carrier. The Commission directed the non-GTE ITCs to convert end offices with electromechanical switches as soon as practical but did not specify a timetable.[3] Moreover, the *ITC Equal Access Order* provided that a non-GTE ITC may seek a waiver of the Commission's rules if such a carrier can "demonstrate that such a timetable, or the provision of such access features, is not feasible except at costs that clearly outweigh potential benefits to users of telecommunications services."[4]

3. On March 28, 1991, the Bureau denied United's petition for waiver, stating that United had "essentially sought an indefinite waiver of the Commission's equal access conversion rules," and had failed to present any information that would confirm United's allegations that the costs of complying with the equal access conversion requirements would outweigh the potential benefits to users.[5] The Order also noted that MCI -- the interexchange carrier requesting equal access -- opposed United's waiver request.

III. DISCUSSION

4. In its petition for reconsideration, United argues first that the Commission did not intend to subject non-standard stored-program-controlled switches to the three-year equal access conversion period. United asserts that the equal access conversion rules were based on the Commission's experience with Bell Company and GTE switches, which required only software upgrades to provide equal access. United claims that its stored-program-controlled switches cannot easily be converted to equal access.[6] United states that conversion of its ITT 1210 switches is a complex and expensive process requiring major hardware modifications, and would be over 930 percent more expensive than the conversion of an AT&T SPC switch.[7] United claims that its NE (North Electric) NX1E switch is not equal access capable, and must be replaced, just as an electromechanical switch would be replaced, in order to provide equal access. Therefore, United requests that the Commission treat the ITT 1210 and the NE NX1E switches as electromechanical for the purposes of the access conversion requirements.

5. United also argues that the costs of conversion outweigh the potential benefits of equal access to its customers. United states that conversion essentially requires accelerating the replacement of the ITT 1210 and NE NX1E switches, and that customers would be better off if it replaced its older analog switches instead, because the older switches are not capable of providing custom calling features, and have higher maintenance costs than digital switches. United states that channeling capital expenditures away from older analog office conversions would delay equal access functionality and new feature availability at those analog offices, and result in a loss of maintenance expense savings due to delay in the introduction of digital technology.

6. In its comments filed on May 14, 1991 in response to United's petition for reconsideration, MCI opposes United's petition for reconsideration, arguing that the Bureau properly considered and rejected United's allegations that

---

[1] United Telephone Company of Indiana and United Telephone Company of Ohio Request for Waiver of the Commission's Equal Access Implementation Plan for Independent Telephone Companies. *Memorandum Opinion and Order*, 6 FCC Rcd 1796 (1991)(Comm.Carr.Bur.) (*United Order*).

[2] *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase III, 100 FCC 2d 860 (1985) (*ITC Equal Access Order*).

[3] *See ITC Equal Access Order* at 878, paras. 48-49.

[4] *Id.* at para. 50.

[5] *United Order* at para. 12.

[6] The switches at issue are seventeen ITT 1210 digital SPC switches and one NE NX1E analog SPC switch. Both provide custom calling features, such as call forwarding and call waiting. United states that the NE NX1E switch is no longer manufactured.

[7] United Petition for Reconsideration at 12.

equal access conversion would be cost prohibitive.[8] In addition, MCI challenges United's assertion that the Commission envisioned the conversion process as extending only to SPC switches requiring software upgrades but not hardware upgrades, and states that the Commission was aware that the ITCs had switches that were different from those used by the BOCs.

7. On December 4, 1991, MCI and United filed a joint letter stating that United will accelerate its equal access conversion schedule, and MCI no longer opposes United's waiver request.[9] In the letter, United states that it plans to convert all the end offices designated by MCI in its request by the end of 1996. In addition, in the letter MCI withdraws its opposition to United's petition for reconsideration, and United modifies its petition for reconsideration, to the extent necessary to permit the Bureau to accept the revised equal access conversion schedule.

8. We reject United's argument that the Commission did not intend to impose a three-year conversion requirement on United's SPC switches, but find that granting United a waiver of the Commission's equal access requirements to implement the revised conversion schedule submitted with the *MCI/United Letter* is in the public interest.[10] We find no merit in United's argument that we should treat the ITT 1210 and NE NX1E switches as electromechanical. The Commission's *ITC Equal Access Order* established a "bright-line" distinction between ITC end offices equipped with SPC switches and ITC offices equipped with electromechanical switches.[11] The Commission devised its ITC equal access implementation requirements with knowledge that heterogeneous SPC equipment exists in ITC end offices, and that certain hardships could arise in the transition to equal access conversion.[12] In light of these circumstances, the Commission established a waiver process so that ITCs would have an opportunity to demonstrate that the costs of equal access interconnection at an SPC-equipped office outweigh the benefits of equal access to subscribers.[13]

9. We conclude that although United has failed to show that a waiver is unnecessary, it has demonstrated that a waiver would be in the public interest. In its pleadings, United sets forth specific circumstances justifying its request and MCI, the only party opposing the waiver, has now withdrawn its opposition to United's petition for reconsideration. Moreover, whereas United's original pleadings requested a seven and one-half year waiver of the Commission's equal access rules, the longest extension requested under United's negotiated conversion schedule is now three and one-half years. We conclude that United has demonstrated that the timetable established by the Commission's rules is not feasible "except at costs that clearly outweigh potential benefits to users."[14]

IV. ORDERING CLAUSE

10. Accordingly, IT IS ORDERED that the reconsideration petition of United Telephone Company of Indiana and United Telephone Company of Ohio is GRANTED to the extent described herein and is otherwise DENIED.

11. IT IS FURTHER ORDERED that the equal access implementation requirements are WAIVED to the exten described herein.

12. IT IS FURTHER ORDERED that this Memorandum Opinion and Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

APPENDIX A

United Telephone Company of Ohio
United Telephone Company of Indiana

EQUAL ACCESS CONVERSION SCHEDULE

INDIANA CENTRAL OFFICES	CONVERSION DATE
Jamestown	9/30/95
Twelve Mile	10/26/96
Denver	10/26/96
Roann	11/30/96
North Judson	10/28/95
San Pierre	10/28/95
Knox	10/28/95
Hamlet	10/28/95
Trafaler	12/14/91

OHIO CENTRAL OFFICES	CONVERSION DATE
Croton	12/30/95
Johnstown	12/30/95
Shelby	11/30/96
Glenmont	11/30/96
Holmesville	11/30/96
Millersburg	11/30/96
Luckey	12/28/96
Stoney Ridge	12/28/96
Madisonburg	6/25/94

---

[8] *See* MCI Opposition to the Petition for Reconsideration, filed May 14, 1991 (MCI Opposition to Reconsideration). MCI incorporated by reference the analysis contained in its Opposition to United's waiver request, filed January 22, 1991 (MCI Opposition to Waiver).

[9] *See Ex parte* letter from Donald F. Evans, Director, Federal Regulatory Affairs, MCI Telecommunications Corp.; Jay C. Keithley, Vice President, Legal and External Affairs, United Telecommunications, Inc., to Richard M. Firestone, Chief, Common Carrier Bureau, FCC, December 4, 1991, (*MCI/United Letter*).

[10] A copy of the revised conversion schedule is contained in Appendix A. United States Telephone Association (USTA) filed a statement in support of United's Petition for Reconsideration USTA Supporting Statement, filed May 3, 1991.

[11] *See ITC Equal Access Order* at 878, paras. 48-49.

[12] *See ITC Equal Access Order* at 872-880.

[13] *Id.* at 875, para. 50.

[14] *See ITC Equal Access Order* at para. 50.

**Before the
Federal Communications Commission
Washington DC 20554**

In the Matter of

US West
Communications
Tariff F.C.C. No. 1

Transmittal No. 196

ORDER

Adopted: December 26, 1991; Released: December 27, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

1. US West Communications (US West) Transmittal No. 196 introduces Extended Digital Service (EDS), a private line service which uses multiplexing equipment to transmit both voice grade and digital data signals over a common 1.544 Mbps circuit. EDS allows a customer to obtain a DS1 channel interface at a customer location and channelized voice grade and digital data equivalent channels at another customer location. This offering also establishes a promotion which waives nonrecurring charges for EDS during the first 90 days the service is available. Tr. 196 at § 7.4.12(A); Description and Justification (D&J) at §§ 1.1.-1.3.

2. Metropolitan Fiber Systems, Inc. (MFS) filed a petition to reject, or alternatively, suspend and investigate a portion of Transmittal 196 on October 15, 1991. MFS argues that US West's 90 day promotional offering -- under which it believes US West will install new facilities at no charge -- will result in a loss of $66,608.70. Therefore, MFS maintains, the promotion is fundamentally at odds with the Commission's price cap rules and with its policies in favor of cost-based pricing. MFS Petition at 2-3. In support of this position, MFS argues that in the recent *Part 69 ONA Order*,[1] the Commission rejected non-cost-based pricing for new services, and stated that the "new services test must be cost-based." *Id.* at 2.

3. MFS further asserts that US West did not attempt to make a showing of competitive necessity or advance any other argument to justify its promotion. *Id.* at 3. MFS states that the one explanation proffered by US West -- that the promotion will drive network offerings toward the digital environment -- appears to indicate strategic pricing, which the Commission specifically has rejected in the price cap regulatory environment. *Id.*

4. US West replies that of the three types of nonrecurring charges associated with initiating EDS, US West intends to waive only one -- the EDS Channel Charge.[2] Reply at 3 and n.7, citing D&J at § 1.3. According to US West, waiver of nonrecurring charges to stimulate demand for a new service is a common practice in both telecommunications and in other businesses. *Id.* at 3. US West also asserts that it will not be harmed by promotional costs which exceed its forecast because these costs vary directly with monthly revenues from new subscribers. *Id.* at 3 and n.9. Furthermore, US West contends, the promotion will have a significant impact on demand for EDS during the first 90 days after its introduction, and will ultimately result in an increase in EDS' net revenues during the first year. *Id.* at 3-4. US West also states that its net revenue test showing includes the costs of its promotional offering and demonstrates that EDS will increase net revenues by $666,514.79 during the first two years of its offering. *Id.* at 4 and n.10.

5. The Common Carrier Bureau has reviewed US West Transmittal No. 196, MFS' petition, and US West's reply. We conclude that no compelling argument has been presented that the tariff is so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

6. Accordingly, IT IS ORDERED that the petition to reject, or alternatively, suspend and investigate US West Communications Tariff F.C.C. No. 1, Transmittal No. 196, filed by Metropolitan Fiber Systems, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

---

[1] Amendment of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 6 FCC Rcd 4524 (1991) *(Part 69 ONA Order)*.

[2] Citing Tariff F.C.C. No. 1 at § 7.5.16, US West lists the following nonrecurring charges: (i) EDS DS1 Channel Termination Charge; (ii) EDS Channel Charges; and (iii) EDS Optional Feature Charges.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-406

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Grenada, Artesia, and Okolona, Mississippi)[1]	RM-6745 RM-7255

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 30, 1991; Released: January 7, 1992

By the Chief, Allocations Branch:

1. Before the Commission is the *Notice of Proposed Rule Making,* 4 FCC Rcd 6947 (1990), issued at the joint request of Chatterbox, Inc. ("Chatterbox"), licensee of Station WQXB(FM), Channel 261A, Grenada, Mississippi, and WYS Inc. ("WYS"), licensee of Station WZIX(FM), Channel 261A, Artesia, Mississippi. The *Notice* proposed the substitution of FM Channel 261C2 for Channel 261A at Grenada, Mississippi, the modification of the license for Station WQXB(FM) to specify Channel 261C2, the substitution of FM Channel 260C2 for Channel 261A at Artesia, Mississippi, and the modification of the license for Station WZIX(FM) to specify operation on Channel 260C2. Chatterbox and WYS filed supporting comments reaffirming their intentions to upgrade Stations WQXB(FM) and WZIX(FM) to Class C2 facilities, respectively. Charisma Communications Co. ("Charisma") filed a counterproposal. Chatterbox and WYS filed reply comments. Chatterbox also filed reply comments to the Public Notice accepting Charisma's counterproposal.[2] Charisma filed a response to Chatterbox's reply comments accompanied by a motion for acceptance of the response.[3]

2. Charisma, in its counterproposal, proposes the allotment of Channel 260A to Okolona, Mississippi, as that community's first local service. Charisma states that Channel 260A can be allotted to Okolona in compliance with the new minimum distance requirements that became effective on October 2, 1989, with a 12 kilometer site restriction northeast of Okolona. Charisma further note that this proposal conflicts with the proposal to substitut Channel 260C2 for Channel 261A at Artesia.

3. Charisma contends that its proposal satisfies Priorit (3) under the Commission's comparative criteria by providing Okolona with its first local broadcast service. Se *Revision of FM Assignment Policies and Procedures,* 9 FCC 2d 88 (1982).[4] Charisma states that Okolona has population of 3,409 persons and is also one of two count seats of Chickasaw County, which has a population o 17,853 persons.[5] Charisma argues that the Okolona proposal should be preferred over the proposed Artesia upgrade which would extend the secondary coverage area o Station WZIX(FM). Thus, the Artesia upgrade would satisfy only Priority (4). Charisma contends that the Commission's allotment priorities clearly favor a first loca service to Okolona over an extended coverage area fo Artesia, citing *Atmore, Alabama,* DA 89-1198, release October 3, 1989. Charisma also notes that Artesia alread has authorized local service and will continue to hav local radio service even if the Artesia upgrade proposal i denied, citing *Savannah and Cameron, Missouri,* D 89-1319, released November 1, 1989; *Haltom City, Texas* 4 FCC Rcd 5396 (1989); *Scranton and Surfside Beach South Carolina,* 3 FCC Rcd 2798 (1988); *recon. denied* FCC Rcd 2366 (1989).[6]

4. Chatterbox, in support of the proposal to substitut Class C2 channels at Grenada and Artesia, argues that thi would better serve the public interest than grant of Charisma's counterproposal because the Grenada upgrad would provide gray area service (*i.e.*, second full-tim reception service) to 893 people and would provide service to an additional 92,889 people. Further, Chatterbo contends that the Artesia upgrade would provide servic to an additional 96,131 people, resulting in a combine gain of 189,020 people between the two upgrades. By wa of contrast, Chatterbox alleges that the Okolona proposa would provide service to only 78,000 people and firs service to only 3,409 people.

5. Chatterbox concedes that it is possible, as suggeste by Charisma in its counterproposal, to allow Grenada t upgrade while allotting a new Class A channel a Okolona. Chatterbox claims that Channel 255A can b substituted for Channel 261A at Artesia for use by Statio WZIX(FM) in compliance with applicable spacing requirements. Chatterbox contends that this substitutio will permit both the proposed upgrade of Statio WQXB(FM) (from Channel 261A to Channel 261C2) an the allotment of Channel 260A to Okolona. Chatterbo states that in the event that the Commission orders th substitution of Channel 255A for Channel 261A at Artesi to permit the upgrade of Station WQXB(FM), it wi reimburse the Artesia licensee for its reasonable expense incurred in making the channel change. If this proposal i considered, Chatterbox requests that the Commission issu

---

[1] The community of Okolona, MS, has been added to the caption.

[2] Public Notice of the counterproposal was given on February 6, 1990, Report No. 1807.

[3] Although Charisma's response was filed after the pleading cycle ended in this proceeding, we will consider it because this will provide a more complete record for resolution of this proceeding. *See* Section 1.425 of the Commission's Rules.

[4] The priorities set forth therein are: (1) first fulltime aural service; (2) second fulltime aural service; (3) first local service; and (4) other public interest matters. Co-equal weight is give to priorities (2) and (3).

[5] Population figures were taken from the 1980 U.S. Census.

[6] Charisma points out that the conflict between the Grenad and Artesia proposals could be resolved by moving the Artesi station to another Class A channel. Charisma points out that the conflict between the Grenada upgrade and the current Clas A channel at Artesia were eliminated in the above manner, the both the Grenada upgrade and the Okolona allotment could b granted.

to the licensee of Station WZIX an order to show cause why its license should not be modified to specify operation on Channel 255A.

6. Charisma, in response to Chatterbox, argues that in light of the fact that the Grenada upgrade does not conflict with the Okolona proposal and that the Grenada upgrade can be accommodated separately by substituting Channel 255A for Channel 261A at Artesia, the only comparison before the Commission is between a first FM service at Okolona and an alleged increase in secondary service to 96,131 people from the proposed Artesia upgrade. Charisma notes that under the Commission's allotment priorities, a first local service to Okolona would prevail over the new reception service offered by Artesia. Charisma contends that the Grenada showing of a second aural service to 893 persons has no relevance to the comparison since that service can be achieved consistent with the adoption of the Okolona proposal. Charisma argues that since the Grenada proposal is a separate matter, the public interest would be better served by having the Commission issue a First Report and Order allotting Channel 260A to Okolona with a window filing period and separately issue an Order to Show Cause to Station WZIX(FM), Artesia, to modify its channel for the benefit of Grenada.

7. We believe the public interest would be served by substituting Channel 261C2 for Channel 261A at Grenada, Mississippi, and Channel 260C2 for Channel 261A at Artesia, Mississippi, as well as modifying the licenses for Stations WQXB(FM) and WZIX(FM) to specify the higher class channels, since this will enable the Grenada and Artesia stations to expand their coverage areas. In addition, we believe the public interest would be served by allotting Channel 289A to Okolona, Mississippi, as that community's first local service. As noted above, the counterproposal for Channel 260A at Okolona is in conflict with the proposed substitution at Artesia. However, a staff study determined that Channel 289A instead of Channel 260A could be allotted to Okolona thus eliminating the need for a comparison of the communities or further action in this proceeding.[7]

8. Although we have not based our decision on a comparative analysis of the Grenada and Artesia upgrades versus the need for a first local service at Okolona, we note that there is a conflict between allotting Channel 289A at Okolona and protecting Station WWZQ(FM)'s application (File No. BPH-900516IB) for a construction permit for Channel 287C3 at Aberdeen, Mississippi. Under the policy set forth in *Andalusia, Alabama*, 49 FR 32201 (1984), a site preference specified in an application does not control over rule making proposals to allot new channels or upgrade existing channels unless there are overriding public interest reasons for favoring the application. As a result, we have conducted an analysis under allotment priority (4), other public interest matters, to determine if the application should be preferred.[8] In this regard, we compared the number of people that could receive service within the 60 dBu contour of Station WWZQ(FM), using maximum facilities on Channel 287C3, from the site specified in the application and the actual reference coordinates for the channel. We determined that 19,179 people could receive service from the application site while 21,020 could receive service from the reference coordinates for the channel. As a result, the application site would serve 1.841 fewer people than a transmitter site located at the actual reference coordinates for the channel.

9. Balanced against this fact, we next consider the public interest benefits flowing from grant of the allotment proposals in this proceeding. For this purpose, we will consider only the benefits from the upgrade proposals and not the new allotment at Okolona. This is because, absent an alternative channel to resolve the conflict between a new allotment at Okolona and the Grenada/Artesia upgrades, we would have preferred the first local service at Okolona over the expansion of secondary service to Grenada and Artesia. Thus, the allotment of Channel 289A at Okolona makes the Artesia and Grenada upgrades possible.

10. As Chatterbox has shown, the Artesia upgrade would provide service to an additional 96.131 people and the Grenada upgrade would provide service to an additional 92,889 people. Since these two upgrades would provide a combined gain of service to 189.020 individuals, we believe that it would better serve the public interest to grant these upgrades than to protect the Aberdeen application site which merely constitutes a site preference. Our view is further buttressed by the fact that the application site for the Aberdeen station would serve fewer people than a transmitter located at the reference coordinates for Channel 287C3 at Aberdeen.

11. Channel 261C2 can be allotted to Grenada, Mississippi, in compliance with the Commission's minimum distance separation requirements at the site specified by Chatterbox.[9] Channel 260C2 can be allotted to Artesia, Mississippi, in compliance with the minimum distance separation requirements at the site specified by WYS.[10] Channel 289A can be allotted to Okolona, Mississippi, in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.4 kilometers (2.7 miles) to avoid a short-spacing to Channel 287C3, Aberdeen, Mississippi, which was reserved for Station WWZQ in MM Docket No. 89-468.[11]

12. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 21, 1992**, the FM

---

[7] The reference coordinates used for Channel 289A at Okolona are 33-57-51 and 88-44-41. Although the Okolona restricted site, 4.4 kilometers south, is short-spaced to the site specified by Station WWZQ-FM, Aberdeen, MS, in its construction permit application (File No. 900516IB) for Channel 287C3, it meets the spacing requirement to the reference coordinates for Channel 287C3 at Aberdeen (33-50-20 and 88-18-30) as required by Section 73.208(a) of the Commission's Rules.

[8] Normally, we would not undertake an analysis on our own motion. Rather, we would expect the Aberdeen proponent to make a comparative showing. However, since we determined that Channel 289A was available to resolve the conflict between the mutually exclusive rulemaking proposals in this case and since we do not want to further delay this proceeding, we have done our own analysis.

[9] The coordinates for Channel 261C2 at Grenada are North Latitude 33-43-08 and West Longitude 90-01-56.

[10] The coordinates for Channel 260C2 at Artesia are North Latitude 33-41-00 and West Longitude 88-36-48.

[11] The reference coordinates for Channel 289A at Okolona are set forth in note 7 *supra*.

Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, as follows:

City	Channel No.
Artesia, Mississippi	260C2
Grenada, Mississippi	261C2
Okolona, Mississippi	289A

13. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WZIX(FM), Artesia, Mississippi, IS MODIFIED to specify operation on Channel 260C2 in lieu of Channel 261A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

14. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WQXB(FM), Grenada, Mississippi, IS MODIFIED to specify operation on Channel 261C2 in lieu of Channel 261A, subject to the following conditions:

(a) With 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

15. IT IS FURTHER ORDERED, That the Secretary SHALL SEND BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Report and Order* to the following:

Jim Buffington,
President
Tenn-Tom
Broadcasting Corp.
P.O. Box 1240
Aberdeen,
Mississippi 39730
(Licensee of
Station WWZQ(FM),
Channel 287C3,
Aberdeen, MS)

Frank R. Jazzo,
Esq.
Fletcher, Heald,
& Hildreth
1225 Connecticut
Avenue, N.W.
Suite 400
Washington, D.C. 20036
(Counsel to Bravo
Communications,
successor-in-interest
to WYS, Inc.)

16. The window period for filing applications for Channel 289A at Okolona, Mississippi, will open on **February 24, 1992,** and close on **March 25, 1992.**

17. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

18. For further information concerning this proceeding, contact Arthur D. Scrutchins, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-179

In the Matter of

Amendment of Section 73.202(b), RM-7734
Table of Allotments,
FM Broadcast Stations.
(Bixby, Oklahoma)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 30, 1991; Released: January 8, 1992

By the Assistant Chief, Allocations Branch:

1. At the request of John M. Singer ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making,* 6 FCC Rcd 3662 (1991), proposing the substitution of Channel 287C3 for Channel 287A at Bixby, Oklahoma, and the modification of his construction permit for Station KBXT-FM to specify the higher class channel. Petitioner filed comments reiterating his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 287C3 for Channel 287A at Bixby since it could provide the community with a wide coverage area FM service and enable Station KBXT-FM to expand its service area. Channel 287C3 can be allotted to Bixby in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] As proposed, and in accordance with Section 1.420(g) of the Commission's Rules, we will also modify petitioner's construction permit for Station KBXT-FM to specify operation on Channel 287C3.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 21, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Bixby, Oklahoma	287C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of John M. Singer for Station KBXT-FM, Bixby, Oklahoma, IS MODIFIED to specify operation on Channel 287C3, in lieu of Channel 287A, subject to the following conditions:

> (a) Within 90 days of the effective date of this *Order,* the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).
>
> (b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.
>
> (c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, John M. Singer, permittee of Station KBXT-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

---

[1] The coordinates for Channel 287C3 at Bixby are North Latitude 35-56-30 and West Longitude 95-52-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-563

In the Matter of

Amendment of Section 73.202(b),	RM-6078
Table of Allotments,	RM-6710
FM Broadcast Stations.	
(Dyersburg, Tennessee;	
De Witt, Heber Springs,	
Hoxie, Jonesboro, and	
Newport, Arkansas)	

SECOND REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 30, 1991; Released: January 7, 1992

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *First Report and Order*, 5 FCC Rcd 2579 (1990), which postponed a final disposition on a counterproposal filed by Newport Broadcasting Company ("Newport Broadcasting"), licensee of Stations KOKR(FM), Newport, Arkansas, and KAWW-FM, Heber Springs, Arkansas, proposing to substitute Channel 244C2 for Channel 288A[1] at Newport, and Channel 264C2 for 244A at Heber Springs, and the modification of the licenses of Stations KOKR(FM) and KAWW-FM, accordingly.[2] In the *First Report and Order*, the Commission found that because Newport Broadcasting's comments indicated that it would not reimburse Quadras, Inc., the licensee of Station KDEW-FM, De Witt, Arkansas, for a necessary channel change, it could not grant Newport Broadcasting's uncontested[3] counterproposals for the nonadjacent channels at Newport and Heber Springs. Because Quadras, Inc.'s subsequently filed petition for rule making requesting an upgrade would resolve the conflict posed by Station KDEW-FM, the Commission held in abeyance Newport Broadcasting's counterproposal to allot Channel 244C2 at Newport, and Channel 264C2 at Heber Springs until resolution of the separate De Witt proceeding. That proceeding having been resolved, *see De Witt and England, Arkansas*, 5 FCC Rcd 6735 (1990), and Newport Broadcasting having expressed a continuing intention to pursue the upgrades, we will now address Newport Broadcasting's proposed upgrades for Newport and Heber Springs.

2. We believe the public interest would be served by substituting Channel 244C2 for Channel 264A at Newport, Arkansas, and by substituting Channel 264C2 for Channel 244A at Heber Springs, Arkansas, as this will provide first wide coverage service to the communities, respectively. Channel 244C2 can be allotted at Newport with a site restriction of 17.3 kilometers (10.7 miles) southwest in order to avoid a short-spacing to Station KAHR(FM) (formerly KXOQ(FM), Channel 244A, Poplar Bluff, Missouri.[4] We note that this allotment is short-spaced to Station KDEW-FM, De Witt, Arkansas, at its licensed facility on Channel 244A, at coordinates 34-16-09 and 91-21-02, and thus is dependent on Station KDEW-FM's relocating to Channel 247C2 pursuant to the directive set forth in the *Report and Order* in MM Docket No. 90-335 in order to meet the Commission's minimum distance separation requirements. We also note that the Newport allotment meets the minimum distance separation requirements with respect to the site specified in the application (File No. BPH-910722IB) for construction permit filed by Station KDEW-FM's licensee, Quadras, Inc. Therefore, the issuance of a license for the Newport facility will be withheld until the license grant occurs at De Witt. The allotment of Channel 264C2 to Heber Springs requires a site restriction of 6.2 kilometers (4.2 miles) south of the city in order to avoid a short spacing to Station KFCM(FM), Channel 265A, Cherokee, Arkansas.[5] In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein Newport Broadcasting's licenses for Station KOKR(FM), Channel 264A, Newport, Arkansas, to specify operation on Channel 244C2, and Station KAWW-FM, Channel 244A, Heber Springs, Arkansas, to specify operation on Channel 264C2.[6]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 21, 1992,** the FM

---

[1] The *First Report and Order* substituted Channel 264A for Channel 288A at Newport.

[2] After considering the six options presented in the *Further Notice of Proposed Rule Making and Order to Show Cause*, 4 FCC Rcd 4814(1989), the *First Report and Order* allotted Channel 261C2 at Dyersburg, Tennessee, at the request of Dr Pepper Pepsi-Cola Bottling Company of Dyersburg, Inc. Channel changes at Hoxie, Arkansas (Channel 287A for Channel 263A), Newport, Arkansas (Channel 264A for Channel 288A) and Jonesboro, Arkansas (Channel 262A for Channel 261A) were granted in order to accomplish that upgrade. As stated, action on Newport Broadcasting's Newport and Heber Springs counterproposals was deferred.

[3] As noted in the *First Report and Order*, no party filed a timely expression of interest in the nonadjacent channels for Newport and Heber Springs. Further, the Commission dismissed as procedurally defective counterproposals filed by Mountain Home Radio Station and Pauline Rose. *See* 5 FCC Rcd at 2581.

[4] The restricted site coordinates for Channel 244C2 at Newport are 35-29-00 and 91-22-30. We note that the allotment meets the required minimum distance separation to Station KXOZ, Channel 245C2, Mountain View, Missouri, at coordinates 36-59-29 and 91-47-41, based upon the provisions of Section 73.208 of the Commission's Rules.

[5] The restricted site coordinates for Channel 264C2 at Heber Springs are 35-25-52 and 92-01-54.

[6] Because these allotments are made as a result of a petition for rule making filed prior to October 2, 1989, the licensee of Station KOKR, Newport, Arkansas, may avail itself of the provisions of Section 73.213(c) of the Commission's Rules with respect to Station KAHR, Channel 244A, Popular Bluff, Missouri. Likewise, the licensee of Station KAWW-FM, Heber Springs, Arkansas, may avail itself of the provisions of Section 73.213(c) with respect to Station KCJC(FM), Channel 265A, Russellville, Arkansas, and Station KFCM(FM), Channel 265A, Cherokee, Arkansas. *See* 47 C.F.R. Section 73.213(c).

able of Allotments, Section 73.202(b) of the Commis-
ion's Rules, IS AMENDED, with respect to the commu-
ities listed below, to read as follows:

City	Channel No.
Newport, Arkansas	244C2
Heber Springs, Arkansas	264C2

4. IT IS FURTHER ORDERED, That, pursuant to
ection 316(a) of the Communications Act of 1934, as
mended, the licenses of Newport Broadcasting Co. for
tation KOKR(FM), Channel 264A, Newport, Arkansas,
nd Station KAWW-FM, Channel 244A, Heber Springs,
rkansas, ARE MODIFIED to specify operation on
hannel 244C2 and Channel 264C2, respectively, subject
o the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall submit to the Commission applications for construction permits (Form 301), specifying the new facilities;

(b) Upon grant of the construction permits, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding
S TERMINATED.

6. For further information concerning this proceeding,
ontact Victoria M. McCauley, Mass Media Bureau (202)
34-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 7, 1992

MOBILE MARINE RADIO FILES FURTHER COMMENTS REGARDING ITS PETITION FOR DETERMINATION OF NON-DOMINANT STATUS

PUBLIC COMMENT INVITED

Mobile Marine Radio, Inc. (MMR) has filed further comments regarding its Petition for Determination of Non-Dominant Common Carrier Status, filed February, 1988, File No. DF-88.001-DS. We placed MMR's Petition on public notice, DA-88-897, on May 8. 1988. MMR requested in its Petition that the Commission formally declare public coast maritime mobile radio service providers to be non-dominant in their provision of such service.

In its further comments, MMR urges the Commission to differentiate among public coast maritime providers and find those carriers who offer both point-to-point and maritime telex services to be dominant carriers in the maritime market and those who render only maritime service to be non-dominant. Alternatively. MMR requests the Commission to require dual authority telex carriers to operate their point-to-point and their maritime services on fully separated bases, in order to eliminate allegedly anticompetitive tying arrangements between their maritime service and their point-to-point service.

Parties may file comments in response to MMR's further comments no later than **February 10, 1992.** Replies should be filed no later than **February 25, 1992.** Comments should reference File No. DF-88.001-DS. Parties should file copies of their comments and replies with the Secretary, FCC, and additionally send one copy of each pleading to Ms. Jennifer Warren, International Facilities Division, Common Carrier Bureau. 1919 M Street, N.W., Room 534, Washington, D.C. 20554 and to Downtown Copy Center (DDC), 1114 21st Street, N.W., Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying in the International Facilities Division public reference room, 1919 M Street, N.W., Room 533, Washington, D.C. Copies are also available from DCC.

For further information contact Jennifer Warren or Susan Lee O'Connell at (202) 632-3214.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PCI COMMUNICATIONS, INC.	File No. I-T-C-91-171
Application for authority to operate as an international resale carrier.	
MICRO BUSINESS SYSTEMS, INC.	File No. I-T-C-91-174
Application for authority to operate as an international resale carrier.	
ASIAN AMERICAN TELECOM	File No. I-T-C-91-189
Application for authority to operate as an international resale carrier.	

MEMORANDUM OPINION, ORDER AND CERTIFICATE

Adopted: December 24, 1991; Released: January 7, 1992

By the Chief, International Facilities Division:

1. The above captioned applications request authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched services between the U.S. mainland, Guam and various overseas points. We placed File Nos. ITC-91-171 and ITC-91-174 on public notice on July 24, 1991. File No. ITC-91-189 was placed on public notice on August 14, 1991. Comments on the applications of PCI Communications, Inc. ("PCI") and Asian American Telecom ("AAT") were filed by US Sprint Communications Company, Ltd. ("Sprint").[1] IT&E Overseas, Inc. ("IT&E") filed a Petition to Deny[2] PCI's application.

2. Micro Business Systems, Inc. ("MBS") and AAT are non-dominant start-up companies which propose to provide international switched voice, data and facsimile services in competition with other common carriers already providing such services. In its application, MBS states that it intends to lease lines between Guam and the contiguous U.S. ("CONUS") from MCI or IT&E and resell switched voice services of MCI, AT&T and/or Sprint from CONUS to international points covered by the international carriers' tariffs. AAT states that it wishes to lease capacity between Guam and Hawaii from Comsat. or use fiber optic bearer facilities leased from PCI and/or World Communications, Inc. ("Worldcom") to link Guam and Hawaii, and resell Sprint's WATS and "800" service from Hawaii to international points covered by that tariff.[3]

3. PCI is a non-dominant carrier currently offering domestic packet-switched data services between Guam, the Northern Marianas, Hawaii and CONUS. PCI now proposes to provide international switched voice, data and facsimile services in competition with other common carriers already providing such services. It intends to offer international services by leasing capacity from Worldcom between Guam and CONUS, and reselling the international switched voice service of Sprint and Execuline of Sacramento.[4]

4. In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[5] Accordingly, we have consistently authorized applicants to provide international resale of switched services in competition with established carriers and other resellers.[6] We find here that the market will support additional carriers and that the added competition will be in the public interest.[7]

5. Sprint argues in File Nos. ITC-91-171 and ITC-91-189 that we should delay granting resale authority until the Commission issues an order in DA-90-1198. In DA-90-1198 IT&E has alleged that division of revenue contracts allegedly forced on it by Guam Telephone Authority ("GTA"), a public corporation created and owned by the Government of Guam, discriminate against IT&E in favor of RCA Globcom (the dominant international carrier on Guam), contravene FCC access charge rules and conflict with FCC equal access policies. IT&E has also challenged a law promulgated by the Guam legislature requiring the Guam Public Utilities Commission ("PUC") to regulate interstate access services on Guam and requiring the GTA to file interstate access tariffs with the PUC. IT&E has requested a declaratory ruling that the law is unlawful, that the FCC has exclusive jurisdiction over interstate access and rates, and that the agreement between GTA and IT&E is unlawful and unenforceable.

6. Sprint believes that the issue of Guam's status as either a domestic or international entity, and whether or not the Commission has jurisdiction over it, is one that directly affects these applications. Implicit in Sprint's argument is the notion that Guam's status remains in doubt. If Guam is an international point, then "international" settlement arrangements between RCA Globcom and a U.S. overseas carrier, such as Sprint, would be undermined by entities which attempt to lease private lines between Guam and CONUS. Sprint argues against granting the authority because both PCI and AAT intend to lease lines between Guam and the U.S. mainland, whereas Sprint and RCA Globcom have a settlement agreement, similar to traditional international correspondent arrangements, to provide service between the two points. The lease of private lines by PCI and AAT, Sprint argues, would amount to international resale of private lines, if Guam is considered an international point, and would undermine the accounting rates arrangement between the two companies.

7. IT&E argues that Sprint mischaracterizes both the proceeding in DA-90-1198 and the arrangement between RCA Globcom and Sprint. Asserting that the proceeding concerns only the question of equal access and discriminatory local exchange carrier rates, IT&E denies that the domestic or international character of Guam is in issue. IT&E also notes that the relationship between Sprint and RCA Globcom is a voluntary agreement, as opposed to an international correspondent arrangement. PCI contends that its proposed service is lawful under current FCC practice, that it can perceive no nexus between DA-90-1198 and its application, and that it would be willing

to make any modifications to its service, along with similarly situated carriers, if the proceeding in DA-90-1198 were to affect PCI's service offering.

8. We agree with both IT&E and AAT that the domestic status of Guam for interexchange communications has been long-settled.[8] Further, we believe that Sprint misjudges the relevance of DA-90-1198 to these applications. The proceeding in DA-90-1198 concerns the issue of what jurisdiction over Guam entails, and not the broad issue, already settled, regarding whether Guam is a domestic or international point. Whether or not the Commission has jurisdiction over the GTA has no ascertainable relation to the "domestic" or "international" character of the revenue-sharing agreement between Sprint and RCA Globcom for service to and from Guam. And since international resale of private lines can only occur between international points, we find no occasion to be concerned over the possible effect of private line domestic resale on the Sprint-RCA Globcom arrangement. As stated above, we believe that the international resale of international switched service is in the public interest, and we find no reason to delay the grant of applications that would increase competition in the provision of international telecommunications service to and from Guam.

9. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched services to the general public by PCI, MBS and AAT by the resale of the switched voice services of other carriers.

10. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-91-171, I-T-C-91-174 and I-T-C-91-189 ARE GRANTED; and

a. PCI is authorized to:

1. lease from Worldcom and operate private line facilities between Guam and the contiguous U.S. for provision of international switched voice, data and facsimile service through interconnection with the switched voice services of Worldcom, Sprint and Execuline of Sacramento; and

2. provide international switched voice, data and facsimile services by the resale of the international switched voice services set forth in Worldcom's Tariff F.C.C. No. 1, Sprint's Tariff F.C.C. Nos. 1 and 2 and Execuline of Sacramento's Tariff F.C.C. No. 1, between the contiguous U.S. and Guam, on the one hand, and international points listed in those tariffs, on the other hand.

b. MBS is authorized to:

1. lease from MCI or IT&E and operate one 56 kbps circuit in the TPC-3 cable between Guam and the U.S. mainland, for provision of international switched voice, data and facsimile service through interconnection with the switched voice services of MCI, Sprint and AT&T; and

2. provide international switched voice, data and facsimile service by the resale of the international switched voice services set forth in MCI's Tariff F.C.C. No. 1, Sprint's Tariffs F.C.C. Nos. 1 and 2 and AT&T's Tariff F.C.C. Nos. 1 and 2, between the contiguous U.S. and Guam, on the one hand, and the international points listed in those tariffs, on the other hand.

c. AAT is authorized to:

1. lease from Worldcom, PCI and/or Comsat and operate facilities between Guam and Hawaii for the provision of international switched voice and data service through interconnection with the switched voice services of Sprint; and

2. provide international switched voice and data service by the resale of the international switched voice services set forth in Sprint's Tariff F.C.C. No. 2, between Guam and international points listed in those tariffs.

11. IT IS FURTHER ORDERED that copies of any operating agreements entered into between the applicants and their correspondents shall be filed with the Commission within 30 days of their execution.

12. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

13. IT IS FURTHER ORDERED that applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 74 C.F.R. section 43.61.

14. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

15. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

---

[1] IT&E Overseas, Inc. ("IT&E") also filed Comments on AAT's application, as well as a Response to Sprint's Comments thereon. Both AAT and PCI filed Oppositions to the Comments of Sprint on their respective applications.

Commenting on AAT's application, IT&E stated that AAT did not indicate whether it was foreign-owned or controlled and failed to file separate applications for IMTS and non-IMTS services. We note simply that we will accept AAT's statement, in its Opposition to IT&E's Comments, that it is not a foreign-owned or controlled carrier. Furthermore, AAT no longer proposes to offer non-IMTS service, thus obviating IT&E's second concern.

[2] Filed on August 23, 1991, IT&E's Petition to Deny was withdrawn on November 18, 1991. The Petition alleged that PCI offered international service without Section 214 authorization for a time prior to and during the period of the PCI's application. IT&E also alleged that PCI violated the International Competitive Carrier decision by submitting requests for IMTS and non-IMTS service in the same application. *See In re the Matter of International Competitive Carrier Policies* ("*International Competitive Carrier*"), 102 FCC 2d 812, 845 (1985). IT&E also filed a formal complaint against PCI, which was subsequently withdrawn. *See* Order released Dec. 5, 1991, DA-91-1492, File No. E-91-107 (Com.Car.Bur. 1991).

[3] AAT originally proposed to provide service between Guam and international points directly, pursuant to COMSAT's Tariff FCC No. 103, as well as service pursuant to COMSAT's Tariffs FCC Nos. 102 and 104. In addition, AAT had requested authority to provide international video conferencing services. In response to a staff inquiry, AAT filed a letter clarifying that it was no longer requesting such authority in its present application.

[4] PCI originally sought authorization to resell international packet data service. In response to a staff inquiry, however, PCI withdrew its request. Additionally, PCI clarified in a separate letter that it intended to lease a fiber optic facility from World Communications, Inc., in order to provide the Guam-U.S. link for its proposed international service.

[5] *See, e.g.*, the cases cited in *Teltec Saving Communications Co.*, File No. I-T-C-86-062, Mimeo No. 3548, (released April 4, 1986) at n.2.

[6] *See, e.g.*, *International Telecom, Inc.*, 6 FCC Rcd 1964 (Int'l Fac. Div. 1991); *Argo Communications International, Inc.*, 1 FCC Rcd 578 (Com.Car.Bur. 1986).

[7] *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *Mackay Radio & Telegraph Co.*, 28 FCC 231 (1960).

[8] *See* 47 U.S.C. section 153(e), (f), (g); *Application of General Electric Co., GE Subsidiary, Inc. 21, and MCI Communications Corporation for Authority to Transfer Control of RCA Global Communications, Inc.*, 3 FCC Rcd 2803 at 2806-07; *Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorization Therefor, Third Report and Order*, Mimeo No. 012, released Oct. 6, 1983, 48 Fed. Reg. 46,791 (Oct. 15, 1983), paras. 2-4. *See also*, *International Common Carrier*, 102 FCC 2d at 832.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-327

In the Matter of

Conquest Telecommunications, Inc.

ORDER
Proceeding Terminated

Adopted: December 23, 1991; Released: December 23, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On November 8, 1991, we released orders directing certain operator service providers (OSPs) to demonstrate that their rates are just and reasonable and to begin announcing, at the beginning of each call, that their rates are available upon request.[1] The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) authorizes the Commission to impose either or both of these requirements on any OSP whose rates and charges filed pursuant to that Act appear, upon review, to be unjust or unreasonable. *See* 47 U.S.C. § 226(h)(2).

2. On December 20, 1991, Conquest Telecommunications, Inc. (Conquest) filed revisions to its informational tariff which reduce its rates substantially. In an accompanying report of sample prices, Conquest states that its total charge for a sample eight-minute call would be $6.58. In a report filed June 21, 1991, Conquest stated that its total charge for the same call under the rates then in effect would be $8.71. This represents a reduction of more than 24 percent from the highest total charge Conquest reported in its June 21 report. It was on the basis of that report and the rates Conquest then had in effect that we found that Conquest's rates appeared to be unjust and unreasonable. Conquest no longer charges the rates that prompted this proceeding. Conquest therefore need not provide further justification for its rates and charges at this time and is not required to announce, at the beginning of each call that it handles, that its rates are available on request.[2] We hereby terminate the captioned proceeding.

3. Accordingly, IT IS ORDERED that the proceeding initiated in CC Docket No. 91-327 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

---

[1] Advanced Technology Cellular Telecommunications, CC Docket No. 91-324, DA 91-1379, released Nov. 8, 1991 (Com.Car.Bur.); Cherokee Communications, Inc., CC Docket No. 91-325, DA 91-1380, released Nov. 8, 1991 (Com.Car.Bur.); Capital Network Systems, Inc., CC Docket No. 91-326, DA 91-1381, released Nov. 8, 1991 (Com.Car.Bur.); Com Systems, Inc. CC Docket No. 91-329, DA 91-1384, released Nov. 8, 1991 (Com.Car.Bur.); Conquest Telecommunications Services, CC Docket No. 91-327, DA 91-1382, released Nov. 8, 1991 (Com.Car.Bur.); CPS Operator Services, Inc., CC Docket No. 91-328, DA 91-1383, released Nov. 8, 1991 (Com.Car.Bur.); International Pacific, Inc., CC Docket No. 91-330, DA 91-1385, released Nov. 8, 1991 (Com.Car.Bur.); Peoples Telephone Company, Inc., CC Docket No. 91-331, DA 91-1386, released Nov. 8, 1991 (Com.Car.Bur.); South Texas Phone, Inc., CC Docket No. 91-332, DA 91-1387, released Nov. 8, 1991 (Com.Car.Bur.); TelTrust, Inc., CC Docket No. 91-333, DA 91-1388, released Nov. 8, 1991 (Com.Car.Bur.); U.S. Fiberline Communications, CC Docket No. 91-334, DA 91-1389, released Nov. 8, 1991 (Com.Car.Bur.); U.S. Long Distance, Inc., CC Docket No. 91-331, DA 91-1390, released Nov. 8, 1991 (Com.Car.Bur.). (*Rate Review Orders*).

[2] We emphasize that this Order does not represent an affirmative finding that Conquest's rates are just and reasonable.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-329

In the Matter of

Com Systems, Inc.

ORDER
Proceeding Terminated

Adopted: December 23, 1991; Released: December 23, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On November 8, 1991, we released orders directing certain operator service providers (OSPs) to demonstrate that their rates are just and reasonable and to begin announcing, at the beginning of each call, that their rates are available upon request.[1] The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) authorizes the Commission to impose either or both of these requirements on any OSP whose rates and charges filed pursuant to that Act appear, upon review, to be unjust or unreasonable. *See* 47 U.S.C. § 226(h)(2).

2. On December 20, 1991, Com Systems, Inc. (CSI) filed revisions to its informational tariff which reduce its rates substantially. In an accompanying report of sample prices, CSI states that its total charge for a sample eight-minute call would be $6.54. In a report filed June 21, 1991, CSI stated that its total charge for the same call under the rates then in effect would be $8.09. This represents a reduction of approximately 19 percent from the highest total charge CSI reported in its June 21 report. It was on the basis of that report and the rates CSI then had in effect that we found that CSI's rates appeared to be unjust and unreasonable. CSI no longer charges the rates that prompted this proceeding. CSI therefore need not provide further justification for its rates and charges at this time and is not required to announce, at the beginning of each call that it handles, that its rates are available on request.[2] We hereby terminate the captioned proceeding.

3. Accordingly, IT IS ORDERED that the proceeding initiated in CC Docket No. 91-329 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Bureau Chief (Policy)
Common Carrier Bureau

---

[1] Advanced Technology Cellular Telecommunications, CC Docket No. 91-324, DA 91-1379, released Nov. 8, 1991 (Com.Car.Bur.); Cherokee Communications, Inc., CC Docket No. 91-325, DA 91-1380, released Nov. 8, 1991 (Com.Car.Bur.); Capital Network Systems, Inc., CC Docket No. 91-326, DA 91-1381, released Nov. 8, 1991 (Com.Car.Bur.); Com Systems, Inc. CC Docket No. 91-329, DA 91-1384, released Nov. 8, 1991 (Com.Car.Bur.); Conquest Telecommunications Services, CC Docket No. 91-327, DA 91-1382, released Nov. 8, 1991 (Com.Car.Bur.); CPS Operator Services, Inc., CC Docket No. 91-328, DA 91-1383, released Nov. 8, 1991 (Com.Car.Bur.); International Pacific, Inc., CC Docket No. 91-330, DA 91-1385, released Nov. 8, 1991 (Com.Car.Bur.); Peoples Telephone Company, Inc., CC Docket No. 91-331, DA 91-1386, released Nov. 8, 1991 (Com.Car.Bur.); South Texas Phone, Inc., CC Docket No. 91-332, DA 91-1387, released Nov. 8, 1991 (Com.Car.Bur.); TelTrust, Inc., CC Docket No. 91-333, DA 91-1388, released Nov. 8, 1991 (Com.Car.Bur.); U.S. Fiberline Communications, CC Docket No. 91-334, DA 91-1389, released Nov. 8, 1991 (Com.Car.Bur.); U.S. Long Distance, Inc., CC Docket No. 91-331, DA 91-1390, released Nov. 8, 1991 (Com.Car.Bur.). (*Rate Review Orders).*

[2] We emphasize that this Order does not represent an affirmative finding that CSI's rates are just and reasonable.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

CC Docket No. 91-332

In the Matter of

South Texas Phone, Inc.

ORDER
Proceeding Terminated

Adopted: December 23, 1991; Released: December 23, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On November 8, 1991, we released orders directing certain operator service providers (OSPs) to demonstrate that their rates are just and reasonable and to begin announcing, at the beginning of each call, that their rates are available upon request.[1] The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) authorizes the Commission to impose either or both of these requirements on any OSP whose rates and charges filed pursuant to that Act appear, upon review, to be unjust or unreasonable. *See* 47 U.S.C. § 226(h)(2).

2. On December 12, 1991, South Texas Phone, Inc. (STP) filed revisions to its informational tariff which reduce its rates substantially. In an accompanying report of sample prices, STP states that its total charge for a sample eight-minute call would be $6.48. In a report filed June 21, 1991, STP stated that its total charge for the same call under the rates then in effect would be $7.95. This represents a reduction of more than 18 percent from the highest total charge STP reported in its June 21 report. It was on the basis of that report and the rates STP then had in effect that we found that STP's rates appeared to be unjust and unreasonable. STP no longer charges the rates that prompted this proceeding. STP therefore need not provide further justification for its rates and charges at this time and is not required to announce, at the beginning of each call that it handles, that its rates are available on request.[2] We hereby terminate the captioned proceeding.

3. Accordingly, IT IS ORDERED that the proceeding initiated in CC Docket No. 91-332 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

---

[1] Advanced Technology Cellular Telecommunications, CC Docket No. 91-324, DA 91-1379, released Nov. 8, 1991 (Com.Car.Bur.); Cherokee Communications, Inc., CC Docket No. 91-325, DA 91-1380, released Nov. 8, 1991 (Com.Car.Bur.); Capital Network Systems, Inc., CC Docket No. 91-326, DA 91-1381, released Nov. 8, 1991 (Com.Car.Bur.); Com Systems, Inc. CC Docket No. 91-329, DA 91-1384, released Nov. 8, 1991 (Com.Car.Bur.); Conquest Telecommunications Services, CC Docket No. 91-327, DA 91-1382, released Nov. 8, 1991 (Com.Car.Bur.); CPS Operator Services, Inc., CC Docket No. 91-328, DA 91-1383, released Nov. 8, 1991 (Com.Car.Bur.); International Pacific, Inc., CC Docket No. 91-330, DA 91-1385, released Nov. 8, 1991 (Com.Car.Bur.); Peoples Telephone Company, Inc., CC Docket No. 91-331, DA 91-1386, released Nov. 8, 1991 (Com.Car.Bur.); South Texas Phone, Inc., CC Docket No. 91-332, DA 91-1387, released Nov. 8, 1991 (Com.Car.Bur.); TelTrust, Inc., CC Docket No. 91-333, DA 91-1388, released Nov. 8, 1991 (Com.Car.Bur.); U.S. Fiberline Communications, CC Docket No. 91-334, DA 91-1389, released Nov. 8, 1991 (Com.Car.Bur.); U.S. Long Distance, Inc., CC Docket No. 91-331, DA 91-1390, released Nov. 8, 1991 (Com.Car.Bur.). (*Rate Review Orders*).

[2] We emphasize that this Order does not represent an affirmative finding that STP's rates are just and reasonable.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-333

In the Matter of

TelTrust, Inc.

ORDER
Proceeding Terminated

Adopted: December 23, 1991; Released: December 23, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On November 8, 1991, we released orders directing certain operator service providers (OSPs) to demonstrate that their rates are just and reasonable and to begin announcing, at the beginning of each call, that their rates are available upon request.[1] The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) authorizes the Commission to impose either or both of these requirements on any OSP whose rates and charges filed pursuant to that Act appear, upon review, to be unjust or unreasonable. *See* 47 U.S.C. § 226(h)(2).

2. On December 13, 1991, TelTrust, Inc. (TelTrust) filed revisions to its informational tariff which reduce its rates substantially. In an accompanying report of sample prices, TelTrust states that its total charge for a sample eight-minute call would be $6.06. In a report filed June 21, 1991, TelTrust stated that its total charge for the same call under the rates then in effect would be $7.81. This represents a reduction of more than 22 percent from the highest total charge TelTrust reported in its June 21 report. It was on the basis of that report and the rates TelTrust then had in effect that we found that TelTrust's rates appeared to be unjust and unreasonable. TelTrust no longer charges the rates that prompted this proceeding. TelTrust therefore need not provide further justification for its rates and charges at this time and is not required to announce, at the beginning of each call that it handles, that its rates are available on request.[2] We hereby terminate the captioned proceeding.

3. Accordingly, IT IS ORDERED that the proceeding initiated in CC Docket No. 91-333 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

---

[1] Advanced Technology Cellular Telecommunications, CC Docket No. 91-324, DA 91-1379, released Nov. 8, 1991 (Com.Car.Bur.); Cherokee Communications, Inc., CC Docket No. 91-325, DA 91-1380, released Nov. 8, 1991 (Com.Car.Bur.); Capital Network Systems, Inc., CC Docket No. 91-326, DA 91-1381, released Nov. 8, 1991 (Com.Car.Bur.); Com Systems, Inc. CC Docket No. 91-329, DA 91-1384, released Nov. 8, 1991 (Com.Car.Bur.); Conquest Telecommunications Services, CC Docket No. 91-327, DA 91-1382, released Nov. 8, 1991 (Com.Car.Bur.); CPS Operator Services, Inc., CC Docket No. 91-328, DA 91-1383, released Nov. 8, 1991 (Com.Car.Bur.); International Pacific, Inc., CC Docket No. 91-330, DA 91-1385, released Nov. 8, 1991 (Com.Car.Bur.); Peoples Telephone Company, Inc., CC Docket No. 91-331, DA 91-1386, released Nov. 8, 1991 (Com.Car.Bur.); South Texas Phone, Inc., CC Docket No. 91-332, DA 91-1387, released Nov. 8, 1991 (Com.Car.Bur.); TelTrust, Inc., CC Docket No. 91-333, DA 91-1388, released Nov. 8, 1991 (Com.Car.Bur.); U.S. Fiberline Communications, CC Docket No. 91-334, DA 91-1389, released Nov. 8, 1991 (Com.Car.Bur.); U.S. Long Distance, Inc., CC Docket No. 91-331, DA 91-1390, released Nov. 8, 1991 (Com.Car.Bur.). (*Rate Review Orders).*

[2] We emphasize that this Order does not represent an affirmative finding that TelTrust's rates are just and reasonable.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-334

In the Matter of

U.S. Fiberline Communications

ORDER
Proceeding Terminated

Adopted: December 23, 1991; Released: December 23, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On November 8, 1991, we released orders directing certain operator service providers (OSPs) to demonstrate that their rates are just and reasonable and to begin announcing, at the beginning of each call, that their rates are available upon request.[1] The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) authorizes the Commission to impose either or both of these requirements on any OSP whose rates and charges filed pursuant to that Act appear, upon review, to be unjust or unreasonable. *See* 47 U.S.C. § 226(h)(2).

2. On December 18, 1991, U.S. Fiberline Communications (U.S. Fiberline) filed revisions to its informational tariff which reduce its rates substantially. In an accompanying report of sample prices, U.S. Fiberline states that its total charge for a sample eight-minute call would be $6.58. In a report filed June 21, 1991, U.S. Fiberline stated that its total charge for the same call under the rates then in effect would be $9.81. This represents a reduction of almost 33 percent from the highest total charge U.S. Fiberline reported in its June 21 report. It was on the basis of that report and the rates U.S. Fiberline then had in effect that we found that U.S. Fiberline's rates appeared to be unjust and unreasonable. U.S. Fiberline no longer charges the rates that prompted this proceeding. U.S. Fiberline therefore need not provide further justification for its rates and charges at this time and is not required to announce, at the beginning of each call that it handles, that its rates are available on request.[2] We hereby terminate the captioned proceeding.

3. Accordingly, IT IS ORDERED that the proceeding initiated in CC Docket No. 91-334 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

---

[1] Advanced Technology Cellular Telecommunications, CC Docket No. 91-324, DA 91-1379, released Nov. 8, 1991 (Com.Car.Bur.); Cherokee Communications, Inc., CC Docket No. 91-325, DA 91-1380, released Nov. 8, 1991 (Com.Car.Bur.); Capital Network Systems, Inc., CC Docket No. 91-326, DA 91-1381, released Nov. 8, 1991 (Com.Car.Bur.); Com Systems, Inc. CC Docket No. 91-329, DA 91-1384, released Nov. 8, 1991 (Com.Car.Bur.); Conquest Telecommunications Services, CC Docket No. 91-327, DA 91-1382, released Nov. 8, 1991 (Com.Car.Bur.); CPS Operator Services, Inc., CC Docket No. 91-328, DA 91-1383, released Nov. 8, 1991 (Com.Car.Bur.); International Pacific, Inc., CC Docket No. 91-330, DA 91-1385, released Nov. 8, 1991 (Com.Car.Bur.); Peoples Telephone Company, Inc., CC Docket No. 91-331, DA 91-1386, released Nov. 8, 1991 (Com.Car.Bur.); South Texas Phone, Inc., CC Docket No. 91-332, DA 91-1387, released Nov. 8, 1991 (Com.Car.Bur.); TelTrust, Inc., CC Docket No. 91-333, DA 91-1388, released Nov. 8, 1991 (Com.Car.Bur.); U.S. Fiberline Communications, CC Docket No. 91-334, DA 91-1389, released Nov. 8, 1991 (Com.Car.Bur.); U.S. Long Distance, Inc., CC Docket No. 91-331, DA 91-1390, released Nov. 8, 1991 (Com.Car.Bur.). (*Rate Review Orders*).

[2] We emphasize that this Order does not represent an affirmative finding that U.S. Fiberline's rates are just and reasonable.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 3401 and 3598

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: December 23, 1991; Released: December 23, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 3401 to modify Virtual Telecommunications Network Service (VTNS) Option 12. VTNS modified Option 12: reduces the Basic Charge; reduces the Minimum Annual Charge; clarifies the application of certain credits; and introduces a Domestic Data Transmission Capability Volume Pricing Plan. AT&T Transmittal No. 3401 Description and Justification (D&J) at 2-5. Transmittal 3401 is scheduled to take effect on December 24, 1991. On November 1, 1991, AT&T filed Transmittal No. 3598 to modify revisions in Transmittal 3401 by reducing the Basic Charge for a two month period to conform pending revisions to AT&T's agreement with the initial VTNS customer.

2. Williams Telecommunications Group, Inc. (Williams) filed a petition to reject or suspend and investigate Transmittal 3401 on September 9, 1991. MCI Telecommunications Corporation (MCI) filed a petition to reject Transmittal 3401, and US Sprint Communications Company Limited Partnership (Sprint), and Competitive Telecommunications Association (CompTel) filed petitions to reject or suspend and investigate Transmittal 3401 on September 10, 1991. AT&T filed a reply on September 19, 1991. MCI filed a petition to reject Transmittal 3598 on November 6, 1991; AT&T replied to that petition on November 12, 1991.

3. Petitioners argue that the Commission's action in CC Docket 90-132,[1] prohibits the Commission from accepting the revisions to Option 12.[2] In that Order, the Commission prohibited the bundling of inbound service in Tariff 12 Options but exempted existing options from the prohibition. Petitioners argue that the Commission intended to grandfather only those options on file as of August 1. MCI Petition at 4; Sprint Petition at 4-5; Williams Petition at 3; CompTel Petition at 2. The petitioners contend that the proposed revisions substantially alter Option 12, which they assert establishes that AT&T is using revisions as a way of avoiding the 800 bundling restriction. *See* MCI Petition at 3; Sprint Petition at 1; Williams Petition at 3; CompTel Petition at 1. Sprint and Williams allege that these modifications expand the scope of 800 service bundling in Option 28 and should not be permitted. *See* Sprint Petition at 2-3; Williams Petition at 3.

4. Williams argues that AT&T has failed to demonstrate that modified Option 36 is an integrated service package that is "unlike" its component services and thus has failed to justify the discrimination between this option and AT&T's other services. Williams Petition at 5-7. Williams asserts that even if Option 12 could qualify as an integrated service package, its rates vary without justification from other options under Tariff 12 and are thus discriminatory. *Id.* at 7-9. Williams further alleges Tariff 12 cannot be justified under the principles enunciated in the *Tariff 12 Remand* and *Sea-Land* decisions, claiming that those cases require that the tariff filing or contract provide sufficient information to ensure compliance with statutory antidiscrimination provisions. *Id.* at 9-13. Williams also insists that discounted prices, even if generally available, are not automatically reasonable under Section 202(a) of the Communications Act. *Id.* at 14-15.

5. AT&T replies that this filing makes no fundamental change to Option 12; the rate elements, rate structure and functionality remain essentially as originally filed. AT&T Reply at 1. AT&T also asserts that Transmittal 3401 makes no modifications whatever in the rates for any inbound capabilities. *Id.* at 2. AT&T also argues that grandfathering involves a balancing of interests, and allowing these "routine" tariff revisions to become effective will in no way impede the Commission's Docket 90-132 policies. *Id.* at 5-6. Rather, says AT&T, it will prevent inequity to the initial Option 12 customer who has made a substantial investment in its VTNS network in reasonable reliance on the continued availability of tariff revisions. *Id.* at 6.

6. AT&T argues that petitioners repeat the same arguments they have raised since the inception of Tariff 12, alleging that Option 12 is unlawfully discriminatory. *Id.* AT&T asserts that these claims have been made before, without success, and should be rejected here as being patently without merit. *Id.* at 6-7.

7. The Commission's *Interexchange Order* precluded AT&T from including any inbound service in new Tariff 12 options until 800 numbers become portable, but "grandfathered" existing Tariff 12 options containing such service. *Interexchange Order* at para. 149. The Commission reasoned that, while this action would inconvenience customers who were in negotiations for Tariff 12 options, such customers would not have to reconfigure their existing service offerings, which existing customers would be required to do in the absence of the grandfathering provision. *Id.* at n. 237. On November 25, 1991, the Commission released an Order extending the grandfathering provision of the *Interexchange Order* to include the additional Tariff 12 options that had been filed with the Commission before September 1, 1991.[3]

---

[1] Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd 5880 (1991) (*Interexchange Order*).

[2] These petitions were filed prior to the release of the *Interexchange Order*. Consequently, the discussions in the petitions rely upon the Commission's News Release and statements made at the August 1 meeting. AT&T claims that such reliance is improper. Since the *Interexchange Order* has been released, we will not address AT&T's concerns that the petitioners' claims were "premature at best."

[3] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Memorandum Opinion and Order, FCC No. 91-390, Mimeo 38289, (released Nov. 25, 1991).

8. The Common Carrier Bureau has reviewed AT&T Transmittal No. 3401, the revisions, and the appropriate pleadings. We conclude that this transmittal must be rejected because these revisions substantially change Option 12, which includes inbound service, and are therefore inconsistent with the Commission's decision in CC Docket 90-132 to prohibit any further bundling of inbound services in Tariff 12 Packages and in contract-based tariffs.[4]

9. Accordingly, IT IS ORDERED that American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal Nos. 3401 and 3598, ARE REJECTED.

10. IT IS FURTHER ORDERED that the petition to reject American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3401, filed by MCI Telecommunications Corporation, the petitions to reject or suspend and investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3401, filed by US Sprint Communications Company Limited Partnership, Williams Telecommunications Group, Inc., and Competitive Telecommunications Association, and the petition to reject American Telephone and Telegraph Company Tariff F.C.C. No. 12 Transmittal No. 3598, filed by MCI Telecommunications Corporation, ARE GRANTED to the extent indicated herein, and otherwise ARE DENIED.

11. IT IS FURTHER ORDERED that such revisions should be filed within five working days of the release of this Order to be effective on one day's notice. For this purpose, Special Permission No. 91-1155 is assigned and Sections 61.58 and 61.59 of the Commissions Rules, 47 C.F.R. §§ 61.58, 61.59, are waived.

12. IT IS FURTHER ORDERED that American Telephone and Telegraph Company SHALL ISSUE revisions to the tariff no later than 5 business days from the release of this Order removing the rejected material and reinstating currently effective material. These revisions shall be scheduled to become effective on not less than one day's notice.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

---

[4] *See Interexchange Order, supra,* note 1; *id.*; *see also* American Telephone and Telegraph Company, Transmittal No. 3375, DA 91-1577 (released Dec. 19, 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-335

In the Matter of

U.S. Long Distance, Inc.

ORDER
Proceeding Terminated

Adopted: December 23, 1991; Released: December 23, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On November 8, 1991, we released orders directing certain operator service providers (OSPs) to demonstrate that their rates are just and reasonable and to begin announcing, at the beginning of each call, that their rates are available upon request.[1] The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) authorizes the Commission to impose either or both of these requirements on any OSP whose rates and charges filed pursuant to that Act appear, upon review, to be unjust or unreasonable. *See* 47 U.S.C. § 226(h)(2).

2. On December 20, 1991, U.S. Long Distance, Inc. (USLD) filed revisions to its informational tariff which reduce its rates substantially. In an accompanying report of sample prices, USLD states that its total charge for a sample eight-minute call would be $6.58. In a report filed June 21, 1991, USLD stated that its total charge for the same call under the rates then in effect would be $7.54. This represents a reduction of approximately 13 percent from the highest total charge USLD reported in its June 21 report. It was on the basis of that report and the rates USLD then had in effect that we found that USLD's rates appeared to be unjust and unreasonable. USLD no longer charges the rates that prompted this proceeding. USLD therefore need not provide further justification for its rates and charges at this time and is not required to announce, at the beginning of each call that it handles, that its rates are available on request. [2] We hereby terminate the captioned proceeding.

3. Accordingly, IT IS ORDERED that the proceeding initiated in CC Docket No. 91-335 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

---

[1] Advanced Technology Cellular Telecommunications, CC Docket No. 91-324, DA 91-1379, released Nov. 8, 1991 (Com.Car.Bur.); Cherokee Communications, Inc., CC Docket No. 91-325, DA 91-1380, released Nov. 8, 1991 (Com.Car.Bur.); Capital Network Systems, Inc., CC Docket No. 91-326, DA 91-1381, released Nov. 8, 1991 (Com.Car.Bur.); Com Systems, Inc. CC Docket No. 91-329, DA 91-1384, released Nov. 8, 1991 (Com.Car.Bur.); Conquest Telecommunications Services, CC Docket No. 91-327, DA 91-1382, released Nov. 8, 1991 (Com.Car.Bur.); CPS Operator Services, Inc., CC Docket No. 91-328, DA 91-1383, released Nov. 8, 1991 (Com.Car.Bur.); International Pacific, Inc., CC Docket No. 91-330, DA 91-1385, released Nov. 8, 1991 (Com.Car.Bur.); Peoples Telephone Company, Inc., CC Docket No. 91-331, DA 91-1386, released Nov. 8, 1991 (Com.Car.Bur.); South Texas Phone, Inc., CC Docket No. 91-332, DA 91-1387, released Nov. 8, 1991 (Com.Car.Bur.); TelTrust, Inc., CC Docket No. 91-333, DA 91-1388, released Nov. 8, 1991 (Com.Car.Bur.); U.S. Fiberline Communications, CC Docket No. 91-334, DA 91-1389, released Nov. 8, 1991 (Com.Car.Bur.); U.S. Long Distance, Inc., CC Docket No. 91-331, DA 91-1390, released Nov. 8, 1991 (Com.Car.Bur.). (*Rate Review Orders*).

[2] We emphasize that this Order does not represent an affirmative finding that USLD's rates are just and reasonable.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

SEG CELLULAR LIMITED PARTNERSHIP File No. 163500-91-26-MHK

For unauthorized construction of
two new cells for Station KNKN586
in the Domestic Public Cellular
Radio Telecommunications Service
serving Market 102A, Des Moines, Iowa.

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: December 24, 1991; Released: January 8, 1992

By the Commission:

1. On April 25, 1990, SEG Cellular Limited Partnership (SEG) filed an FCC Form 401 (File No. 05453-CL-MP-91) proposing the construction of two new cell sites located at Indianola and Dallas, Iowa for its authorized station KNKN586 serving the Des Moines, Iowa MSA. In order to receive construction authority, an FAA determination is required for each tower and the Antenna Survey Branch (ASB) of the Field Operation Bureau must clear the tower.[1] ASB cleared the Indianola cell site and provided the lighting and marking requirements. ASB did not clear the Dallas cell site because the required FAA determination was not provided by SEG. Accordingly, the Mobile Services Division (MSD) requested SEG to provide a copy of the final FAA determination for the Dallas site.[2] SEG, however, did not respond to the request and, therefore, the application to construct and operate the two new cell sites was not granted. On November 13, 1990, SEG filed FCC Form 489 (File No. 07231-CL-L-91) notifying the Commission of the completion of its construction of the Indianola cell site and a new cell site at Panther, Iowa, that had not been previously requested.[3] On August 5, 1991, SEG filed a request for Special Temporary Authority to continue cellular operations and on August 7, 1991, an amendment to its application correcting the unauthorized construction. Because the construction of the Panther site was a major modification to SEG's existing facilities, an FCC Form 401 requesting prior Commission authority was required. A notification on FCC Form 489 was, therefore, in violation of the rules. SEG thus had constructed and placed into operation, without Commission authority, the proposed Indianola cell site and a new cell site at Panther, Iowa.[4]

2. Section 301 of the Communications Act provides in relevant part:

> No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

Similarly, Section 22.3 of the Commission's rules states:

> No person shall use or operate any device for the transmission of energy or communications by radio in the services authorized by this part except as provided in this part.

Because SEG had not received authority to construct the cell sites proposed under File No. 05453-CL-MP-91, it is determined that an apparent violation of Section 301 of the Communications Act and Section 22.3 of the Commission's rules has occurred for constructing facilities at unauthorized locations.

3. Section 503(b) of the Communications Act states in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
>
> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter . . . shall be liable to the United States for a forfeiture penalty.

We find that SEG's construction of the facilities as of January 8, 1991 constitutes willful and repeated conduct within the terms of the statute.

4. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), the base forfeiture amount for constructing at an unauthorized location is $40,000. Consistent with this *Policy Statement*, we are adjusting upward the amount to $80,000 because SEG repeated the violation by constructing two unauthorized cells.

5. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's rules, IT IS ORDERED that SEG Cellular Limited Partnership be advised of an APPARENT LIABILITY FOR FORFEITURE of Eighty Thousand Dollars ($80,000) for willful and repeated violations of the aforementioned statutory and rule provisions.

6. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within thirty (30) days of the release date of this order, payable to the order of the Federal Communications Commission to: Federal Communications Commission, Post Office Box 73481, Chicago, IL 60673-7482.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Applicants can request marking and lighting instructions for preconstruction of their towers pursuant to Section 22.43(d) of the Commission's rules. SEG made no such request. .

[2] *See* letter from the Chief, Mobile Services Division, to Richard L. Vega (Aug. 20, 1990) requesting FAA determination for SEG's Dallas cell site. A copy of this letter was also sent to SEG on the same date.

[3] The MSD staff had not discovered the unauthorized construction and inadvertently issued an authorization on January 8, 1991. The MSD subsequently discovered the unauthorized construction and notified SEG.

[4] The Panther site has been cleared by the ASB and marking and lighting instructions have been provided.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

McCaw RCC Communications, Inc.

File No. 63500-91-25-RPS

Notice of Apparent Liability for
Forfeiture Penalty for Station KAA276
in the Public Land Mobile Radio
Service at Colorado Springs, CO

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: December 24, 1991; Released: January 8, 1992

By the Commission:

1. On July 9, 1987, the Commission granted Interlink Communications of Colorado (Interlink) authority to construct and operate control facilities for Station KAA276 on frequency 72.30 MHz at 11 Transmitter Lane, Colorado Springs, CO. On May 24, 1988 Interlink filed FCC Form 489 notifying the Commission that construction was completed. On May 27, 1989, the Commission granted a renewal of the license. On August 11, 1989, after receiving Commission approval, Station KAA276 was transferred from Interlink to McCaw RCC Communications Inc. (McCaw). On May 21, 1991, the Commission received from McCaw: (1) a request for Special Temporary Authority to continue to operate its 72.30 MHz facility of Station KAA276 at a location described as Cheyenne Mountain 6.6 miles SSW of Colorado Springs, CO, pending Commission action on an application to relocate the facility from 11 Transmitter Lane, Colorado Springs, to the Cheyenne Mountain location at which it is currently operating, and (2) an application to relocate the 72.30 MHz facility from 11 Transmitter Lane, Colorado Springs, CO, to Cheyenne Mountain, 6.6 miles SSW of Colorado Springs, CO.

2. Section 301 of the Communications Act provides in relevant part:

> No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

Similarly, Section 22.3 of the Commission's rules states:

> No person shall use or operate any device for the transmission of energy or communications by radio in the services authorized by this part except as provided in this part.

Any service to the public that was provided from the location of Station KAA276, at Cheyenne Mountain 6.6 miles SSW of Colorado Springs, CO from the date McCaw acquired control, August 11, 1989, and May 21 1991, the receipt date of the STA request and the applica tion to relocate was, therefore, unauthorized and in viola tion of Section 301 of the Communications Act an Section 22.3 of the Commission's rules. Consequently, is determined that an apparent violation of Section 301 c the Communications Act and Section 22.3 of the Com mission's rules has occurred for operating a facility at a unauthorized location after that date.

3. Section 503(b) of the Communications Act states i pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
>
> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter . . . shall be liable to the United States for a forfeiture penalty.

We find that the McCaw operation of the facility unti May 21, 1991, constitutes willful and repeated conduc within the terms of the statute.

4. Pursuant to our *Policy Statement. Standards for As sessing Forfeitures*, 6 FCC Rcd 4695 (1991), the base for feiture amount for operating at an unauthorized locatio is $40,000. Consistent with this *Policy Statement*, we ar adjusting downward the forfeiture to $28.000 becaus McCaw voluntarily disclosed its unauthorized operation t the Commission.

5. Accordingly, pursuant to Section 503(b) of the Com munications Act of 1934, as amended. 47 U.S.C. Se 503(b) and Section 1.80 of the Commission's rules 4 C.F.R. Sec. 1.80, IT IS ORDERED that McCaw RC Communications Inc. IS APPARENTLY LIABLE FOR FORFEITURE in the amount of Twenty Eight Thousan Thousand Dollars ($28,000.00) for willful and repeate violations of the aforementioned statutory and rule prov sions until May 21, 1991.

6. Payment of the forfeiture may be made by mailing check or similar instrument to the Commission withi thirty (30) days of the release date of this order. payabl to the order of the Federal Communications Commissio to: Federal Communications Commission. P.O. Bo 73482, Chicago, Illinois 60673-7482.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

McCaw RCC Communications, Inc. File No. 63500-91-30-RPS

Notice of Apparent Liability for
Forfeiture Penalty for Station KWU329
in the Public Land Mobile Radio
Service at Colorado Springs, Colorado

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: December 24, 1991; Released: January 8, 1992

By the Commission:

1. On June 21, 1983, the Commission granted authority to Radio Contact Corporation to construct and operate facilities for Station KWU329 on frequency 931.5875 MHz at Cheyenne Mountain, 8 miles SSW of Colorado Springs, Colorado. The expiration date of the license was April 1, 1984. The expiration date was subsequently extended five years to April 1, 1989. On September 7, 1989, the Commission was notified of the consummation of a transfer of the facilities of Station KWU329 from Interlink Communications of Colorado to McCaw RCC Communications Inc. (McCaw). On May 21, 1991, the Commission received from McCaw: (1) a request for Special Temporary Authority (STA) to continue to operate the 931.5875 MHz facilities licensed under call sign KWU329 from a location described as 6.6 miles SSW of Colorado Springs, Colorado, pending Commission action on an application to relocate the facility from Cheyenne Mountain 8 miles SSW of Colorado Springs, Colorado,[1] to the location at which it is currently being operated, and (2) an application to relocate the facilities.

2. Section 301 of the Communications Act provides in relevant part:

> No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

Similarly, Section 22.3 of the Commission's rules states:

> No Person shall use or operate any device for the transmission of energy or communications by radio in the services authorized by this part except as provided in this part.

Any services to the public that was provided from the location of Station KWU329, 6.6 miles SSW of Colorado Springs, Colorado, between the date of transfer September 7, 1989 and May 21, 1991 the receipt date of the STA request was, therefore, unauthorized and in violation of Section 301 of the Communications Act and Section 22.3 of the Commission's rules. Consequently, it is determined that an apparent violation of Section 301 of the Communications Act and Section 22.3 of the Commission's rules has occurred for operating a facility in an unauthorized manner after that date.

3. Section 503(b) of the Communications Act states in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
>
> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or if any rule, regulation, or order issued by the Commission under this chapter . . . shall be liable to the United States for a forfeiture penalty.

We find that McCaw RCC Communications, Inc. operation of the facility continuing until May 21, 1991, constitutes willful and repeated conduct within the term of the statute.

4. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), the base forfeiture amount for operating at an unauthorized location is $40,000. Consistent with this *Policy Statement*, we are adjusting downward the forfeiture to $28,000 because McCaw voluntarily disclosed its unauthorized operation to the Commission.

5. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Sec 503(b) and Section 1.80 of the Commission's rules 47 C.F.R. Sec. 1.80, IT IS ORDERED that McCaw RCC Communications Inc. IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of Twenty Eight Thousand Dollars ($28,000) for willful and repeated violations of the aforementioned statutory and rule provisions continuing until May 21, 1991.

6. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within thirty (30) days of the release date of this order, payable to the order of the Federal Communications Commission to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

---

[1] A review of the Commission's files indicates that no application had ever been received to relocate the 931.5875 MHz facility from the Cheyenne Mountain location, 8 miles SSW of Colorado Springs, Colorado.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-183

In re Applications of

WOODS COMMUNICATIONS GROUP, INC.	File No. BPCT-870904KJ
PEARS BROADCASTING, INC.	File No. BPCT-871109KF
GILES TELEVISION, INC.	File No. BPCT-871110KE
CALDWELL BROADCASTING LIMITED PARTNERSHIP	File No. BPCT-871110KH
KTVE, INC.	File No. BPCT-871110KL

For Construction Permit for
New Television Station,
Channel 11,
Columbia, Louisiana

MEMORANDUM OPINION AND ORDER

Adopted: December 24, 1991; Released: January 9, 1992

By the Commission:

1. We have before us applications for review of the Review Board's Decision in this case. 6 FCC Rcd 3529 (Rev. Bd. 1991).[1] In light of the arguments raised in these pleadings and our review of the evidence and the lower decisions, we hold that a different outcome is warranted than that ordered by the Board. Nonetheless, we agree with the Board's conclusions except as otherwise indicated.

2. The ALJ selected Pears as the best-qualified applicant because he determined that only Pears deserves 100 percent quantitative integration credit and because he concluded that Pears is not to be charged with a diversification demerit. As for the other applicants, the ALJ found that Caldwell deserves no integration credit because its integration proposal is not reliable; that Woodscom deserves no integration credit because its principal's integration commitment is merely temporary and that it must be charged with a substantial diversification demerit; that Giles TV is also to be charged with a diversification demerit and deserves only 40 percent integration credit in view of inappropriate involvement by its nominally passive owner; and that no applicant deserves a preference for superior coverage or past performance. 5 FCC Rcd 5859 (ALJ 1990).

3. After considering exceptions filed by Caldwell, Woodscom, and Giles TV, the Review Board concluded that Caldwell, rather than Pears, ought to prevail. The Board held that Caldwell's integration proposal is credible and that its multiple qualitative integration enhancements outweigh Pears'. As it also held that Caldwell's several integration enhancements outweigh the minority enhancement claimed by Giles TV, the Board saw no need to decide whether Giles TV deserves full quantitative integration credit. The Board held that Woodscom could not win because its integration enhancement showing is inferior, because it is charged with a substantial diversification demerit, and because it has no significant preference to offset these deficiencies. 6 FCC Rcd 3529, 3529-30 ¶ 4, 3533 n.3, n.5 (Rev. Bd. 1991).

4. Pears, Giles TV, and Woodscom contend that the Board erred in concluding that Caldwell deserves full credit for integration, and Giles TV and Woodscom also argue that the Board erred by denying or dismissing the claims for preferences and quantitative integration credit that they had raised in exceptions. Caldwell, Pears, Giles TV, and Woodscom each maintains that it deserves to prevail in the final comparative assessment. We hold, for the reasons stated below, that Pears is the best-qualified applicant.

DISCUSSION

A. Pears

5. As noted, Pears received full quantitative integration credit in the Initial Decision and no diversification demerit. No one has challenged the award of integration credit. One competing applicant, Giles TV, contends in its application for review that Pears should be charged with a diversification demerit because of the interests of one of its principals, but the contention is unpersuasive, as Giles TV advances no reason for reversing the ALJ's conclusion that the principal in question made timely commitments to divest his existing media interests. 5 FCC Rcd a 5860-61 ¶¶ 13, 18-21. We therefore concur in the conclusions that Pears deserves full quantitative integration credit and that it is not to be charged with a diversification demerit. These conclusions are of dispositive significance when considered in light of the determinations that we reach in the following discussion regarding the comparative qualifications of the other competing applicants.

B. Woodscom

6. *Claim of Special Preference for Performance as a Broadcast Licensee*: Woodscom complains of the fact that the ALJ refused to admit into evidence a document that Woodscom designated as Exhibit 1B, concerning certain of its activities as the licensee of UHF television Station KARD-TV, Channel 14, West Monroe, Louisiana. The ALJ rejected Exhibit 1B because Woodscom had not previously moved for the addition of a hearing issue regarding its performance as the licensee of KARD-TV and had not made a threshold showing that its broadcast record was superior. Tr. 342. Woodscom had argued that the exhibit was admissible in the absence of a threshhold showing or enlargement of hearing issues because the

Commission had assertedly indicated in *Amendment of Television Table of Assignments to Add New VHF Stations in the Top 100 Markets*, 63 FCC 2d 840, 892 (1977), that it would give special consideration to past performance by the licensee of a UHF station in a market where a VHF channel had recently been assigned when making a comparative evaluation of an application by the UHF licensee for a permit to operate on the "dropped-in" VHF channel coupled with a contingent pledge to divest itself of the UHF station. Woodscom also cited *Knoxville Broadcasting Corp.*, 103 FCC 2d 669 (Rev. Bd. 1986), a case entailing comparative evaluation of such an application for a dropped-in VHF channel, in which the Review Board, citing *Top 100 Markets*, reviewed findings based on evidence of the UHF licensee's past performance that had been received in the absence of a motion for addition of a special hearing issue and awarded a decisive preference in light of those findings. The Board agreed with the ALJ that *Top 100 Markets* and *Knoxville* are inapposite, however. 6 FCC Rcd at 3533 n.5.

7. Woodscom still insists that *Top 100 Markets* and *Knoxville* are controlling. We agree with the Board and the ALJ, however, for the reasons given in their decisions, that Woodscom is not entitled to special consideration merely because of its status as the licensee of KARD-TV, and we therefore reject its contention that the exclusion of Exhibit 1B was in error.

8. In any case, even if we agreed with Woodscom that the ALJ should have accepted Exhibit 1B, we would not hold that his exclusion of it was reversible error, as it does not appear that the exhibit, taken at face value, is of material importance.[2] The exhibit contains no information as to the nature of the programming that Woodscom broadcast over KARD-TV or other information from which to judge the extent to which the station responded to local needs and interests. It merely asserts that Woodscom filed an application for authority to change its transmitter and antenna site; that it later abandoned the application after learning that it was contrary to the Commission's rules for antenna spacing; that it filed a second application to change sites, which was granted; and that it subsequently took various measures, as required by FCC rules, to eliminate interference with land-mobile communications. Woodscom cites no pertinent authority and presents no reasoned argument for the proposition that a showing such as this would warrant the award of a comparative preference, and we are aware of no precedent or public-interest consideration that supports its position. The Commission did not say or imply in *Top 100 Markets*, nor did the Review Board hold in *Knoxville*, that credit would be given for past performance in the absence of any evidence concerning the licensee's programming service. As admission of this non-probative exhibit would not have helped Woodscom's case, the exclusion of it was, at worst, harmless error.

9. *Claim of Credit for Integration*: According to undisputed findings, Woodscom's only principal, Charles Woods, proposes to work at the new station for twenty to forty hours per week for an initial period of one year, after which he would devote a lesser, unspecified amount of time to managing the station. He plans to remain domiciled in Nevada but testified that he would lease an apartment in Columbia for use on occasions when he found it necessary to spend time at the station. 5 FCC Rcd at 5862 ¶¶ 26-27. The ALJ held that, because of the uncertainty of Woods' testimony as to the manner in which he plans to supervise station operation after the initial period and as to the amount of time that he would devote to that function, Woodscom deserves no credit for integration. *Id.* at 5862 ¶ 26, 5868 ¶ 87. The Review Board sustained that ruling, noting that in the *Policy Statement on Comparative Broadcast Hearings* the Commission stressed the importance of permanent adherence to integration proposals. 5 FCC Rcd at 3533 n.5; 1 FCC 2d 393 at 395 n.6 (1965).

10. Woodscom contends that the refusal to credit its integration proposal is at odds with *Omaha TV 15, Inc.*, 4 FCC Rcd 730 (1988), where the Commission gave credit for a principal's part-time integration commitment even though he proposed to work at the station for only three days a week, in contrast to previous holdings that integration credit was not to be given for commitments to be present for less than five days per week. *Id.* at 733 ¶ 23. Woodscom contends that Mr. Woods has proven by his "unquestionable" success and dedication in supervising the operation of KARD-TV and three other full power television stations licensed to Woodscom that he is able to manage broadcast stations effectively without daily physical presence at their studios. Hence, Woodscom maintains that it is entitled to integration credit despite the fact that Mr. Woods has not proposed to be physically present at the station on a regular basis after the first year.

11. The Commission did not hold in *TV 15*, or in any other precedent of which we are aware, that integration credit may be awarded for proposed involvement for unspecified amounts of time at unspecified intervals. On the contrary, as *TV 15* recognizes, *id.* at 733 ¶ 26, the Commission has declined to grant even partial credit unless involvement is proposed for at least twenty hours per week. We have not been shown any reason to depart from that rule, the rationale for which was well-explained in *Midwest Broadcasting Co.*, 70 FCC 2d 1489, 1494-95 (Rev. Bd. 1979), rev. denied, FCC 79-397 (rel. 6-21-79). Woodscom therefore deserves no credit for its principal's vague proposal to devote unspecified amounts of time to supervision of the new station after an initial period of involvement. As for Mr. Woods' commitment to spend "twenty to forty" hours per week at the station for one year, it merits no more credit than would be due for a twenty-hour-per-week commitment for the same period of time. *See Midwest*, *supra*, 70 FCC 2d at 1495 n.11. Thus, even if Mr. Woods were proposing to work at the station for at least twenty hours per week on a long-term basis, Woodscom would deserve far less quantitative integration credit than Pears, whose award of full quantitative credit is uncontested. The disparity is still wider in light of the temporary nature of Mr. Woods' specific commitment. Because it deserves only partial quantitative integration credit, at best, and because it has been charged with a substantial diversification demerit, 5 FCC Rcd at 5868 ¶ 86, that it has not challenged, Woodscom is comparatively inferior to Pears, which receives full quantitative integration credit and no diversification demerit.[3]

C. Caldwell

12. In order to receive credit for integration an applicant must prove that its principals can be relied upon to carry out their ostensible commitments to participate in station management. Hence, an applicant that claims credit for the proposed fulltime involvement of a principal who currently has a fulltime occupation must credibly prove that the principal intends to quit or curtail his

existing employment in the event that the applicant receives a grant, as a pledge to work at a station for forty or more hours per week while retaining another fulltime job does not merit credence. *Cuban-American Ltd.*, 5 FCC Rcd 3781, 3785 ¶¶ 28-29 (1990). Moreover, the Commission does not credit 80 hour work weeks or proposals to maintain two fulltime jobs. *Kennebec Valley Television, Inc.*, 2 FCC Rcd 1240, 1242 ¶ 10 (1987), rev. den. 3 FCC Rcd 4522 (1988). As explained below, Caldwell has not carried its burden with respect to the proposed integration of its forty-nine percent principal, Betty Robinson.

13. Caldwell is a limited partnership. Its sole general partner is a corporation, Caldwell Communications Corp. (CCC), which holds twenty percent of the equity. CCC is owned, in turn, by three women, Betty Robinson, Mary Lou Winters, and Clarice Kenney. Winters and Kenney, who are white, own, in combination, fifty one percent of CCC's outstanding shares of stock; Robinson, who is black, owns forty-nine percent. In affidavits that Caldwell submitted as part of its direct case, Winters and Kenney both pledged to quit their current employment and devote full time to daily station management. Caldwell also submitted an affidavit by Betty Robinson in which she represented that she, too, would work at the station in a managerial capacity for forty hours a week, but, unlike Winters and Kenney, Robinson did not pledge to quit her present job if Caldwell's application were to be granted, either in her affidavit or in her hearing testimony. Mrs. Robinson is employed fulltime as a reading teacher in an elementary school.

14. The ALJ concluded that Caldwell's proposal to integrate Mrs. Robinson is not credible, based on findings that she is financially dependent upon other principals, played no part in CCC's decisionmaking, and had admittedly been offered a stock interest in CCC in order to secure minority and female enhancements for Caldwell, among other things. 5 FCC Rcd at 5865 ¶¶ 58-61, 5869 ¶ 91. Furthermore, the ALJ denied credit for Mrs. Robinson's fulltime integration commitment because she has not pledged to quit her fulltime teaching position and because she intends to continue to devote substantial amounts of time to civic activities. *Id.* at 5866 ¶¶ 69 and 71-72, 5869 ¶ 91.

15. The Review Board disagreed. Concurring in the view of the evidence presented in Caldwell's exceptions, the Board concluded that Mrs. Robinson has been significantly involved in the applicant's decision-making processes and is in no apparent danger of losing her stock in CCC by defaulting on loans from other principals that are secured by the stock. 6 FCC Rcd at 3532 ¶¶ 15-16. The Board also concluded that Robinson's integration commitment is credible despite the absence from the record of an explicit pledge by her to quit her teaching position, asserting that there is ample evidence to show that Mrs. Robinson intends to resign from her current job should Caldwell's application be granted. *Id.* at 3532 ¶ 15. The considerations that it mentioned as bearing upon this latter question are as follows: first, that counsel for Caldwell had alleged at oral argument that the absence from the record of a pledge by Robinson to quit her current employment was merely due to inadvertent omission; second, that Mary Lou Winters, one of the other two co-owners of CCC, had testified that she herself, Robinson, and Clarice Kenney had been chosen to be the co-owners of CCC because they had indicated at an organizational meeting that they were willing to retire or resign from their present occupations; third, that a provision of Cal well's partnership agreement expressly obliges Robinso Winters, and Kenney to each devote at least forty hou per week to station management and to set asid conflicting commitments; and finally, that Mrs. Robinso testified that she planned to spend at least forty hours pe week in carrying out her assigned functions in statio management (*viz.*, Director of Public Service Broadcastin and Director of Community Affairs). *Id.* at 3531 ¶ 1 Pears, Giles, and Woodscom all contend in their applica tions for review that the Board erred in concluding tha Mrs. Robinson's integration commitment is credible.

16. We do not agree with the Board that the evidenc in this case supports a finding that Mrs. Robinson woul quit her teaching job prior to the new station's com mencement of operation if we were to grant Caldwell' application. The statement of counsel at oral argument t which the Board referred, Tr. at 1976, is not evidence i Caldwell's favor, as it was not given at the hearing by witness subject to cross examination. In any event, th statement lends no support to the Board's finding. Cald well's counsel at oral argument did not allege that th omission of a pledge by Mrs. Robinson to resign from he teaching position was merely due to inadvertence. H said, rather, that an early draft of the typed declaratio that had been prepared for submission with her endorse ment as part of Caldwell's integration statement had in cluded such a pledge and that he *did not know* why th pledge had been omitted from the final draft. *Id.* Tha statement, even if true, leaves open the possibility that th omission had been deliberately made by someone els involved in preparing the declaration.

17. Robinson's testimony that she would work at th station for 40 hours per week is not equivalent to a pledg to resign from her current fulltime employment. The ver point in question is the credibility of her ostensible com mitment to work at the station fulltime in light of he failure to pledge to resign from her current job. Thus, th Board indulged in circular reasoning in relying upon tha commitment as evidence of such an intention. The testi mony of Mary Lou Winters that the Board cited is als inconclusive; as evidence of what Robinson may have sai at the meeting it is less probative than Robinson's ow testimony on point. Mrs. Robinson did not testify that sh had expressed willingness to quit her current job in th event of a grant to Caldwell; rather, she merely testifie that she and others had indicated at the meeting that the could work at the proposed station. Tr. at 1155. The fac that Caldwell's partnership agreement includes a covenan that the President, Vice President, and Secretary of th general partner shall devote at least forty hours per wee to management of the station and shall not engage i other ventures "if . . . such participation would . . materially interfere with his personal participation in th management of . . . the Station on a full-time basis" als proves little. The covenant is not a definite commitme which would clearly put Robinson, as the Vice Preside of CCC, under obligation to resign from her current jo and the agreement specifies no remedy for breach of it.

18. The burden was on Caldwell to submit clear ev dence that Mrs. Robinson would resign her present pos tion to fulfill her integration commitment if Caldwe were awarded a permit. Caldwell has not met this burde We therefore hold that the Board erred in giving credenc to Mrs. Robinson's fulltime integration commitmen Consequently, Caldwell deserves only 51 percent integr

tion credit, at most. *See Cuban-American*, *supra*, 5 FCC Rcd at 3786 n.3.[4] As this holding has dispositive significance, we do not find it necessary to address the appellants' contentions that Caldwell's integration plan is unreliable for reasons aside from its failure to establish that Mrs. Robinson intends to give up her teaching position in the event that Caldwell were to receive a grant.

D. Giles TV

19. Giles TV is a two-tier stock corporation that was formed by a merger between two former applicants in this proceeding, Love Television Partnership and Jimmy V. Giles. Mr. Giles, who is black and who proposes to work fulltime as the station's general manager, owns all of the voting stock of Giles TV. Giles TV therefore claims full quantitative integration credit enhanced by credit for minority ownership, broadcast experience, and future residence. Concluding, however, that Giles TV is partially controlled by its nonvoting stockholder, Love Television Partnership, which has 60 percent of the corporation's equity, the ALJ held that Giles TV is only entitled to 40 percent integration credit. 5 FCC Rcd at 5868 ¶ 88. The Review Board declined to review that ruling, as it held that Giles TV is comparatively inferior to Caldwell even if Giles TV deserves full quantitative integration credit. 6 FCC Rcd at 3530 ¶ 4. As we do not concur in the Board's conclusion that Caldwell deserves full quantitative integration credit, we cannot rely upon its concomitant ruling that the issue of Giles TV's entitlement to full integration credit is immaterial.

20. Giles TV maintains that the ALJ based the holding in question on findings that are at odds with the evidence or that are immaterial, but we agree with the ALJ that Giles TV is entitled to no more than 40 percent integration credit. We so hold because we conclude, after reviewing the record, that the evidence does not demonstrate that its voting stockholder would exercise exclusive control over its affairs.

21. Mr. Giles, as President and sole Director, endorsed an amendment of Giles TV's certificate of incorporation that was duly filed with the Secretary of State for the state of Delaware on May 23, 1989. Giles TV Exh. 1. The amendment was inserted at Love's request, prior to its disbursement of money to fund the applicant as it was obliged to do under the parties' merger agreement and after the filing of the applicant's original certificate of incorporation. Its avowed purpose was to protect the interests of nonvoting stockholders from invasion by the voting stockholders by barring the latter from diluting the equity of nonvoting stockholders by issuing more shares of stock without their permission. Giles TV Exh. 1; Tr. at 874-76.

22. The amendment, which augmented the rights of nonvoting stockholders at the expense of Mr. Giles' prerogatives as Director and sole voting shareholder, was included at Love's insistence and with Giles' acquiescence *after* the formation of the corporation and as a precondition of funding by Love. This shows that Love has been involved in the affairs of Giles TV and thus the applicant has failed to demonstrate that Love will remain passive. In this regard, it is clear that

> where an owner has assumed an active role after the applicant has declared that that owner will be passive, that owner's equity interest will be attributed to the applicant for integration purposes regardless of the nature of the "passive" owner's involvement.

Coast TV, 5 FCC Rcd 2751, 2753 ¶ 26 (1990); also see *Royce International Broadcasting*, 5 FCC Rcd 7063, 7064 ¶ 9 (1990). Attribution of at least the passive owner's equity interest is the necessary result when an applicant seeks full integration credit and the record shows that its principals have failed to adhere to the organization's two-tiered arrangement. Because the record shows that Love was willing and able to refuse to carry out its obligation to pay for its stock interest until requested changes were made in the applicant's certificate of incorporation, there is no assurance that the applicant will adhere to its organizational structure in the future. Thus, the applicant has not met its burden of demonstrating the reliability of its two-tiered arrangement.

CONCLUSION

23. As Pears deserves full quantitative integration credit, as it is not charged with any diversification demerit, and as no other applicant is entitled to comparable quantitative integration credit, we hold that its qualifications are superior to those of any of the other competing applicants in this proceeding.

ORDER

24. ACCORDINGLY, IT IS ORDERED that the Review Board's decision, 6 FCC Rcd 3529, IS MODIFIED as indicated above; that the application for review filed by Pears Broadcasting, Inc. on July 17, 1991 and the application of Pears Broadcasting for a construction permit for a new television station on Channel 11 serving Columbia, Louisiana (BPCT-871109KF) ARE GRANTED; that the applications for review filed by Woods Communications Group, Inc., on July 15 and by Giles Television, Inc. on July 17 ARE GRANTED IN PART, to the extent indicated above, AND ARE OTHERWISE DENIED; and that the applications of Woods Communications Group, Inc. (BPCT-870904KJ), Giles Television, Inc. (BPCT-871110KE), and Caldwell Broadcasting Limited Partnership (BPCT-871110KH) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Woods Communications Group, Inc. (Woodscom) filed an application for review on July 15, 1991, and Pears Broadcasting, Inc. (Pears), and Giles Television, Inc. (Giles TV) filed applications for review on July 17. Caldwell Broadcasting Limited Partnership (Caldwell) filed oppositions on July 30 and August 1, 1991, and Pears and Giles did so on August 1. Caldwell filed a

correction to its August 1 opposition on August 15. KTVE, Inc. did not file an appeal, and the Board's denial of its application is therefore final.

[2] Despite the ALJ's exclusionary ruling, the exhibit is included in the hearing docket, and we have taken notice of its content.

[3] Woodscom also claims enhancement credit for Mr. Woods' Native American ancestry, but such a qualitative factor has no decisional significance in light of the dispositive quantitative disparity in these proposals.

[4] In the *Cuban-American* case, the Review Board inferred from circumstantial indications that a principal named Molina who was currently employed for more than 40 hours per week would quit his current employment in order to work fulltime as station manager if the applicant in which he had an interest were to obtain a permit, despite the absence from the record of an explicit promise from him to that effect. The Commission reversed, holding that as there was no promise in evidence from Molina to curtail his current employment the applicant had failed to establish that he would carry out his fulltime integration commitment. *Id.* at 3785 ¶ 28.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-106

In re Applications of

INTERMART BROADCASTING GULF COAST, INC.	File No. BPH-880224MN
SOUTHWEST FLORIDA FM BROADCASTING, LTD.	File No. BPH-880303MG
BYRON DOUGLAS KIGHT & MARY GIGLIA MARTINEZ JOHNSON d/b/a KIGHT BROADCASTING LIMITED PARTNERSHIP	File No. BPH-880303MH
PALM TREE FM LIMITED PARTNERSHIP	File No. BPH-880303MQ

For Construction Permit for a
New FM Station on Channel 249A
in Punta Rassa, Florida

Appearances

Gary S. Smithwick, *Arthur Belendiuk*, and *Lisa Thornton*, on behalf of InterMart Broadcasting Gulf Coast, Inc.; *Thomas J. Keller* and *Jacqueline R. Kinney*, on behalf of Southwest Florida FM Broadcasting, Ltd.; *Dennis F. Begley*, *Matthew H. McCormick*, and *Andrew S. Kersting*, on behalf of Byron Douglas Kight & Mary Giglia Martinez Johnson d/b/a Kight Broadcasting Limited Partnership; *Stephen Diaz Gavin* and *Paula Perrone*, on behalf of Palm Tree FM Limited Partnership: and *Jerry Hermele*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: January 3, 1992; Released: January 10, 1992

PRELIMINARY STATEMENT

1. Of the eleven applications for Channel 249A in Punta Rassa, Florida, originally designated for hearing,[1] four applicants remain: InterMart Broadcasting Gulf Coast, Inc. (InterMart); Southwest Florida FM Broadcasting, Ltd. (Southwest); Byron Douglas Kight & Mary Giglia Martinez Johnson d/b/a Kight Broadcasting Limited Partnership (Kight Broadcasting); and Palm Tree FM Limited Partnership (Palm Tree).[2]

2. The *Hearing Designation Order* indicated that the areas and populations proposed to receive service of 1.0 mV/m or greater intensity, together with the other available primary aural services in these areas, would be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants. *Id.* at ¶ 14.

3. In addition to the standard comparative issue, by *Order*, FCC 90M-3396 (released October 26, 1990), the Presiding Judge designated the following issues against Palm Tree:

> To determine whether Palm Tree FM Limited Partnership is financially qualified to construct and operate its proposed Punta Rassa FM radio station;
>
> To determine whether Palm Tree FM Limited Partnership lacked candor or misrepresented facts in certifying that it was financially qualified to construct and operate its proposed station; and
>
> To determine, in light of the evidence adduced under the foregoing issues, whether Palm Tree FM Limited Partnership possesses the basic qualifications to be a Commission licensee.[3]

4. After a prehearing conference was held on June 8, 1990, hearing sessions were held on October 22, 23, 24, and December 3 and 4, 1990. The record was closed at the conclusion of the hearing session on December 4, 1990. *Order*, FCC 90M-3869 (released December 7, 1990). By *Order*, FCC 90M-3980 (released December 17, 1990), the record was reopened for the limited purpose of accepting into evidence the deposition testimony of Dale C. Edmunds, Vice President of the Bank of New England. The record was then re-closed. Proposed findings of fact were filed February 4, 1991; replies were filed February 25, 1991.

Findings Of Fact

InterMart Broadcasting Gulf Coast, Inc.

Ownership Structure and Control

5. InterMart is a corporation organized under the laws of the State of Florida. James E. Martin, Jr., is President, Treasurer, sole director, and holds 100% of the applicant's stock. Patricia S. Fierro serves as Secretary and Assistant Treasurer, but holds no ownership interest. Harley P. Pa[illegible] serves as Vice President and Chief Financial and Administrative Officer, but he also holds no ownership interest. InterMart Ex. 1, p. 1; Tr. 21-22.

Integration

6. No InterMart principal proposes to be integrated into the ownership and management of the proposed station at Punta Rassa, Florida. InterMart Ex. 1, p. 1.

Diversification

7. InterMart itself has no other media interests. James E. Martin, Jr., however, is the President, Treasurer, a director, and 100% stockholder of InterMart Broadcasting of Las Vegas, Inc. (IBLV), licensee of Station KLTN(FM), Las Vegas, Nevada. Martin is also President, Treasurer, a

director, and 80% stockholder of InterMart Broadcasting of Orlando, Inc. (IBO), which holds a 30.74% general partnership interest in Radio Orlando, permittee of Station WMMO(FM), Orlando, Florida. Upon consummation of an application (File No. BTCH-900814HH) granted September 28, 1990, IBO will hold a 31.39% interest in Radio Orlando. *Id.*

8. In addition, Martin is President, a director, and a 66.67% stockholder of InterMart Broadcasting Georgia Coast, Inc. (IBGC), licensee of Station WGCO(FM), Jesup, Georgia, and President, Treasurer, a director, and 100% stockholder of InterMart Broadcasting of Holmes Beach, Inc., which holds a one-seventh general partnership interest in 98.7 Partnership, permittee of Station WAYP(FM), Holmes Beach, Florida. *Id.* at 1-2.

9. Harley P. Park is Vice President and Chief Financial and Administrative Officer of IBLV, IBO and IBGC. Patricia S. Fierro is Secretary and Assistant Treasurer of IBLV, IBO and IBGC. *Id.* at 2.

Auxiliary Power

10. InterMart proposes to install auxiliary power facilities. *Id.*

Southwest Florida FM Broadcasting, Ltd.

Ownership Structure and Control

11. Southwest is a limited partnership organized under the laws of Florida. Since the filing of Southwest's application, the sole General Partners has been J. Lynn Stephens, a 70 year old female, who holds, as General Partner, a 21% equity interest. Stephens now also holds a 69% limited partnership interest. The remaining 10% of the equity is now held by Limited Partner Mary Louise Corey. Southwest Ex. 1, pp. 1-2.

12. As of the April 20, 1990, deadline for the filing of integration statements in this proceeding, Southwest had 26 Limited Partners. Southwest Ex. 7. Each of these individuals held a 3% equity interest with the exception of Eva Nelle Sidden, who held a 4% interest. *Id.* The withdrawal of these individuals from the partnership is discussed at ¶¶ 26-27, *infra.*

Preparation and Prosecution of Application

13. Stephens first learned of the Punta Rassa allocation through a telephone conversation with Tony Rizzo, a broker for Blackburn and Company.[4] After indicating he wanted to put Stephens back in the radio business, Rizzo informed her that he knew a gentleman named Carl Hurlebaus who was interested in putting an application in for the Punta Rassa allocation. Rizzo wanted to know whether Stephens would like to talk to him. Tr. 37-38. Stephens spoke with Hurlebaus the following day. Hurlebaus informed Stephens he was the President of Capital Radio Services, Inc. (Capital Radio) and that there were investors who were interested in filing an application for the proposed Punta Rassa station. Hurlebaus said that Rizzo had told him about her having had a station the previous year and thought Stephens might be interested in a station near her home. Tr. 39-40. Hurlebaus also mentioned to Stephens the possibility of her being a General Partner in a limited partnership. At this point, Stephens questioned why it had to be a limited partnership. Hurlebaus told her it could be any structure she an the group decided on. He informed her that he believe an investment group would find value in having an expe ienced local person head their group, and would probabl be willing to offer her an equity interest in the partne ship for performing those functions necessary to proces an application. Tr. 40-41. Stephens believes Hurlebau later forwarded her some forms which may have include a questionnaire containing a list of people who wer interested in being a part of the applicant. Tr. 45. Stephens is certain she saw a list containing the names of th limited partners when Thomas Keller, Southwest's communications counsel sent her a copy of the partnershi agreement for her to file in Tallahassee. The list als included the equity percentages for each of the investor Tr. 45.

14. Southwest filed its Certificate and Agreement c Limited Partnership with the State of Florida on March 2 1988. Southwest Ex. 8. Southwest's communication counsel, Thomas Keller, decided the applicant should tak the form of a limited partnership and drafted the limite partnership agreement. Stephens signed the affidavit a tached to the agreement on February 29, 1988. Tr. 40, 46 57. The affidavit, *inter alia*, contains a list of the 2 original Limited Partners as well as their respective initia capital contributions. According to the affidavit, 25 of th Limited Partners had contributed $3,000 to the applican and one had contributed $4,000. Thus, the affidavit aver that the partnership had received $79,000 in initial capita contributions. *See* Kight Ex. 5. The list of Limited Par ners and their initial capital contributions was prepare by Keller. As of the time Stephens signed the affidavi several Limited Partners listed had not yet signed th limited partnership agreement. Tr. 46.[5]

15. Stephens has no knowledge of who decided wha the total capitalization of the applicant was going to b nor does she know who determined the respective owne ship percentages each investor would have or how muc each investor would pay for his or her ownership interes Tr. 50-51. At the time Southwest's application was filed Stephens also had no knowledge of whether the Limite Partners listed in the affidavit attached to the limite partnership agreement had, in fact, made their capita contributions, and she took no action to determin whether any of the initial capital contributions reflecte in the affidavit had actually been made. She stated tha the initial capital contributions were not her responsibi ity, but, rather, were the responsibility of whoever wa putting together the group of investors. Tr. 47-49, 55, 8 Stephens did not learn which Limited Partners had mad their initial capital contributions until she received fro Capital Radio K-1 federal tax returns for 1988. Stephe forwarded to the limited partners the 1989 K-1 federal ta returns. Tr. 49, 94-95.

16. Stephens did not have any contact with any of th original Limited Partners prior to the filing of Southwest application. Her only subsequent contact occurred i April 1990 when Robert Tyvoll advised her that he wan ed to withdraw from the partnership. Tr. 51-52. Stephe has no knowledge of what the original Limited Partne were told regarding the proposed Punta Rassa statio who recruited them, how they were recruited, when the were recruited, or if they were all recruited before or aft the partnership agreement was filed. Tr. 44, 50. She als has no knowledge of whether the original Limited Par ners were provided anything in writing regarding th

financial prospects of the proposed Punta Rassa station or what, if anything, they were told regarding the financial prospects of the station. Tr. 77.

17. Stephens presumes the original Limited Partners made their initial capital contributions payable to Capital Radio because Capital Radio ultimately advanced funds to her for the processing of Southwest's application. Tr. 47, 53. Stephens did not see any of the money or checks reflecting the Limited Partners' initial capital contributions, nor did she have any knowledge of what transpired between the Limited Partners and Capital Radio. She had no knowledge of whether Capital Radio established a bank account for the applicant. Tr. 84-85. Stephens established a bank account for Southwest in February 1988. The funds she received came from Capital Radio. Tr. 84-85.

18. Stephens had an oral understanding with Hurlebaus regarding the percentage of funds invested by the Limited Partners that she was to receive. Stephens stated Hurlebaus simply advised her that whatever funds were necessary to prosecute the application would be available. Tr. 56. Either Capital Radio or Hurlebaus forwarded her funds to pay the application filing fee, the Florida State filing fees, legal fees for the prosecution of the comparative issue by Verner, Liipfert, and additional money for miscellaneous expenses. When it became necessary to pay the FCC hearing fee, Stephens telephoned Hurlebaus and he forwarded her the necessary funds. Stephens did not receive any funds to pay engineering fees, however, and was never informed of the amount of those fees. Stephens assumes Hurlebaus paid all of the engineering fees directly. In all, Capital Radio and/or Hurlebaus forwarded Stephens approximately $40,000. Tr. 54-55, 57, 69.

19. A document titled, "Capital Radio Services, Inc. FM Service Agreement for Owner/Manager." dated February 14, 1988, recites that Stephens retained Capital Radio to serve as a general contractor to assist in preparing and filing her application. The agreement further provides, *inter alia*, for the following services:

> Introducing you to other potential owners who are interested either in active management or passive investment, whom you may want to join with you to form an entity to apply for the new station;
>
> Assisting you in the acquisition of transmitter site and documentation of site data;
>
> Preparing all engineering requirements of FCC Form 301;
>
> Recommending counsel for full legal representation before the FCC through all comparative proceedings and decision by an Administrative Law Judge.

Kight Ex. 6. The service agreement further states:

> Your cost for Capital's exclusive application services shall be a total fee of $ *See Attached Promissory Note*, payable upon execution of this agreement. As part of a group which will cause a legal entity to be formed for the purpose of filing the application, you agree to purchase 21% of ownership in the group, and we shall notify you promptly of the identity of other potential members of the group.

Kight Ex. 6.

20. Hurlebaus located Southwest's original transmitter site. This was one of the services Southwest had contracted with Capital Radio to provide. Tr. 58. Capital Radio hired the consulting firm of Shaffer & Associates, Inc. to locate and secure the use of the original transmitter site specified by Southwest. Stephens had no role in selecting the applicant's original transmitter site other than communicating with Keller to ensure that the site was being located. Tr. 59-60. She was not informed in advance that Shaffer & Associates would be used to locate the applicant's transmitter site, has never spoken with anyone regarding the cost of Shaffer & Associates' services, and has not had any contact with Shaffer & Associates regarding the location of either Southwest's original transmitter site or its amended site. Tr. 60-61.

21. Stephens has also never had any contact with the owner of the originally specified site. She did not know under what terms the original site would have been available, but assumed it would have been a lease arrangement because "that's customary." Tr. 61-62. After the Federal Aviation Administration notified Southwest of a problem with the applicant's originally specified site, Stephens assumed Shaffer & Associates then made the decision as to where the new transmitter site would be located. Stephens had no role in selecting the new site or in establishing the terms under which that site would be available to Southwest. Stephens has never spoken to the owner of the property, but assumes that Shaffer & Associates negotiated with the owner to deliver an acceptable transmitter site to Capital Radio. Tr. 63-64. Stephens recalls seeing a document showing the name of the owner of the property. Tr. 64. In this regard, Keller sent Stephens a letter dated August 24, 1988 from Shaffer & Associates to Sachs Freeman Associates attaching a signed statement from the property owner agreeing to make the property available. Southwest Ex. 2; Tr. 89-91. Also, in February 1988, Keller sent Stephens a letter from Shaffer & Associates to Capital Radio accompanied by a letter from Capital Radio to Stephens assigning use of the site to Southwest. Southwest Ex. 3; Tr. 91-92.

22. In addition to locating the applicant's transmitter site, Capital Radio selected Sachs Freeman to serve as the applicant's engineering firm. Stephens asked Hurlebaus for the names of communications attorneys he considered well qualified. Hurlebaus provided Stephens with a list of four communications attorneys from which she selected Keller.[6] Tr. 64-66, 87. Stephens dealt solely with Keller regarding the financial terms under which Keller's firm would represent Southwest. Stephens had no discussions with Hurlebaus regarding such financial terms. Tr. 64-65.

23. Following her contacting Keller's firm, Keller sent her a Form 301 and a Form 396A (Model EEO Program). The attached letter detailed the items to be completed in order to timely file the application. Southwest Ex. 4. Keller's enclosure to Stephens included a letter describing the billing policies and procedures of the firm which Stephens accepted on behalf of Southwest. Southwest Ex. 5; Tr. 92-94. Stephens has been involved in every aspect of the application with the exception of locating a transmitter site and the engineering. However, as the exhibits discussed, *supra*, attest, she was kept abreast of the efforts to secure a transmitter site. She and Keller discussed on the phone decisions made in connection with the application. Also, she personally prepared the EEO section of the application. Further, prior to Keller's send-

ing the letter to the limited partners, discussed in paragraph 26, *infra*, Keller and Stephens fully discussed the matter. Tr. 106-107; Southwest Ex. 6.

24. As noted above, the Capital Radio service agreement reflects Stephens' 21% ownership interest in the applicant. Stephens stated she and Hurlebaus reached a mutual agreement that her ownership percentage would be 21%. Tr. 42-43. Section 2.01 of the limited partnership agreement states that the General Partners' capital contributions shall be $21,000, comprised of $2,500 in cash and $18,500 in services which the General Partner promises to perform on behalf of the partnership. *See* Southwest Ex. 8, p. 3. The service agreement also provides that Stephens may issue a promissory note upon execution of the agreement. *See* Kight Ex. 6. Stephens states that she and Hurlebaus discussed a promissory note in the amount of $2,500. She does not recall to whom the promissory note was to be payable, however, because she never saw the note. Tr. 41. In any event, the promissory note was only to be payable if the station's profits were in excess of $2,500. Tr. 42.

25. As of the date of the hearing, Stephens had not put any money into Southwest other than out-of-pocket expenses for travel, postage and telephone calls. However, she has incurred an obligation of several thousand dollars in legal fees to Southwest's communications counsel for work performed in connection with the filing of an opposition to the petition to enlarge issues filed by Kight Broadcasting. Tr. 68-69, 106. The retainer agreement entered into by Verner Liipfert and Stephens on behalf of Southwest provided for a fixed fee for representing Southwest in connection with the comparative issues. The money for such services was paid from funds received from Capital Radio. The retainer arrangement, however, did not include representation with respect to issues added or sought to be added. Tr. 69; Southwest Ex. 5.

26. Capital Radio, through Hurlebaus, eventually offered the original Limited Partners of Southwest a reimbursement of their initial capital contributions. Tr., 67. The offer was discussed in a letter dated November 13, 1989, from Hurlebaus to Keller, which stated in part:

> When we last spoke, you raised the subject of the media attention recently directed at Sonrise Management Services, Inc. and the apparent "prosecution mentality" of both FCC staffers and other members of the communications bar toward that company.
>
> You also expressed concern that this negative attention toward Sonrise could unfairly prejudice the applicant you are representing before the FCC for whom we provided various consulting services. You and I agree that the services provided by Capital were very different from the "turnkey" work apparently provided by the Sonrise Company. In fact, Capital served only to bring together interested parties in applying for certain FM stations, provided technical application work, and referred them to lawyers such as yourself for structuring and filing new applications. Hence, I feel certain that we have complied with FCC regulations and there would be no basis whatsoever for any allegation to the contrary.
>
> Nevertheless, these recent developments could result, as you suggest, in the necessity for you to defend against allegations related to "Sonrise-type" issues. This could necessitate the Limited Partners having to raise additional monies for you to provide legal services beyond the standard comparative issue. In keeping with our policy, we do not feel these parties should be left with the sole option of paying additional legal fees with the possibility of ongoing capital calls to defend their position.
>
> Accordingly, we are preparing to offer the partners in the Punta Rassa application a *full refund* of their original fees paid towards their applications. In exchange, we would, of course, require the execution of a release.
>
> . . .

Southwest Ex. 6, p. 9.[7] Hurlebaus made the decision t offer the refund on his own. Stephens had nothing to d with the refund process. Tr. 67-68, 85.

27. Following discussions between Keller and Stephen regarding Hurlebaus' previous involvement with Sonris Management Services, Inc. (Sonrise) and the engineerin firm of Sachs Freeman, Keller sent Stephens a lette containing an analysis of the possibility that a competin applicant might attempt to raise a Sonrise-type issu against Southwest in this proceeding. *See* Southwest Ex. 6 pp. 5-6; Tr. 70-71. In May 1990, pursuant to Stephens instructions, Keller sent copies of that letter to all of th original Limited Partners of Southwest along with a ballo form in which the partners were able to choose to accep a full refund and withdraw from the partnership, or elec to stay in the partnership with the understanding the may be called upon to produce documents, travel t Washington at their own expense for a deposition, an respond to a capital call which was estimated to be approximately $500 per percent of their original investment Southwest Ex. 6, pp. 5-6, 9-11: Tr. 71. Southwest's original limited partners accepted the refund offer an Hurlebaus reimbursed their initial capital contributions t the applicant.[8]

Integration

28. Stephens proposes to work on a full-time basis (4 hours per week) as General Manager of Southwest's proposed Punta Rassa station. As General Manager, Stephen will have responsibility for managing the station and supervising its employees. She will have exclusive authorit regarding matters of station management, including, bu not limited to, programming, news, sales, finances an personnel. Southwest Ex. 1, pp. 2-3.

29. Stephens is currently a 50% co-owner of a marketing firm which she established in 1969, Stephens/Lane & Associates, and presently does part-time consulting wor for this firm. Tr. 84, 103. To the extent any part-tim consulting work for Stephens/Lane & Associates interfere in any way with her ability to work at the propose station on a full-time basis, Stephens will withdraw fro and/or decline her part-time consulting work. Southwe Ex. 1, 1; Tr. 104.

30. Stephens resides at 4865 Abadan Street, Northpor Florida. Northport is located within Sarasota Count which is immediately north of Charlotte County. Punt Rassa is located within Lee County which is to the immediate south of Charlotte County. No part of Southwest

original 1.0 mV/m contour extends into Charlotte County or Sarasota County.[9] Tr. 36; Kight Ex. 4. Stephens intends to either commute on a daily basis between Northport and Punta Rassa, a drive of approximately 50 minutes, or purchase a condominium or rent an apartment in or near Punta Rassa and live there during the work week. If Stephens decides to reside in Punta Rassa during the week, she will return to Northport each weekend. Southwest Ex. 1, p. 1.

31. From approximately 1978 to 1981, Stephens served as a member of the board of directors of public broadcasting Station WSFP-FM, Fort Myers, Florida. All of the board meetings were held in Fort Myers which is within the service area of Southwest's proposed station. Southwest Ex. 1,, p. 3. From 1981 to 1986, Stephens served as Chairman of the Board of Trustees of St. Joseph Hospital, located in Port Charlotte, Florida, which is within Charlotte County. *Id.*; Tr. 79. In this capacity, Stephens met with hospital administrators from the tri-county area consisting of Collie,[10] Lee, and Charlotte counties, and was involved in addressing issues regarding the adequacy of health care services throughout the entire tri-county area, including the area to be served by Southwest's proposed Punta Rassa station. Southwest Ex. 1, pp. 3-4.

32. She also has served as a director of the Charlotte County Chamber of Commerce; Chairman of the Charlotte County Code Enforcement Board: President of the Board of Trustees of the Charlotte County Surgicenter; President of the Charlotte County YMCA; Chairman of the Board of Trustees of the St. Joseph Life Enrichment Center; President of St. Charles Housing, Inc., a low-income housing facility; and charter member of the Advisory Board of the Charlotte County Vocational-Technical Center. Ex. 1 at 4-5. As discussed above, Southwest's pertinent 1.0 mV/m contour does not include portions of Charlotte County. Southwest did not offer evidence showing a nexus between the listed organizations and the residents of the proposed service area.

33. From 1954 until 1959, Stephens was employed at Station WLRP, New Albany, Indiana. Stephens served as Sales Manager of the station for two years out of that four-year period, and Assistant Station Manager for the remaining two years. From 1963 to 1965, Stephens served as the General Manager and corporate secretary-treasurer of Station WCCF, Punta Gorda, Florida. Southwest Ex. 1, pp. 5-6.

34. From 1976 to 1981, Stephens was President and General Manager of Station WEEJ, Port Charlotte, Florida. A corporation in which Stephens was the majority stockholder, Charlotte Broadcasting Corp., applied to the FCC for the construction permit for that station. Upon grant of Charlotte Broadcasting's application, Stephens oversaw the construction and operation of the station until it was sold in 1981. *Id.* at 6. Stephens has not held a management position in broadcasting since 1981. Tr. 87.

Diversification

35. Neither Southwest nor any of its partners has any ownership interest in any broadcast station or any other medium of mass communications. Southwest Ex. 1, p. 2.

Auxiliary Power

36. In the event its application is granted, Southwest will install auxiliary power generators at both its studio and transmitter site. Southwest Ex. 1, p. 6.

Byron Douglas Kight & Mary Giglia Martinez Johnson d/b/a Kight Broadcasting Limited Partnership

Ownership Structure and Control

37. Kight Broadcasting is organized under the laws of Florida. Its partners and their respective voting and equity interests are as follows:

Name	Partnership Interest	Voting Interest	Equity Interest
Byron Douglas Kight	General	50%	40%
Mary Giglia Martinez Johnson	General	50%	20%
Phillip Memoli	Limited	0%	40%

38. In the event of a dispute between the General Partners, the vote of Byron Douglas Kight shall control. Kight Ex. 1.

Preparation and Prosecution of Application

39. Kight heard about the Punta Rassa channel allocation in late December 1987. He learned of it either by reading about it in a publication or from Ron Pierce, a friend, who is a retired broadcaster. Tr. 129-130. After deciding to pursue the allocation. Kight telephoned Phillip Memoli, a former client when Kight was employed at a television station and a friend of Kite for 15 or 16 years. Tr. 130. Memoli expressed interest in the potential investment opportunity and Kight and Memoli met in early January 1988 to further discuss the allocation. After contacting Memoli, Kight also discussed the allotment and the prospects of applying for it with Dennis Begley, his present counsel. Kight does not recall how he knew about Begley. He believes that either someone recommended him or he had prior dealings with him in his broadcast career. Tr. 134-135.

40. Following his conversation with Begley, Kight called Mary Johnson and briefly apprised her of the opportunity and arranged a meeting to discuss the matter further. Tr. 135. Kight contacted Johnson because he believed she would be a strong addition to the group. Kight states that Johnson was a long time local resident, a broadcaster, as well as a female and minority member. Tr. 134. Also, Johnson, based on her broadcasting background, is able to run a news operation and handle public affairs, areas in which Kight has no prior experience. Tr. 182-183. Kight and Johnson knew each other from WBBH TV 20 where they worked together. Tr. 231. Johnson knew Memoli from her working at that station, his business ventures, and Memoli's involvement in the arts and community affairs in the Lee County area. Tr. 231.

41. Kight, Johnson and Memoli met in mid-January 1988 in a local restaurant. Tr. 136; 230-231. At the meeting, Kight proposed that he and Johnson become general partners of the venture. Johnson did not agree to join the

partnership at that meeting but agreed to the proposal within a week. Tr. 140-141, 232-233. Also, at the restaurant meeting, Kight proposed the partnership percentage splits to be received by Memoli, the limited partner, and Kight and Johnson, the general partners. Tr. 136-137.

42. Kight Broadcasting's lawyer prepared the limited partnership agreement after consultation with Kight and Johnson. Tr. 156, 237. All the partners received copies to review prior to executing the document. Tr. 156. The limited partnership agreement provides for the partners to make contributions covering three separate phases. The purpose of establishing the various phases is to cover costs through grant of a construction permit. The first phase concerns activities involved in the processing of the application. Under the partnership agreement, during Phase 1, Kight was to contribute $2,000 and Johnson $1000. Kight Ex. 8, p. 31; Tr. 14, 142, 232, 234. In May 1990 Johnson made her phase 1 contribution of $1,000 as well as the $1,000 *pro rata* share of her phase 2 capital contribution. Johnson didn't make her phase 1 contribution earlier because Kight didn't ask for the contribution until May 1990. Kight asserted, in this regard, that more funds were not needed prior to designation. Tr. 165, 184-185.

43. Kight is relying on a bank letter from the Barnett Bank dated February 12, 1988. The letter resulted from a meeting at the bank in which Kight and Memoli were present. Tr. 171-172. Kight set up the meeting and was instrumental in approaching the bank for the letter. Tr. 253. Kight and Johnson discussed his going to the bank prior to the meeting with a bank official. Tr. 253. The bank letter requires a personal guaranty from Johnson and Kight. Tr. 254. Memoli's continued participation in Kight Broadcasting is not a condition of issuance of a bank loan. Tr. 173.

44. Memoli's participation in Kight Broadcasting's activity has been limited to his attending the pre-formation meeting and his involvement in obtaining the loan letter, discussed, *above*. Both of these events occurred prior to execution of Kight Broadcasting's limited partnership agreement on February 24, 1988. *See* Kight Ex. 8, pp. 33-35. Kight Broadcasting's certification of limited partnership was executed on March 4, 1988. *Id.* at 3-4. There is no evidence that Memoli actively participated in the applicant's affairs after the adoption of its ownership structure.

45. Every significant aspect of the applicant's affairs has been handled by either Kight or Johnson. These include locating a limited partner, Tr. 131, preparing a budget for the estimated construction and initial operating expenses, Tr. 154, selecting and retaining FCC counsel and an engineer, Tr. 135, 158-159, 235-236, and locating the applicant's transmitter site. Tr. 234.

46. While it appears that Kight has carried more of the laboring oars, Johnson has also been actively involved in the preparation and prosecution of the application. Johnson participated in a February 1988 meeting with Kight and Memoli in which they discussed the appropriate legal structure for the applicant. Tr. 133. She also participated in the drafting of the applicant's limited partnership agreement and reviewed a draft version of the agreement from FCC counsel prior to the date she signed the agreement. Tr. 237, 249, 156. Also, while Kight visited the transmitter site and ordered the engineering study, Johnson was kept fully informed and Kight called her whenever a decision had to be made regarding the site. Further, Johnson was sent copies of the engineering study. Tr. 234. In addition, Johnson worked with Kight in preparing a budget for the proposed station, and prepared the EEO section of Kight Broadcasting's application. Tr 154, 239, 240. In preparing the EEO portion of the application, Johnson explained that her position with the School Board had enabled her to become well acquainted with EEO programs, and she considered educational institutions and other organizations which would provide the station with a broad range of minority applicants rather than from merely one segment of the minority population. Tr. 239. Johnson is also a co-signator on the partnership bank account and has written a check drawn on that account. Tr. 147, 169-170.

Integration

Byron Douglas Kight

47. In the event Kight Broadcasting's application is granted, Kight will work at the Punta Rassa station on a full-time basis (a minimum of 40 hours per week) as General Manager. Serving in this capacity, he will supervise all station operations, including programming, sales financial and engineering matters. Kight Ex. 2, p. 1.

48. Since February 1990, Kight has held a minority stock interest (36%) and has been the full-time manager of Naples Auto Air d/b/a Modern Auto Air. *Id.*; Tr. 177 180. Kight will terminate his employment with Modern Auto Air prior to the commencement of program tests at the proposed station. Kight Ex. 2, p. 1. A new manager Tony Craig, has been trained by the company and is available to assume Kight's duties at any time in the event Kight Broadcasting's application is granted. *Id.*; Tr. 116 Kight's skills as manager of Naples Auto Air are not unique and his duties are presently performed by his designated successor -- Tony Craig -- in his absence. Tr 181-183. The controlling stockholder of Modern Auto Air, Lindsay Burhans, will also begin to oversee the operation on a part-time basis to ensure its continued successful operation. Kight Ex. 1, p. 1; Tr. 116-117. The controlling stockholder has been aware of Kight's inten to leave in the event the Kight Broadcasting application is granted since "the first day [he] went to work in the air conditioning business." Tr. 180. Accordingly, Kight will have no commitments that will interfere with his duties as full-time General Manager of the station. Kight Ex. 2, p 1.

49. Kight has resided within the service area of the proposed Punta Rassa station since February 1972, and will continue to reside in the proposed service area in the event Kight Broadcasting's application is granted. Kight has resided at his present address of 833 Iris Drive, North Fort Myers, Florida, since 1975. From approximately 1973 to 1975, Kight resided on Fifth Avenue in South Fort Myers, Florida. Prior to that time, he resided on San Matéo Drive in Fort Myers, Florida. Kight Ex. 2, p. 2.

50. Kight served as a fundraiser and promoter of a gol tournament for the benefit of the Sickle Cell Anemi Association, the Heart Association, and the United Way in Fort Myers, Florida, in 1987. He also served as fundraiser for the Care and Rehabilitation of Wildlife on Sanibel in Fort Myers, Florida, in 1986. *Id.*

51. In addition, Kight served as a charter member of the Advertising Federation of Southwest Florida, and a fundraiser for the Southwest Florida Sports Association (fundraiser for various charitable causes) in Fort Myers, Florida, from 1979 to 1987. *Id.*

52. From 1985 to April 1987, Kight served as Executive Vice President and General Manager of Station WQEZ(FM), Fort Myers Beach, Florida. In his capacity as General Manager, Kight supervised approximately 15 employees all of whom reported directly to him. *Id.*; Tr. 123. From 1972 until 1985, Kight was employed at Station WBBH-TV, Fort Myers, Florida. Kight was initially employed as a technical director, and later became involved in the production of television commercials and directing newscasts during which time he supervised other employees. Kight Ex. 2, p. 2; Tr. 125. From the latter part of 1973 until early 1974, Kight also served as a weekend sportscaster for the television station. He held the title of Account Executive between 1975 and 1980, and served as Sales Manager from 1980 until 1985. Kight Ex. 2, pp. 2-3.

53. Prior to his employment with Stations WEQZ(FM) and WBBH-TV, Kight served as an announcer, Program Director, and engineer at Station WUOK(AM), Cumberland, Maryland, from 1966 to 1967, and from 1969 through 1972. During the time he served as Program Director, there were five announcers at the station who reported directly to him. Kight Ex. 2, p. 3; Tr. 128. During the period between 1967 and 1969, Kight served as a transmitter/receiver specialist for the United States Navy. He returned to his employment with Station WUOK upon return from active duty. Kight Ex. 2, p. 3.

54. From 1965 to 1966, Kight was employed at Station WTBO(AM), Cumberland, Maryland. *Id.*

Mary Giglia Martinez Johnson

55. In the event Kight Broadcasting's application is granted, Johnson will work at the Punta Rasss station on a full-time basis (a minimum of 40 hours per week) as News and Public Affairs Director. Serving in this capacity, Johnson will be responsible for supervising all aspects of the station's news and public affairs operations, including news gathering, producing and directing public affairs programming, and ascertaining the needs and interests of the listening audience. Kight Ex. 3, p. 1. She will hire, supervise, and train a staff of at least four individuals who will be working directly under her at the proposed station. Tr. 254.

56. Johnson is presently employed on a full-time basis as the Coordinator of Foreign Language and Bilingual Education for the Lee County School Board. She will retire from her employment with the School Board prior to the commencement of program testing at the proposed station. Johnson is also employed on a part-time basis as Director of Community Affairs for Station WBBH-TV, Fort Myers, Florida. In the event Kight Broadcasting's application is granted, however, Johnson will also terminate her employment with Station WBBH-TV prior to the commencement of program tests at the proposed station. She will have no other commitments to interfere with the performance of her duties as full-time News and Public Affairs Director of the proposed station. Kight Ex. 3, pp. 1-2.

57. Johnson has served as Coordinator of Foreign Language and Bilingual Education for the Lee County School Board since 1967. Her responsibilities have included the supervision and administrative of programs and services related to the educational and other needs of non-English origin students in kindergarten through the twelfth grade. She has also supervised all foreign language instruction. Kight Ex. 3, pp. 2-3. In her position with the School Board, Johnson directly supervises nine employees, and has indirect supervisory responsibility for another 50 employees. She has supervised hiring for the School Board for approximately 20 years. Tr. 298-299.

58. In addition to having taken 40 hours of in-service workshops on trends and research in education during the 1989-1990 school year, Johnson has the following educational background:

> Bilingual Education Endorsement - University of Miami, Miami, Florida (1977-1979)
>
> Education Certification - University of South Florida, Tampa, Florida (1975-1977).
>
> Masters in Arts, Spanish - Technologico de Monterrey, Mexico (1965-1970).
>
> National Defense Education - Act Institute, San Miguel, Allende, Mexico (1964-1965).
>
> National Defense Education - Act Institute, University of Florida, Gainesville, Florida (1964).
>
> B.A., Math and Philosophy - Wesleyan College, Macon, Georgia (1947).

Kight Ex. 3, pp. 3-4.

59. Johnson has resided at her present address of 1260 Vesper Drive, Fort Myers, Florida, since 1980. This address is within the city-grade (3.16 mV/m) contour of the proposed station. From 1960 to 1980, Johnson resided at 1624 Pawnee Avenue, Fort Myers, Florida. The Pawnee Avenue address is also located within the service area of the proposed station. Johnson will continue to reside in the service area of the proposed station in the event Kight Broadcasting's application is granted. Kight Ex. 3, p. 2.

60. Johnson has been involved in the civic activities set forth below. Unless otherwise indicated, all of the activities occurred within the Fort Myers community. Those organizations located outside the service area are statewide organizations that also service the Punta Rassa area.

> Governor's Appointment, Member, International Language Institute Advisory Council, Tallahassee, Florida (1990).
>
> Member, "Dinamation" Board of Directors, Public Broadcasting System Educational Project (1990).
>
> Member, Board of Directors, Price Halfway House (1988-present).
>
> Chairman, Hispanic and Haitian Meeting on Housing and AIDS (1988).
>
> Assisted in production of two 30-minute video productions regarding migrant housing problem, Hispanic Council (1988).
>
> Member, Board of Directors, Florida Consortium on Multilingual/Multicultural Education (FCOMME) (1981-1990). FCOMME is a state institutional organization consisting of 52 organizations, including educational institutions.
>
> Organizational Chairman, FCOMME (1978-1981).

Chairman, Health Fair for Hispanics, Hispanic Council (1986).

Hispanic Voter Registration, Hispanic Council (1986-1988).

Served on Political Forum for Spanish/English Candidates, Hispanic Council (1985 and 1989).

Chairman, Hispanic Council of Southwest Florida, Families Survey of Needs - Salivar Camp, Johnson Camp, Train Depot Shopping Center, Farmworker Village, Fort Myers High School (1985).

Member, Board of Directors, Hispanic Council of Southwest Florida (1983).

Member, Florida State Bilingual Advisory Council (representatives for Fort Myers district) (1982).

Member, Task Force on establishing endorsement for the certification of Bilingual/ESL teachers (granted by the Florida State legislature in 1981 (1982).

Obtained proclamations from County Commission and City of Fort Myers for declarations regarding Hispanic Cultural Celebration (1982-1990).

Director, Second Lee County Leaders Seminar, Fort Myers Beach, Florida, Topic: "Reading and the Bilingual Child" (1981).

Panel Presenter, The Lau Remedies in Lee County, Title VII Management Conference, Washington, D.C. (1980).

Participant in Sound/Slide Production: *Our Children in a World of Differents* (1980).

Speaker before the Florida State Cabinet, Capital Building, Tallahassee, Florida, regarding Florida Consortium on Multilingual and Multicultural Education. Received proclamation of endorsement signed by the cabinet members and the Governor (1979).

Originator and Annual Chairman of first statewide leadership concerning foreign language and bilingual programs, Sanibel, Florida (1978).

Member, Board of Directors, Lee Mental Health Center (1976-present).

Member, Board of Directors, Florida Foreign Languages Association (1973-1982); President (1972).

Member, Board of Directors, Southern Conference on Language Teaching (1970-1974).

President, Florida Chapter, American Association of Teachers of Spanish and Portugese (1967). Johnson assisted in promoting and arranging competition for approximately 1,500 Spanish students from across the state. Tr. 269.

Speaker: Hispanic Chamber of Commerce (1990); Women in the Media and How It Can Help Community Programs, Naples Athletic Club (1989); District School Board Meetings, Topic: "Bilingual Education" (1980-1990); Zonta Club, Topic: "Bilingual Education" (1982); Sertoma Service Organization, Topic: "Bilingual Education" (1981); Kiwanis Club - East Side, Topic: "Bilingual Education" (1981); Kiwanis Club - Downtown, Topic: "Bilingual Education" (1980); Phi Delta Kappa, Topic: "Bilingual Education" (1980).

Judge: Little Miss Hendry County Contest (1987); Miss South Florida Contest (1989); Night of Stars (talent show to raise funds for the Abuse Counseling Center); Builders Parade of Homes, Port Charlotte, Florida (1989).

Curtain Call, Public Television Fundraiser (1987-1990) (Tr. 275).

Kight Ex. 3, pp. 4-6.

61. In her position as part-time Director of Community Affairs at Station WBBH-TV, Fort Myers, Florida, Johnson has been involved in the production of the following television programs:

Producer and anchor of "Twenty Book Club," a 30-minute videotape on reading which was distributed to six counties (1990). Johnson contacted the people she wanted to be involved with the Book Club and selected educators whom she believed were well qualified to speak on the subject of reading. She also assisted in writing the script. Tr. 276.

Producer of two weekly book reports by children in kindergarten through grade 12 aired each Saturday morning (1990-July 1991). Johnson selects the children, works with them on their writing, and selects the pictures for the visuals. During the production phase of the program, the production staff works under the direction of Johnson. Johnson estimates that she spends between 10-12 hours each week on the Book Club. Tr. 258-260.

Daily interviews: "Community News with Mary Johnson" (1986-1988).

"Learning in Two Languages" (15-minute sound/slide) (1980).

The World Outside Our Skin (30-minute educational documentary (1979). Johnson supervised the entire production of this program, including preparing the script and accompanying the cameraman to take the visuals. Tr. 280.

Anchor-Producer: *Gulf Coast Today* (30-minute daily program) (1973-1988).

Anchor of five-minute Spanish weekday newscast (1973-1986). Responsibilities included: (1) summarizing, translating, and presenting five minutes of news in Spanish, (2) presenting two daily television interviews, and (3) producing a line-up with visuals and timing the show.

Kight Ex. 3, p. 6.

62. Johnson is an Hispanic female. Kight Ex. 3, p. 2; Tr. 299.

Diversification

63. Kight Broadcasting has no ownership interest in or connection with any medium of mass communication. Kight Ex. 1. Similarly, Kight has no ownership interest in or connection with any broadcast station, cable system, newspaper, magazine, or other medium of mass communication. Kight Ex. 2, p. 2.

64. Johnson is presently employed on a part-time basis as Director of Community Affairs at Station WBBH-TV, Fort Myers, Florida. In the event Kight Broadcasting's application is granted, however, Johnson will terminate her employment with Station WBBH-TV prior to commencement of program tests. Johnson has no other ownership interest in or connection with any broadcast station, cable system, newspaper, magazine, or other medium of mass communication. Kight Ex. 3, p. 2.

Auxiliary Power

65. Kight Broadcasting will install auxiliary power facilities at both its studio and transmitter site to ensure continued operation in the event of a power outage. Kight Ex. 1.

Palm Tree FM Limited Partnership -- Comparative Issue

Ownership Structure and Control

66. Palm Tree is a limited partnership organized under Florida law. Palm Tree Ex. 1. Its certificate and agreement of limited partnership, dated February 29, 1988, was filed with the Florida Department of State on March 1, 1988. Palm Tree Ex. 5, pp. 2-3. Michelle L. Karas is identified as the sole General Partner.[11] The nominal Limited Partners are two brothers, Alan Landry and Christopher Kevin Landry (usually referred to as Kevin Landry (Tr. 358)). Alan Landry lives in the vicinity of New York City. Kevin Landry resides in Lincoln, Massachusetts. Palm Tree Ex. 1, p. 1.

67. Under the limited partnership agreement, Ms. Karas was obligated to provide an initial capital contribution of $1,800. The Limited Partners together were to provide an original capital contribution of $10,200 upon execution of the limited partnership agreement[12] and agreed to make further capital contributions in the aggregate amount of $40,000. Palm Tree Ex. 5, pp. 4-5.

68. In a supplementary affidavit filed with the State of Florida on August 28, 1988, Palm Tree stated that its partners had agreed that the initial capital contributions to the partnership shall be as follows:

Michelle Karas	$ 1,800
Alan S. Landry	$ 2,040
Christopher K. Landry	$ 8,160
TOTAL	$12,000

69. The limited partnership agreement specifies that no Limited Partner shall perform any services for the limited partnership materially relating to its radio station; become actively involved in the management or operation of the partnership's radio station; be an employee of the partnership's radio station; perform any services as an independent contractor or agent with respect to the partnership's radio station; or communicate with the General Partner on matters pertaining to the day-to-day operations of the business. Palm Tree Ex. 5, p. 9.

Formation of Partnership

70. Michelle Karas learned of the Punta Rassa allotment from her father, Stan Karas, in December of 1987. Tr. 353. It was "a couple of weeks later," sometime in January 1988, that she decided to become involved in an application for the Punta Rassa station. Tr. 354. After she made that decision, her father recommended she contact communications attorney Thomas Siebert. Mr. Karas and Siebert had known each other for a number of years. At one time, they were co-owners of Station WTEZ, Yorktown, Virginia. Siebert's firm, Besozzi & Gavin, also had represented Karas' other broadcast interests. At the time Ms. Karas contacted Siebert regarding the Punta Rassa station, Stan Karas and Siebert had other business dealings. Tr. 354, 356-357.

71. Ms. Karas testified that after discussing all other options with Siebert, "we decided" that a limited partnership would be "the best route." Ms. Karas testified: "We knew I couldn't be a sole proprietor, I don't have that type of funds, you know." Tr. 357.

72. Siebert suggested to Stan Karas that Alan Landry would be a suitable Limited Partner. Tr. 357. Alan Landry had known Siebert since the mid-1980s. By mid-1987, they had talked about FCC licensing opportunities in general. Tr. 1079-1080. As Alan Landry put it, "it was logical for Mr. Siebert to call me when the Punta Rassa opportunity went into the public realm . . . ." Tr. 1081. They first discussed an application for the Punta Rassa allotment in December 1987 or January 1988. Tr. 1080.[13] Alan Landry was also a client of Siebert's firm at the time. Tr. 358.

73. After the topic of an application had been raised, Stan Karas arranged a dinner meeting between Michelle Karas, Alan Landry, and himself. Also present was Alan Landry's girlfriend and Michelle Karas' boyfriend. Tr. 358, 1020-1021. The dinner meeting was on approximately January 23, 1988. Prior to that meeting, Michelle Karas had no contact whatsoever with Alan Landry. Tr. 358.

74. The structure of the applicant was not discussed at the dinner meeting. Tr. 359. Ms. Karas testified the purpose of the meeting was "just to get to know each other," to learn each other's background, to discuss Ms. Karas' views on the market and for Mr. Landry to see if he wanted to get involved with Ms. Karas "on something like this." Tr. 360. They did not discuss Ms. Karas' percentage of ownership, her financial contribution to the partnership, or how the station would be financed. Tr. 390, 1021-1022.

75. After the dinner meeting, Alan Landry prepared a five-page, handwritten memorandum regarding the proposed Punta Rassa station for his brother, Kevin. Kight Ex. 20; Tr. 1025-1026. Alan Landry described the document as an "overview summary" and "a bit of a sales pitch about the business opportunity in Punta Rassa." Tr. 1025-1026. In the memorandum, Alan Landry stated, *inter alia*.

> 1. Tom Siebert (FCC oriented attorney) and Stan Karas (radio management) are honest and experienced. . . .
>
> 2. Stan's daughter, Michelle, is credible and mature for a 24-year old/4 years experience in radio advertising sales (I have met her).

> . . .
>
> 6. Construction.
>
> Original application must demonstrate financial capacity to perform construction upon license approval.
>
> Per Siebert, attached letter sets forth previously approved letter format.
>
> Given your net worth, business acumen and bank contacts, I assume we could relatively easily establish such a commitment from a Boston bank or other.
>
> 7. Total Cash Requirements.

Application and legal	$ 50-100M
Construction	$200-300M
Year one operating losses	$ 80-120M
	$330-520M

> Let's assume most of construction and operating losses would be financed with a bank loan.
>
> 8. Potential Upside:
>
>> (a) Even with disastrous year one operating results, "stick value" of Class A FM station in Punta Rassa serving Ft. Myers should be at least $1 MM [million], perhaps $1.5 MM [million].
>>
>> (b) After two years of reasonable operating results, value may approach $2-2.5 MM [million].
>>
>> Even assuming an all equity financing the potential upside is attractive.
>>
>> Assuming $100 M/equity and $400 M/bank debt financing, the potential upside is dramatic.

Kight Ex. 20, pp. 1, 3-4. The memo further stated Michelle Karas would "have to be general partner with at least a 20% interest" and under the heading "Summary Thoughts," that "Siebert, Stan Karas and his daughter, Michelle, combine to form a highly qualified team to pursue this somewhat unusual opportunity." *Id.*, pp. 4-5.

76. According to Ms. Karas, Alan Landry decided a week or two after their dinner meeting to go ahead with the project. Tr. 360.

77. Most of Ms. Karas' dealings with Alan Landry at this time were through Besozzi & Gavin. Tr. 360. Alan Landry did not discuss with Ms. Karas her financial contribution or her percentage of the partnership. Rather, he discussed those matters with Siebert and Kevin Landry. Tr. 1022. Alan Landry also discussed with Siebert, not Ms. Karas, whether the applicant should be a partnership or a corporation. Tr. 1093. He acknowledged that Siebert was the person he dealt with on all matters related to the formation of the partnership and the terms of the limited partnership agreement. Tr. 1022.

78. The prospective Palm Tree partners conducted no extensive background check on each other. Michelle Karas never discussed Kevin Landry's background with him. Tr. 390. Indeed, she testified she had never met Kevin Landry and had spoken to him on the telephone only once. Tr. 417, 420.[14] The only discussion Michelle Karas had with Alan Landry regarding his background was during the January 1988 dinner meeting. Tr. 390. Alan Landry made no inquiry of any kind to any station where Ms. Karas had been employed. Tr. 1091. Ms. Karas never received nor requested any financial statement from either of the Landrys. Nor did she provide either of them her financial statement. Tr. 389.

79. Besozzi & Gavin prepared Palm Tree's limited partnership agreement. Tr. 360-361. The law firm presented Ms. Karas with an agreement under which she would have a 20% ownership interest. She accepted the agreement without any sort of counterproposal. Asked if she knew how the 20% figure was derived, she responded: "Not really. I thought it was a standard practice. I have no idea." Tr. 362. Nor did she know who selected the 20% figure. Tr. 362-363. Siebert also presented and she accepted without counterproposal the proposition that she would pay 15% of any additional capital contributions. Tr. 426-427.

80. Siebert came up with the name of the partnership. Ms. Karas testified: "After he asked me to come up with some names, which were not making any sense, I was up for any suggestions that could be offered at the time. So I finally decided I liked his name better than mine." Tr. 363. The name was registered with the State of Florida prior to the limited partnership agreement being drafted. C.T. Corporation performed that task. Ms. Karas did not instruct that organization to reserve the name and does not know who did. Tr. 363-364.

81. Ms. Karas was only sent one draft of the limited partnership agreement. She signed the draft without any changes. Tr. 364. She testified, however, she had a local law firm review the agreement to ensure that it complied with Florida statutes. Tr. 447.

82. In order to make her initial capital contribution of $1,800, Ms. Karas borrowed the money from her father. She subsequently paid back the funds. Tr. 365.

83. Although the limited partnership agreement states that the Limited Partners will provide additional capital contributions of only up to $40,000. Ms. Karas testified there has been no question since the inception of the partnership that the Limited Partners would continue to make whatever capital contributions deemed necessary. Tr. 425. Ms. Karas said that Alan Landry verbally committed himself and his brother to provide additional capital. Tr. 423, 426. This understanding regarding the Limited Partners' willingness to put in money in excess of the figure stated in the limited partnership agreement has not been reduced to writing. According to Ms. Karas, Alan Landry did not establish an upper limit as to the amount the Limited Partners would provide: "He said as much as necessary, so there was no set ceiling on it." Tr. 426.[15]

84. Ms. Karas testified she hired her father to prepare a financial study for the proposed station. The study, which generally was referred to during the hearing as a "*pro forma*," was to include cost estimates. Tr. 366; *see* Palm Tree Ex. 9.[16] After she received the *pro forma*, Ms. Karas sent a copy to Siebert who, in turn, sent it to Alan Landry. Tr. 368. Ms. Karas, however, did not discuss the *pro forma* in detail with either of the Landrys. Tr. 369. Ms. Karas played no role in preparing any of the estimates that appear in the *pro forma*. Tr. 369.

Application Preparation and Prosecution

85. *Selection of Engineer.* Siebert recommended and made arrangements to secure the services of Palm Tree's original consulting engineering firm, Satellite Systems Engineering, Inc. (SSE). Ms. Karas had no personal contact with anyone at that firm until February 29, 1988, the day the engineering section of Palm Tree's application was signed. Tr. 381-382.

86. *Transmitter Site.* Ms. Karas played no role in selecting Palm Tree's transmitter site or establishing the original terms under which the site was to be made available. Tr. 382-383. The transmitter site was located by Chad Daly of a firm identified as Telsa. SSE, not Ms. Karas, made arrangements with Telsa to locate the transmitter site. Ms. Karas was not advised that SSE was going to hire Telsa. Nor was she advised what fee Telsa or Daly would charge. She has never spoken to Daly. Tr. 382-384. Daly, in addition to locating a site, negotiated with the site owner and established the terms under which the site would be available to Palm Tree (*i.e.*, leased for the sum of $1,000 per month). Tr. 383, 409. Daly did not consult with Ms. Karas before agreeing to that figure. Tr. 409. At the time the application was filed, Palm Tree's proposed transmitter site was owned by David Herbott. Ms. Karas' single contact with Mr. Herbott was a telephone conversation on February 19, 1988. Tr. 412. In that conversation they did not discuss the terms under which the property was being made available. Tr. 413.

87. *Tower.* Palm Tree proposes a self-supporting (or "stand-alone") tower. Kight Ex. 19. Palm Tree's consulting engineer was the one who decided to specify a self-supporting tower. Tr. 385. Ms. Karas had no input into that decision. Tr. 387. Moreover, Ms. Karas played no role in estimating the cost of such a tower.[17] The *pro forma* included an estimate of $40,000 for a 350-foot tower "installed." Palm Tree Ex. 9, p. 16. But the *pro forma* also stated, in estimating the total equipment package, that $40,000 could be deducted if an existing tower is available. Palm Tree Ex. 9, p. 20. Ms. Karas acknowledged that at the time the *pro forma* was prepared. Palm Tree did not know whether it was going to use an existing tower, a self-supporting tower or a guyed tower. Tr. 387.

88. *Application Form.* The first time Ms. Karas saw the construction permit application form (FCC Form 301) for Palm Tree, it had already been typed and was ready for her signature. Tr. 388. She testified she found the organizations that were included in the Equal Employment Opportunity Program and "attempted" to write the programming statement, Palm Tree's communications counsel, however, "put it in writing." Tr. 388.

89. *Financial Certification.* With respect to Palm Tree's financial qualifications, which will be discussed in substantially greater detail below, Ms. Karas testified that Palm Tree's communications counsel instructed her that the applicant was not financially qualified. As Ms. Karas testified: "We had not obtained our bank letter at that time, so we were honest and said no, we were not financially qualified." Tr. 389. Ms. Karas claimed, however, she "knew," after "discussions with the Landrys" (although she only spoke with Alan Landry) and Tom Siebert, the Landrys would be qualified without a problem. Tr. 389.

90. Ms. Karas directed Alan Landry to obtain a bank letter for Palm Tree. She gave him that instruction on the same day that Palm Tree's limited partnership agreement was entered into, February 29, 1988. Tr. 391-392; *see* Palm Tree Ex. 5, pp. 1, 3. Ms. Karas personally made no attempt to obtain a bank loan letter nor did she take any other steps to permit Palm Tree to certify it was financially qualified. Tr. 394, 398-399. She did not provide any draft bank letter to Alan Landry or discuss with him what banks he would be approaching. Tr. 395. Ms. Karas' testimony makes clear that she anticipated that both Alan and Kevin Landry would be involved in obtaining the bank letter: ". . . I told Alan what we needed to have, and them being the Limited Partners, to go get it. I didn't care if it came from Alan's references or Kevin's. It was one of the Landrys." Tr. 396. It was clear, however, she was to have no role in obtaining the letter. Tr. 396.

91. An amendment affirmatively certifying to Palm Tree's financial qualifications was signed June 1, 1988 and filed June 3, 1988. That financial certification was based upon a letter dated May 5, 1988, from the Bank of New England. Tr. 789 (Ms. Karas); Tr. 1003-1004 (Alan Landry); *see* Palm Tree Ex. 10. Ms. Karas first learned the Bank of New England had been contacted only when she received the May 5 letter. At hearing she could not recall whether Alan Landry had ever indicated he had contacted more than one bank. Tr. 399. Ms. Karas had no contact with the Bank of New England either before or after the letter was issued. Tr. 400.

92. The bank's letter indicated its willingness to extend a line of credit was subject to various conditions, including that "all reasonable and ordinary credit criteria of Bank of New England are met" at certain times. Palm Tree Ex. 10, p. 1. Ms. Karas neither knew nor had inquired, as of the initial hearing in this proceeding, what those criteria were. Tr. 401. She did not know if the bank had approved any specific collateral in connection with the proposed loan or what documents, if any, were presented to the bank in connection with the proposed loan. She did not prepare any financial statement for the bank nor did she cause her resume to be forwarded to the bank. Tr. 401. She did not know if the bank had been provided any information about her. Tr. 402. And she does not know when the bank was initially approached regarding the proposed loan. Tr. 402.

93. *Limited Partners' Communications with Ms. Karas and Counsel.* Ms. Karas testified that she and Alan Landry had ten or possibly more telephone conversations between February 29, 1988 (the day when she instructed him to get the bank letter) and May 5, 1988 (the date of the bank letter). Tr. 403-404. Ms. Karas initiated these conversations. Tr. 406.[18] She is certain that the topic of obtaining the bank letter came up during these discussions. Tr. 404. Among other topics, Ms. Karas also discussed with Alan Landry the competing applications filed for the Punta Rassa allotment. Tr. 406-407.

94. Ms. Karas testified Alan Landry has had free reign to call Besozzi & Gavin regarding Palm Tree's affairs and, in fact, has done so. Tr. 417, 419-420. For his part, Alan Landry testified he has discussed matters related to the Punta Rassa project with Siebert 20 or 30 times. Tr. 1095-1096. Among the topics discussed have been the number of applicants, the relative merits of the applicants, "what's new" in the comparative hearing process, the United States Supreme Court's reaffirmation of the minority preference and the applicant's expenses. Tr. 1074, 1096-1097. With respect to those expenses, some time before the initial hearing sessions in this proceeding, Alan Landry requested and received copies of all of Palm Tree's bills for legal services. tr. 419.[19]

95. *Checking Account.* Palm Tree's limited partnership agreement provides that all funds belonging to the partnership are to be deposited into a checking or savings account in the name of the partnership. Palm Tree Ex. 5, 18 (¶ 10.1). No bank account for Palm Tree was established until December 1989 or January of 1990. Tr. 414. Prior to that time, Ms. Karas used her personal account to pay Palm Tree's bills. Tr. 415-416; *see* Tr. 354-365. The funds to pay those bills came from the Limited Partners and herself (including the initial capital contribution she borrowed from her father). Tr. 365. On cross-examination by the Presiding Judge, Ms. Karas indicated the opening of an account was delayed because no major funds were coming into the corporation plus, "I had to file and get the tax I.D. number and everything in line to open up the account." Tr. 448. She further testified that the bank informed her she needed a tax identification number before it would open an account for the limited partnership. Tr. 448. Ms. Karas acknowledged that the process of obtaining a tax identification number took a couple of weeks or a month and that she was not precluded from opening up the account in 1988. Tr. 450. Further examination revealed that Palm Tree, in fact, did *not* need a tax identification number to open the account. As Ms. Karas subsequently admitted, the account was opened under Ms. Karas' personal Social Security number. Kight Ex. 14; Tr. 450-451. The bank used her Social Security number because she told the bank that she had filed the proper papers to obtain a tax identification number and wanted to get the account open. Tr. 451.

Integration

96. Ms. Karas, a white female, proposes to work a minimum of 40 hours per week as General Manager of Palm Tree's proposed station. Upon a grant of Palm Tree's application, she will resign her current employment as Station Manager of WKZY-FM, La Belle, Florida. In her capacity as General Manager of the Punta Rassa station, Ms. Karas purportedly would be the principal executive and administrator of the station, ultimately responsible for the formulation and implementation of all station policies for programming, sales and personnel. Ms. Karas testified that all station department heads will report to her and that she will be responsible for development, implementation and oversight of Palm Tree's EEO program. Palm Tree Ex. 3, p. 1.

97. With respect to local residence, Ms. Karas has had the following addresses in the Fort Myers/Punta Rassa area.

Residence Address	Dates
2411 East Mall Drive Apartment 208 Fort Myers, Florida	March 1984-Dec. 1984
903 Gleason Parkway Apartment 103 Cape Coral, Florida	Jan. 1985-Feb. 1986
5027 S.W. Courtyards Court Apartment 51 Cape Coral, Florida	Feb. 1986-Aug. 1987
4401 Evans Avenue Apartment 103 Fort Myers, Florida	Aug. 1987-Sept. 1988
2737 Colonial Boulevard Apartment 201 Fort Myers, Florida[20]	Sept. 1988-Oct. 1990
1629-22 Red Cedar Drive Fort Myers, Florida	Nov. 1990-Present

Palm Tree Ex. 15.

98. Engineering calculations introduced into evidence by both Kight Broadcasting and Palm Tree indicates that, using the methodology specified in the Commission's rules, 4401 Evans Avenue and 2737 Colonial Boulevard, are both situated beyond Palm Tree's 1.0 mV/m contour. Kight Ex. 15; Palm Tree Ex. 14, pp. 1-4. Thus, from August 1987 (*i.e.*, seven months before Palm Tree's application was filed) to November 1990 (*i.e.*, after the initial hearing session), she resided outside of the service area. The only period of service area residence cognizable for comparative purposes is from March 1984 to August 1987.

99. The civic activities of Ms. Karas for which Palm Tree is entitled to credit are as follows:

> In September 1990 (approximately one month before the initial hearing in this proceeding), she became a dues-paying member of the American Business Women Association in Fort Myers. She has served as the "emcee" of the local chapter's annual pageant. Palm Tree Ex. 3, p. 2; Tr. 351-352.
>
> In 1987 she assisted the American Cancer Society, Lee County (Fort Myers) unit with its "Bid for Bachelors" fundraising event, which encompassed approximately one month of her time. Palm Tree Ex. 3, p. 2.
>
> Also in 1987, she assisted the American Cancer Society with its "First Great Florida Duck Race," for which she donated approximately one month of her personal time to help organize the event, sell sponsorships and obtain donations. *Id.*
>
> From 1986 until 1987, Ms. Karas was a member of the Vestry of St. Hillary's Episcopal Church, Fort Myers. *Id.*; Tr. 344.

100. Palm Tree claims the following broadcast experience for Ms. Karas.

Stations/ Location	Position	Dates
WRCC(FM), Cape Coral, FL	Account Executive	April 1984-Dec. 1985
WCVU-FM, Fort Myers/Maples	Executive Account	March 1986-Aug. 1986
WKZY(AM)/WIKX-FM, Fort Myers, FL	Sales Manager/ Account Executive	Aug. 1986-June 1987
WQEZ, Fort Myers, FL	Account Executive	June 1987-Dec. 1987
WAVV, Fort Myers, FL	Account Executive	Dec. 1987-March 1988

WIXI, Fort Myers, FL	Account Executive	April 1988 Nov. 1988
WKZY(FM),[21] La Belle, FL	Previously Sales Manager; Currently Station Manager	1988-Present

Palm Tree Ex. 3, pp. 2-3.

Diversification

101. Neither Palm tree nor any of its partners have any ownership interest in any medium of mass communications. Ms. Karas, as previously noted, is Station Manager of WKZY(FM), La Belle, Florida, but made a timely pledge to terminate her employment with that station in the event Palm Tree's application is granted. Kevin Landry is a Limited Partner in the managing General Partner of T.A. Communications, a venture capital firm. T.A. Communications has various debt and equity instruments in mass media. Mr. Landry, however, has no role in the management of T.A. Communications. Palm Tree Ex. 2.

Auxiliary Power

102. Palm Tree claims comparative credit on the basis of its proposal to install auxiliary power facilities at both its studio and transmitter sites. Palm Tree Ex. 4, p. 1. No reference to auxiliary power equipment, however, is made in the detailed cost estimates prepared for Palm Tree by Stan Karas. *See* Palm Tree Ex. 9; Tr. 370.

Palm Tree Financial and Misrepresentation/Lack of Candor Issues

Cost Estimates

103. As discussed previously (¶¶ 84. 87, *supra)*, prior to the filing of Palm Tree's application, Stan Karas prepared a "pro forma" study which included estimates of the costs of construction and operation of Palm Tree's proposed station. Michelle Karas testified that Thomas Siebert, Palm Tree's communications counsel, had explained that such a document was necessary. Under a cover letter dated February 18, 1988, Mr. Karas forwarded the study to Ms. Karas. Palm Tree Ex. 8, pp. 1-2; *see* Palm Tree Ex. 9.

104. In the *pro forma*, the total cost of equipment, not including furniture, is listed as $214,266. Palm Tree Ex. 9, p. 20. Palm Tree claims that figure is an error and that the actual figure on that page should have been $147,232. Tr. 753-754. Stan Karas, who prepared the study, also testified the figure of $214,266 was wrong. Tr. 828. But Mr. Karas testified the correct figure is $161,962 (a figure which also appears at Palm Tree Ex. 9, 24 under the heading "Construction Costs"). Tr. 828; *see* Kight Ex. 21.

105. At one point in the *pro forma*, monthly operating expenses are estimated to be $28,164 (*i.e.*, $84,492 for three months, without consideration of any pre-operational expenses). Palm Tree Ex. 9, p. 21. At another point in the study, however, the first three months operating costs were estimated to be $72,653. Palm Tree Ex. 9, p. 24. In explaining the difference, Mr. Karas testified that he deducted $6,081 per month in expenses from the figure of $28,164. Certain of those deducted expenses were reflected elsewhere in the construction estimates appearing at Palm Tree Ex. 9, p. 21 (*i.e.*, a contract engineer at $800 per month and payroll taxes of $2,131 per month). Other expenses were simply eliminated on the basis of Mr Karas' understanding that they were not necessary in determining an applicant's budget for purposes of FCC financial qualifications. Among those expenses eliminated was $1,000 per month for telephone service. Kight Ex. 21, p. 2; Tr. 831, 834-835.

106. Ms. Karas' written testimony indicates Palm Tree originally used, from the *pro forma*, the figure of $234,615 as the total cost to construct the Punta Rassa station and operate it for three months without revenue. Palm Tree Ex. 8, p. 2; *see* Palm Tree Ex. 9, p. 24. Ms. Karas' testimony also notes the *pro forma* stated costs could vary 10% to 20%. Based on the material contained in the *pro forma* and her "general knowledge of staffing needs," Ms. Karas claims originally to have estimated that Palm Tree's costs of construction and operation for three months without revenue was approximately $200,000 to $220,000. Palm Tree Ex. 8, p. 2. After extensive cross-examination, Ms. Karas acknowledged that Palm Tree's original estimates came to approximately $223,000. Tr. 779.

107. Through cross-examination of Ms. Karas, Palm Tree's current estimates for construction and three months of operation of the proposed station emerged:

Construction Costs

Transmitter and Related Equipment	$ 34,770
Tower	$100,000
Master Control Equipment	$ 13,797
Production Room Equipment	$ 18,659
STL and Remote Control Equipment	$ 30,006
Satellite Equipment	$ 10.000
Studio Rent	$ 10,000
Installation	$ 10,000
SUBTOTAL	**$227,232**[22]

Three Months Operating Costs

Staff

General Manager ($2,000/month)	$ 6,000
Operations Manager ($1,350/month)	$ 4,000
Announcer ($1,200/month)	$ 3,600
Receptionist ($1,000/month)	$ 3,000
Office Manager ($1,000/month)	$ 3,000
Two Sales Persons ($1,050/month each)	$ 6,300
Contract Engineer ($800/month)	$ 2,400
Payroll Tax	$ 4,250
SUBTOTAL	**$ 32,600** [23]

Other	
Programming	$ 3,450
Electricity	$ 1,800
Tower Rent	$ 2,100
Studio Rent	$ 2,700
Advertising	$ 7,500
Music Licenses	$ 1,500
Supplies	$ 1,800
SUBTOTAL	**$ 23,550**[24]
Transmitter Site	**$245,000**
TOTAL	**$528,382**[25]

108. Although Ms. Karas identified a telephone as a necessity, she was unsure whether the above estimates included allowances for telephone expenses. Tr. 770-772. As discussed previously, no provision was made in the final budget, as prepared by Mr. Karas, for telephone expenses.

109. More importantly, the estimates do not include any provision for repayment of a loan. Ms. Karas never asked her father whether the estimates made any provision for such repayment. Tr. 775-776.[26] Ms. Karas did not know what the monthly payments on the bank loan would be. Tr. 776.

110. Palm Tree's past and present cost estimates regarding its proposed tower and transmitter site require further discussion.

111. *Tower Estimate*. From the initial filing of its application, Palm Tree has specified a self-supporting tower with an overall height of 108 meters (354.24 feet) above ground level. Kight Ex. 19; Tr. 840. The *pro forma* includes an estimate of $40,000 for a 350-foot tower "installed." The *pro forma*, however, does not explicitly indicate whether that estimate is for a guyed or a self-supporting tower. *See* Palm Tree Ex. 9, p. 16. Ms. Karas said she first learned that a self-supporting tower was proposed when Palm Tree's application was filed. Tr. 756-757. She assumed "all towers and things cost the same," and so therefore assumed the estimate prepared by her father was "right on the money." Tr. 757. She did not ask her father where he obtained that figure. Tr. 755.

112. Ms. Karas testified that Palm Tree now estimates that construction of the proposed self-supporting tower will cost $100,000, rather than $40,000. Tr. 755. That estimate was relayed to her by Palm Tree's counsel from Robert Bednarek, who is Palm Tree's present consulting engineer. Tr. 747. She testified that she received that estimate the week prior to the December 3, 1990, hearing session (pertaining to Palm Tree's financial qualifications). Tr. 747-748. At the December 3 hearing, Ms. Karas testified that she had not previously made any efforts to obtain a cost estimate for her tower. Tr. 748. As she testified: "I didn't think I would need to until, you know, if awarded the license and purchasing equipment and then I would know the true cost." Tr. 758. She also testified that no one else on behalf of Palm Tree had made any attempt to obtain an updated or different cost estimate for the tower until the week prior to the December 3 hearing. Tr. 747-748.

113. At the December 3 hearing, Ms. Karas specifically was asked: "Did you ever inquire of counsel whether your cost estimate of $40,000 was adequate to construct a self-supporting tower prior to this conversation a week or so ago?" She responded: "No. I did not." Tr. 759. That answer directly conflicts with Ms. Karas' testimony given October 22, 1990, during the initial hearing sessions in this proceeding. At that time, she was asked: "Did you confer with anyone what the cost of a self-supporting tower would be?" She answered: "After looking at my *pro forma*, I called up the law firm to see if that was normal. I was checking -- even though my father had done it. And so yes, I did question if that was what normal costs were for a self-supporting tower." Tr. 385-386.

114. Stan Karas testified that the $40,000 estimate was part of a standard package of estimates he used in 1988. The figure was for a guyed tower. He has never developed an estimate for a 350-foot self-supporting tower. Tr. 823-824. Mr. Karas volunteered, however, that self-supporting towers are "very expensive." Tr. 823. Mr. Karas was not aware that Palm Tree was proposing a self-supporting tower until his deposition was taken shortly before the December 3, 1990, hearing session. Tr. 825-826.

115. *Tower Site*. As discussed above, Palm Tree originally proposed leasing its transmitter site at $1,000 per month. *See* ¶ 86, *supra*.[27] Ms. Karas testified that, upon the filing of a petition to enlarge against Palm Tree by former applicant Patrick Broadcast Associates, Inc. (Patrick), she learned that Palm Tree's transmitter site was no longer available for lease, but only for purchase.[28] Palm Tree Ex. 8, p. 3. Subsequently, Ms. Karas received a letter dated May 30, 1990, from Alice McBrayer, a broker with Lighthouse Realty of Pine Island, Inc. Ms. McBrayer was the agent for Robert and Betty Kleinschmidt, the present owners of the property specified as Palm Tree's transmitter site. The letter indicated the property was currently listed for $650,000. The letter made no reference to any deferred payment terms. Palm Tree Ex. 11, p. 1. In her written testimony, Ms. Karas states that in consultation with communications counsel she "recalculated the cost estimate for Palm Tree if the transmitter site were to be purchased rather than leased." Palm Tree Ex. 8, p. 3. She further stated:

> In determining a purchase price for the transmitter site, I accounted for the fact that although the property was currently listed for $650,000, it had been sold in January 1984 for $170,000, and in July 1988, it had sold for only $180,000, a $10,000 gain in more than four years. Thus, I recalculated a price to purchase the property of approximately $200,000 [sic].

Id. Nothing in the record indicates that the Kleinschmidts were ever willing to accept a purchase price of $200,000. Palm Tree Ex. 8, p. 4.

116. As of November 15, 1990, the estimated fair market value of the Kleinschmidt property was $245,000. Tr. 744 (stipulation). Nothing in the record indicates the Kleinschmidts would accept an offer of $245,000. The Kleinschmidts' current asking price is $550,000. Palm Tree Ex. 8, p. 4.

Reliance Upon Bank of New England Letter

117. As discussed above (¶ 90, *supra)*, on the day Palm Tree's limited partnership was created, Ms. Karas asked Alan Landry to obtain a letter from a financial institution to cover the costs of construction and operation of the station. At the time Palm Tree originally filed its application, it answered the financial certification question in the negative. Tr. 389. Subsequently, Palm Tree received the following letter from the Bank of New England:

> May 5, 1988
>
> ATTN: Michelle Karas, General Partner
> Christopher K. Landry, Limited Partner
> Alan S. Landry, Limited Partner
> 4401 Evans Avenue
> Apt. 103
> Ft. Myers, FL 33901
>
> Dear Partners:
>
> We understand that you are applying to the Federal Communications Commission for a construction permit for FM Ch. 249A to serve Punta Rassa, FL and environs.
>
> The purpose of this letter is to advise you that, subject to the qualifications stated below, Bank of New England is willing to extend to you, a line of credit up to $400,000 to cover equipment costs and working capital requirements, provided the following conditions are met:
>
> 1. You are successful in obtaining approval from the Federal Communications Commission to construct and operate your proposed FM station in Punta Rassa, FL.
> 2. All reasonable and ordinary credit criteria of Bank of New England are met at such time as you (a) receive the construction permit; (b) request a formal lending commitment from Bank of New England, and (c) execute all customary documentation normally required by the Bank.
>
> While the pricing and terms of the amortization of the loan commitment will be contingent upon the exact credit conditions prevailing at the time the loan is extended, we anticipate calculating interest at Bank of New England's base rate plus additional points as determined from month to month. Our Bank's current base rate is 8.50% (prime lending rate). Any loan made will be repaid in 60 installments or as otherwise reasonable in line with financial projections received prior to the time of borrowing.
>
> If the loan were to be collateralized with the assets of the permittee for the Punta Rassa FM station, our loan documents would comply with all requirements of the Federal Communications Commission, including the provision of a minimum of ten (10) days prior written notification to you and to the Federal Communications Commission before any equipment will be repossessed under any default clause of the loan agreement.
>
> We look forward to working with you in connection with this venture.
>
> Sincerely,
>
> Allyn C. Woodward, Jr.
> Senior Vice President.

Palm Tree Ex. 10, p. 1. Kevin Landry, Alan Landry and Allyn C. Woodward each testified regarding the circumstances leading to the creation of the Bank of New England letter.

118. *Kevin Landry*. Kevin Landry took the first step in obtaining the May 5, 1988, letter from the Bank of New England. Specifically, he made a single telephone call to Woodward, who was at the time a vice president of the bank. Tr. 1042-1043. The telephone conversation was about ten minutes long. Tr. 1052. Kevin Landry testified he could not recall the exact date of the call, stating only that it was "[s]ometime between February and May." Tr. 1045. When asked what, to the best of his recollection, he told Woodward during the conversation, he testified:

> I told him that my brother and I were investors in a new company to apply for an FCC license. I'm sure that I repeated the essence of the investment, reiterating that he understood the value of an FCC license, that we had a very good manager, who knew the market and came up on the sales side, which, I think, is critical to getting a new radio station off the ground, and that Punta Rassa was in a growth area of the country. I think that's the essence of making a good investment in this business. I'm sure that's what I communicated to him.

Tr. 1046. According to Kevin Landry, Woodward agreed in that conversation to provide a letter. They did not discuss, however, the specific terms of the letter nor did they discuss collateral or whether Kevin Landry would provide his personal guarantee. Tr. 1046-1047.[29]

119. Asked if they discussed a dollar amount for the proposed letter, Landry responded, "I believe we did, but I don't recollect all of the details of that conversation." Similarly, he did not recollect whether they discussed a repayment period. Tr. 1052. The May 5, 1988, letter states the bank anticipates calculating interest at its base rate plus additional points as determined from month to month. *See* Palm Tree Ex. 10. What those additional points might be was not discussed by Woodward and Kevin Landry. Tr. 1052.

120. Kevin Landry did not provide his personal financial statement to Woodward in connection with the issuance of the May 5, 1988, letter. Tr. 1052. Indeed, he did not know whether he provided any documents to Woodward in connection with issuance of the letter. Tr. 1043. He recalled no subsequent conversation with Woodward prior to the issuance of the bank's letter. Tr. 1053.

121. Kevin Landry testified he had a relationship with the Bank of New England that dates back "probably to 1970" and had known Woodward for 10-15 years. Tr. 1043-1044. He testified that he has worked closely on situations in which his firm, T.A. Associates,[30] was an equity investor and the Bank of New England was a lender. Tr. 1044. Occasionally, T.A. Associates has invested with the Bank of New England's small business investment company. Tr. 1044.

122. Kevin Landry did not usually discuss his personal investments with Woodward. *Id.* The Bank of New England is not Kevin Landry's personal bank. Tr. 1056. In connection with other transactions, he had provided the Bank of New England his personal financial statement in 1983 and 1985. Tr. 1063.[31] He has not personally borrowed money from the bank in the past but did "contingently" guarantee a loan to a company called Mishoba Cablevision. Tr. 1056-1058. Kevin Landry volunteered that his investment in Mishoba Cablevision is not "terribly important in my life and I don't pay a lot of attention to it." Tr. 1058.[32]

123. At hearing, Palm Tree proffered a financial statement for Kevin Landry dated December 2, 1990. The proffer was rejected. Landry, however, was permitted to testify that his net worth in 1988 was approximately $8 million, including liquid assets in the neighborhood of $5-6 million. Tr. 1058-1059. He, however, had never given a financial statement to Ms. Karas or to Thomas Siebert in connection with Palm Tree's application. Tr. 1060.

124. *Alan Landry.* Alan Landry called Woodward at the Bank of New England after Kevin Landry had made an initial contact with the banker. *See* ¶ 118, *supra.* Alan Landry's call to Woodward occurred several weeks prior to the issuance of the letter on May 5, 1988. Tr. 1005-1006. Although he does not know the specific date of the call, Alan Landry testified it could have been within the first two weeks of April or in late March. The conversation was approximately five minutes in length. Tr. 1069-1070. The purpose of the conversation was to confirm "that my brother had forewarned him, . . . that I would be calling, and just to reconfirm and introduce him to the topic at hand, which was a radio licensing opportunity that involved pursuing a financial commitment." Tr. 1070. The conversation did not entail a discussion of the terms of the proposed loan, the interest rate, the repayment schedule or, to Alan Landry's recollection, discussion of any collateral. Tr. 1070. With respect to the topic of collateral, he offers only that he "may have in passing sort of suggested within reason that we'd be willing to provide guarantees and/or collateral as he saw fit or willing to discuss that topic [sic]." Tr. 1070. He did not, however, have a clear recollection of any such discussion. Nor did he recall discussing Michelle Karas with Woodward. Tr. 1071.

125. Alan Landry testified that he recalled thereafter sending Woodward a copy of the *pro forma* prepared by Stan Karas. Tr. 1008, 1071. Landry testified that the *pro forma* was accompanied by his cover memo. He said he previously had come across a copy of that memo in his files, but has been unable to locate it again. Tr. 1008-1009. He did not provide his or Ms. Karas' personal financial statement to the Bank of New England.

126. Alan Landry's next action was to send a draft bank letter to Woodward. The draft, sent on April 25, 1988 via Federal Express, was attached to a handwritten, undated note to Woodward. Palm Tree Ex. 17; Tr. 1066. The draft bank letter was, in fact, a photocopy of the letter dated January 21, 1988 from Bank One of Milford, Ohio to Crosswinds Limited Partnership, an applicant for an FM station at Louisville, Kentucky. Handwritten alterations in the letter were made to reflect Palm Tree's name, the frequency Palm Tree was seeking and the fact Punta Rassa (rather than Louisville) was the community of question. Also stricken were the name of the bank, the interest rate and the signatory of the letter. The dollar amount stated in Crosswind's Bank One letter ($400,000) was unchanged. Palm Tree Ex. 17, p. 3. Alan Landry received the Crosswind's letter from Mr. Siebert. Tr. 1008.

127. Alan Landry testified the only other contact he had with Woodward prior to the issuance of the letter was possibly a brief telephone call to alert Woodward that the draft bank letter was being sent via Federal Express. Tr. 1010, 1069. Alan Landry did not discuss the terms of the draft letter with Woodward. Tr. 1010.

128. *Allyn Woodward.*[33] Woodward was employed at the Bank of New England from 1963 until April 1990. Palm Tree Ex. 16, pp. 6, 24. In late 1987 and early 1988, he was a senior vice president of the bank and the head of its technology lending group. The technology lending group did not deal with broadcast lending. A separate division of the bank dealt with broadcast lending. *Id.*, pp. 6-7. As of late 1987 through mid-1988, Woodward was not involved in any lending with respect to broadcast or communications properties. *Id.*, p. 8. Woodward testified that, because broadcasting lending was not an area he was concerned with, he did not know whether the bank extended loans to start-up broadcast stations. *Id.*, pp. 8-9.

129. Woodward had dealt with Kevin Landry for a period of 10 to 15 years in Landry's role as head of T.A. Associates, which was well known in the area. *Id.*, pp. 9-11. To Woodward's knowledge the Bank of New England had not extended a loan to Kevin Landry personally. Woodward did not have and had never seen a personal balance sheet for Kevin Landry. *Id.*, pp. 10-11. He did not recall having available to him a balance sheet or similar financial statement for T.A. Associates. *Id.*, p. 11.

130. With respect to the May 5, 1988, letter from the Bank of New England, Woodward testified that Kevin Landry called and asked whether the bank would be willing to make a loan to Palm Tree. Woodward testified he said the bank would be willing to make a loan if Kevin Landry was willing to "stand behind it." By "stand behind it," Woodward meant "[g]uarantee it, collateralize it, do something which would be satisfactory." *Id.*, p. 12. Woodward could not recall any other substance of the conversation. *Id.*, p. 13.

131. More specific, Woodward has no recollection of any discussion of Michelle Karas or the costs associated with constructing and operating the proposed station. *Id.* He does not recall being provided with documents of any sort regarding the proposed station. *Id.*, pp. 14-15. Nor did he recall being contacted by anyone else regarding the proposed Palm Tree station between the time Kevin Landry initially called and the issuance of the May 5, 1988 letter. He did remember being contacted by Alan Landry, but did not recall when that contact was made or if Alan Landry provided him any documents regarding the proposed Punta Rassa station. *Id.*[34]

132. He guessed his telephone conversation with Landry was 10-15 mintues in length, but could have been less than 10 minutes. He does not have any records of when the conversation occurred. *Id.*, pp. 12-13.

133. Woodward testified that, other than the telephone conversation he received from Kevin Landry, he could not tell of any other action taken or information brought to his attention that led to issuance of the May 5, 1988, letter. He did not review the proposed loan described in that letter with anyone else at the bank of New England. *Id.*, 16-18. He does not recall who drafted the proposed letter. He acknowledged that the draft bank letter that is part of Palm Tree Ex. 17 is quite similar to his May 5, 1988, letter. But he did not recall getting the draft letter. *Id.*, p. 17.

134. Asked if he would have required the presentation of a business plan prior to extending credit, Woodward responded that it would "depend upon the terms and conditions that Kevin [Landry] was suggesting that we adhere to and so it was really dependent upon future events as the letter indicated." *Id.*, p. 20. Asked what were some of those future events, he stated that he had "no idea" but added that "we in the final analysis would have lent Kevin, if he stood behind it, $400,000 on terms I'm sure we would have mutually agreed to." *Id.* However, at the time the May 5, 1988, letter was issued, those terms had not been agreed to. *Id.* Woodward testified the loan would have required Kevin Landry's personal guarantee, but not the personal guarantee of anyone else. *Id.*, pp. 20-21. No reference to a personal guarantee by Kevin Landry appears in the bank's letter. *See* Palm Tree Ex. 10.

135. Woodward did not have any knowledge as to what it costs to construct and operate a radio station. Nor did he take any steps to determine whether the $400,000 amount specified in the May 5, 1988, letter was an appropriate or adequate amount. *Id.*, p. 25. Prior to leaving his employment with the Bank of New England in April 1990, Woodward was not advised of any change in the estimates for construction of the proposed Punta Rassa station. *Id.*, p. 24.

136. Other than his brief conversation with Kevin Landry and another brief conversation with Alan Landry, no one contacted Woodward or provided him with any information with respect to the Punta Rassa station (with the exception of a call from Palm Tree counsel Stephen Gavin within the 30-day period prior to Woodward's deposition). *Id.*, pp. 24-25.

137. Woodward had no knowledge as to whether the Bank of New England had on file personal financial statements, balance sheets or net worth statements for the partners of T.A. Associates. *Id.*, p. 26. Woodward stated that, in connection with the May 5, 1988, letter, he did not need a personal financial statement for Kevin Landry to make a credit decision. *Id.*, pp. 26-27. Woodward testified that he was generally aware of what venture capitalists earned and he characterized Kevin Landry as the leader of one of the largest venture capital firms in the country. As a result, Woodward made some assumptions as to what Kevin Landry earned and came to the conclusion that, since Landry had been in his position for many years, he had "accumulated a sufficient amount of net worth that would support a credit decision I would make." *Id.*, pp. 28-29.

Representations Regarding Financial Cushion

138. On August 22, 1990, Kight Broadcasting filed a petition to enlarge issues against Palm Tree seeking specification of financial and financial misrepresentation issues. Palm Tree filed an opposition on September 24, 1990.[35] Kight Broadcasting's motion was based, in part, upon the fact that Palm Tree's transmitter site was no longer available for lease at $1,000 per month, but instead was only for sale at a price of $650,000. Kight Broadcasting argued, *inter alia*, that a material question existed as to whether the 1988 letter from the Bank of New England letter provided a cushion sufficient to cover Palm Tree's substantially increased costs. *See* Tr. 592-593.

139. Attached to Palm Tree's opposition was a declaration signed by Michelle Karas on September 24, 1990. Kight Ex. 17. In that declaration, Ms. Karas stated that the Bank of New England letter "provides a cushion of several hundred thousand dollars over Palm Tree's original cost estimate." *Id.*, p. 2. Significantly, Palm Tree's opposition did not reveal the dollar amount of the Bank of New England letter. Only after specification of financial issues against it did Palm Tree reveal that amount -- $400,000. *See* Palm Tree Ex. 10.

140. As discussed at ¶ 106, *supra*, Ms. Karas' written hearing testimony states that Palm Tree's original cost study estimated the total cost to construct the Punta Rassa station and operate it for three months without revenue to be $234,615. Ms. Karas claims to have adjusted that figure downward to approximately $200,000 to $220,000. Palm Tree Ex. 8, p. 2. Ms. Karas' cross-examination at hearing, however, indicated that the estimated cost of construction and operation for three months originally was $223,000. Tr. 779.[36] Thus, assuming, *arguendo*, that the Bank of New England letter could be relied upon at all, it provided a cushion of only $177,000 over Palm Tree's original cost estimates, not "several hundred thousand dollars" as Ms. Karas claimed in the September 24 declaration proffered in hopes of avoiding specification of an issue.

141. In her September 24 declaration, Ms. Karas indicated that, in consultation with communications counsel, she determined a purchase price for the transmitter site based on previous sales of the property in question. She also recites that she spoke with the listing realty office and learned that the asking price for the proposed transmitter site had been reduced to $550,000 from the previous asking price of $650,000. Kight Ex. 17, pp. 2-3. Ms. Karas then stated: "Based upon the recalculated estimate, as well as the large cushion provided by the Bank of New England line of credit, I concluded that Palm Tree's financial certification had not been effected and that Palm Tree remained financially qualified." *Id.*, p. 3. Ms. Karas' declaration did not reveal the dollar amount of her "recalculated" estimate for the property or that the asking price for the property substantially exceeded the amount stated in the Bank of New England letter.

142. Ms. Karas testified at hearing that she looked at the situation as one in which she could put a downpayment of up to the amount of the cushion available from the Bank of New England loan and "amortize the rest of the loan like a car payment. Tr. 794.[37] Ms. Karas described the proposed transaction as follows: "Well, you put down a nice little downstroke of probably $100,000 and amortize the loan, like I said earlier, like a car payment. I'm not about to purchase land outright the way costs fluctuate." Tr. 806.[38] Ms. Karas testified that this was how she has always thought of doing it since "day one" but ac-

knowledged that she never "put it in writing." Tr. 807. Indeed, nothing in Ms. Karas' written testimony with respect to the financial issue reflects such a plan. *See* Palm Tree Ex. 8.

143. Ms. Karas acknowledged that no one ever advised her it was proper to include only a downpayment in her cost estimates and not the whole purchase price. Nor did she ask anybody whether such a procedure was proper. Tr. 807.

Continued Reliance on Bank of New England Letter

144. In Ms. Karas' written testimony regarding the financial issue, she stated Palm Tree was in the process of obtaining a new financial commitment letter. Palm Tree Ex. 8, p. 4. During the December 3, 1990, hearing session, Ms. Karas testified that it was decided in October 1990, following the initial hearing sessions, that Palm Tree would obtain a new bank letter through Allyn Woodward. Tr. 782. Woodward, as of that time, was no longer associated with the Bank of New England. Palm Tree Ex. 16, p. 24. Ms. Karas, as of the December hearing session, did not know with which bank Woodward was associated. Tr. 783, 792. Ms. Karas was "pretty sure" that Alan Landry and Kevin Landry had spoken to Woodward within the two weeks before the December 3, 1990, hearing session. The purpose of the conversation was to secure a new bank letter. Tr. 781-782. According to Ms. Karas, the amount of the loan requested of Woodward was $600,000. Tr. 785-786. But as of the December 3 hearing session, they had not obtained such a letter. Tr. 783. Indeed, Palm Tree's counsel stipulated that it was not going to offer other bank letters into evidence. Tr. 786-787. Notwithstanding her written testimony that Palm Tree was in the process of obtaining a new financial commitment letter, Ms. Karas testified on the witness stand that Palm Tree presently is relying upon the May 5, 1988, Bank of New England letter and Kevin Landry. Tr. 789. The Presiding Judge ruled that any reliance upon funds coming from Kevin Landry or Alan Landry would not be allowed since (a) such a proposal constituted a variance from Palm Tree's hearing exhibits as exchanged; (b) although the proposal constituted a fundamental change in Palm Tree's financial proposal, no amendment had been filed; and (c) the other parties were not given notice of any such proposal until the day Ms. Karas testified. Tr. 1016; *see* Tr. 1011-1017.

145. With respect to Palm Tree's continued reliance on the Bank of New England letter, Ms. Karas testified that within two to three weeks prior to the December 3, 1990, hearing session, she had been advised through Alan Landry and Palm Tree's counsel that the bank "stood behind" the letter. Tr. 796. Ms. Karas, however never personally has contacted the Bank of New England. Tr. 781, 791.

146. Although Palm Tree purportedly still relies upon the Bank of New England's May 5, 1988, letter, Ms. Karas exhibited a lack of knowledge as to the terms under which the loan would be available. Specifically, although the letter indicates the interest rate would be calculated on the bank's base rate plus additional points determined from month to month, Ms. Karas did not know how many additional points the bank might require. Tr 776-777. Furthermore, although the bank's letter requires the lender to satisfy the bank's "reasonable and ordinary credit criteria," Ms. Karas was unfamiliar with those criteria and had never inquired what they were. Moreover, she did not know if the bank had investigated whether Palm Tree was qualified under those criteria. Tr. 800.

147. For his part, Kevin Landry testified that as far as he knew, the Bank of New England letter was "still in place." He testified: "No one has told me that it's not, although, certainly the situation of the Bank of New England has changed dramatically in the last year because of their own difficulties." Tr. 1048. He was aware that the Bank of New England had lost a great deal of money in the previous year and had "a lot of problems." Tr. 1064.

148. To support its assertion that it could continue to rely upon the Bank of New England letter, Palm Tree introduced into evidence the deposition testimony of Dale C. Edmunds, a vice president of the bank.[39]

149. Edmunds appeared for deposition on November 20, 1990, pursuant to a subpoena duces tecum which called upon him to bring certain categories of documents with him to the deposition. In connection with that requirement, Edmunds made a review of the files within his possession, custody and control, but did not find any documents pertaining to Palm Tree or the proposed loan. Palm Tree Ex. 19, pp. 4-5. In fact, Edmunds could not locate within the bank's files a copy of the May 5, 1988, letter upon which Palm Tree relies. *Id.*, p. 5. Edmunds testified he called the bank's credit department which handles all of the credit files for the bank and was informed there was no file for Palm Tree or Kevin Landry. Edmunds also called Woodward to see if he knew of the location of any files related to Palm tree or Kevin Landry but Woodward told him he did not know of any. *Id.*

150. Edmunds said he did not have any knowledge whatsoever of the circumstances leading to the issuance of the May 5, 1988 letter. *Id.*, p. 16.

151. Edmunds does not know Kevin Landry, Alan Landry or Michelle Karas and has not communicated with any of those individuals regarding the May 5, 1988. *Id.*, pp. 13-14.

152. Edmunds has been employed by the Bank of New England for five years. As of his deposition, he managed the high technology lending group. He assumed that position in May 1990, replacing Woodward. *Id.*, p. 7. In his role at the bank, Edmunds typically would not be involved in a loan to a broadcast station. The bank does have a communications group. which lends funds to broadcasting companies. *Id.*, p. 8.

153. As of his deposition, Edmunds had reviewed the May 5, 1988, letter. *Id.*, pp. 8-9. Edmunds said that he does not see letters such as that and does not do that type of lending. He would not issue such a letter to a customer of the high technology lending group. *Id.*, pp. 9-10.

154. Edmunds did not know whether the Bank of New England makes loans to start-up broadcast operations (*i.e.*, stations that are not yet in operation). Edmunds indicated his lending group does not make loans to companies that are not yet in operation. He could not, however, speak for the entire bank. *Id.*, p. 11. Edmunds did not know whether the bank is currently making any new loans to broadcast companies. *Id.*, p. 18.

155. With respect to the reference in the May 5, 1988, letter to the bank's "reasonable and ordinary credit criteria," Edmunds indicated he did not know what such criteria would be for a communications loan, adding that "I do not make those types of loans." *Id.*, p. 12.

156. Edmunds has no knowledge of anyone making a "due diligence" inquiry with respect to a proposed loan to Palm Tree. *Id.*, p. 13. When asked whether to his knowledge there had been any review of the creditworthiness of Palm Tree for a $400,000 loan, Edmunds said not to his knowledge. *Id.*, p. 15. He confirmed that such a credit review would be necessary before the bank could provide an entity with reasonable assurance of financing. *Id.*, p. 16.

157. Palm Tree's counsel asked whether, with respect to the 1988 letter, there is a present firm intention by the bank to lend Palm Tree up to $400,000 in line with the conditions set forth in the letter. Edmunds responded "I would only say that the bank would certainly stand behind the letter."[40] *Id.*, p. 18. Palm Tree's counsel did not elicit from Edmunds what he meant in stating that the bank would "stand behind" the letter.

Comparative Coverage

158. A joint entineering study was prepared by DataWorld of Bethesda, Maryland. The areas proposed to be served by the remaining applicants are presently served by at least five full-time aural services. Because no party seeks a comparative preference on the basis of the land area within its 1.0 mV/m contour, the only basis for an award of a comparative coverage preference is the total population within the proposed 1.0 mV/m contours of the various applicants. The pertinent population figures are reflected in the table below.

Applicant	Population Within Proposed 1 mV/m Contour (1980 Census)	Population Within Proposed 1 mV/m Contour (1986 Update)
InterMart	100,519	136,675
Southwest	163,951	222,957
Kight Broadcasting	160,865	218,727
Palm Tree	100,519	136,675

Joint Engineering Ex., pp. 1-3.

CONCLUSIONS

Palm Tree Qualifying Issues

Financial Qualifications

159. A fundamental requirement of the Communications Act is that an applicant for broadcast facilities must be financially qualified to build and operate the station it seeks. 47 U.S.C. §308(b). To establish its financial qualifications, an applicant must have "reasonable assurance" of sufficient net liquid assets on hand or sufficient funds available from committed sources to construct and operate the proposed station for three months without revenue. *E.g., Northampton Media Associates*, 4 FCC Rcd 5517, 5518 (1989); *Scioto Broadcasters Limited Partnership*, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990). Under the certification procedures pertinent here, an applicant has the obligation of obtaining such "reasonable assurance" before submitting an affirmative financial certification. "In other words, the applicant may not certify its financial qualifications and then arrange financing." *Northampton Media Associates*, 4 FCC Rcd at 618, *citing Pepper Schultz*, 103 FCC 2d 1052, 1058-1059 (Rev. Bd. 1986), *rev. denied*, 2 FCC Rcd 1476 (1987), *recon. granted in part*, 3 FCC Rcd 1200 (1988).

160. In order to make a proper financial certification, an applicant must engage "in serious and reasonable efforts to ascertain predictable construction and operation costs." *Northampton Media Associates*, 4 FCC Rcd at 5519. Then it must establish the availability of funds to meet those costs. Where an applicant relies upon a "bank letter" to establish such availability, the Commission is concerned whether the letter is issued after consideration of the qualifications of the prospective borrower, is the product of normal banking practices and is not a mere accommodation. *Christina Communications*, 2 FCC Rcd 1971, 1974 (1987); *Global Information Technologies, Inc.*, 5 FCC Rcd 3385 (Rev. Bd. 1990). In recent cases in which the *bona fides* of various bank letters have been considered, the Review Board has repeated the standard to be applied:

> Thus, in order for the Board to determine that an applicant has "reasonable assurance" of "committed sources of funds" from a lending institution, we will review the following factors: Whether (1) the bank has a long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data, *see Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978); or (2) the prospective borrower has provided the bank with such data, and the bank is sufficiently satisfied with this financial information (*e.g.*, collateral guarantees, *see Chapman Radio and Television Co.*, 70 FCC 2d 2063, 2072 (1979)) that, *ceteris paribus*, a loan in the stated amount would be forthcoming, and the borrower is fully familiar with, and accepts the terms and conditions of the proposed loan (*e.g.*, payment period, interest rate, collateral requirements, and other basic terms). Short of these ordinary fundamentals, it would be difficult to infer "reasonable assurance" from a "committed source." In other words, central to any successful "reasonable assurance" showing of a loan from a financial institution is that the "individual qualifications" of the borrower have been primarily reviewed. *Christina Communications*, [*supra*], that adequate collateral has been demonstrated, *Chapman Radio*, *supra*, and that the tentative terms of the loan are specifically identified and are satisfactory to both borrower and lender.

E.g., Scioto Broadcasters, 5 FCC Rcd at 5160; *Mableton Broadcasting Company, Inc.*, 5 FCC Rcd 6314, 6322 (Rev. Bd. 1990). Palm Tree's financial showing fails in several respects to satisfy the Commission's standards.

161. While Palm Tree did obtain some cost estimates from Stan Karas prior to filing its application, it is clear that Palm Tree failed to engage in serious and reasonable efforts to ascertain all of its predicatable construction and operation costs. The most significant defect pertains to Palm Tree's estimate for construction of a tower. Stan Karas' *pro forma* contains an estimate of $40,000 for a guyed tower. However, it is obvious on the face of Palm Tree's application that a self-supporting tower was pro-

posed. Yet, neither Michelle Karas nor anyone else associated with Palm Tree made any effort to ascertain the true cost of such a tower. Stan Karas conceded that self-supporting towers are "very expensive". Tr. 823. Also of significance is the fact that Palm Tree's estimates made no provision for repayment of the bank loan upon which it intended to rely. Nothing in the record indicates that repayment of principal or interest would be deferred until after the station had been on the air for three months. In fact, the May 5, 1988 letter from the Bank of New England contains no provision providing for deferring payment of the loan.

162. It is also clear that Palm Tree has failed to demonstrate "reasonable assurance" of available funds from the source it relied on. One of the key standards in determining whether an applicant has "reasonable assurance" is the borrower's knowledge and acceptance of the terms of the proposed loan including the interest rate and collateral requirements. The record makes unmistakably clear that the May 5, 1988 letter from the Bank of New England was the product of a brief telephone conversation between Limited Partner Kevin Landry and Allyn Woodward, then senior vice president of the bank. What was key to Woodward's issuance of the letter was Kevin Landry's willingness to personally guarantee or otherwise back any loan that was made. However, Landry's and Woodward's testimony confirms that this key conversation included no discussion of the terms under which the loan was to be made. Moreover, the bank's letter makes no reference to any personal guarantee or other security from Kevin Landry. In the absence of evidence that the tentative terms of the loan have been specifically identified and are satisfactory to both borrower and lender, the bank letter can not be credited. In light of the defects discussed in Palm Tree's budget estimates and its deficient bank letter, Palm Tree was not financially qualified at the time it filed its application. Having so found, Palm Tree can not rely on its modified financial proposal. *Aspen FM, Inc.*, 6 FCC Rcd 1602, 1603 (1991).

163. Even assuming, *arguendo*, that Palm Tree had demonstrated that it was initially financially qualified, the evidence establishes overwhelmingly that Palm Tree is not currently financially qualified. Palm Tree now estimates that its total cost for construction and operation for the first three months is $528,382. Even assuming the availability of the $400,000 bank loan, Palm Tree's funds falls far short of its projected needs. Moreover, Palm Tree's budget substantially understates its costs. The budget estimate still has no provision for payments on the bank loan during the period of construction or the first three months of operation. In addition, Palm Tree has allocated $245,000 for its proposed transmitter site. The current cost estimate presumes that Palm Tree can rely upon the fair market value of the proposed transmitter site, instead of the owner's stated price of $650,000 (later reduced to $550,000). However, no Commission precedent endorses such a methodology. Commission precedent indicates that a site owner unilaterally determines whether a site is available and under what terms and it is immaterial whether an applicant believes that a site owner's conditions for assurance of a site are unreasonable. *See Kaldor Communications, Inc.*, 55 RR 2d 567 (Rev. Bd. 1984); *South Florida Broadcasting Co., Inc.*, 57 RR 2d 495,500 (Rev. Bd. 1984); *Dutchess Communications Corp.*, 58 RR 2d 381, 389 (Rev. Bd. 1985). Thus, even putting the bank repayment question aside, the actual cost of construction and operating Palm Tree's station is in the neighborhood of $830,000.

164. As previously discussed, the bank letter could not be relied on since the terms under which the loan was to be made were not agreed upon. The same deficiency applies to Palm Tree's current reliance on the bank letter. In addition, Woodward is no longer employed at the Bank of New England and his replacement, Dale Edmunds, does not know any of Palm Tree's principals. Edmunds, the only Bank of New England representative whose testimony was proffered by Palm Tree, knew nothing about the proposed loan, was not involved in broadcast lending generally and could provide no assurance that the bank was making new loans to broadcast stations at all, let alone to start-up operations. Under the circumstances, Edmunds' statement that the bank will "stand behind the letter" does not provide "reasonable assurance" of the availability of a loan.

Palm Tree's Misrepresentations and Lack of Candor

165. Even if Palm Tree were presumed to have acted in good faith in submission of its original financial certification, Palm Tree's subsequent lack of candor and misrepresentations regarding its financial qualifications cannot be overlooked. As discussed in paragraph 115 above, Palm Tree learned in May 1990 that its transmitter site was no longer available for lease at $1,000 per month, but rather could only be purchased for $650,000 (later reduced to $550,000). Palm Tree immediately should have acknowledged the unmistakable fact it was no longer financially qualied. Instead, without any legitimate basis to do so, it continued to rely upon its previous financial certification.

166. Furthermore, after its financial qualifications were challenged by Kight Broadcasting's petition to enlarge filed August 22, 1990, Palm Tree submitted a patently false declaration as part of its effort to avoid specification of an issue. Michelle Karas affirmatively stated that the bank of New England letter had provided a cushion of "several hundred thousand dollars" over Palm Tree's original cost estimates. That simply was not true. Even using a $200,000 cost estimate, the bottom of the range of estimates referenced in Ms. Karas' hearing testimony, the maximum "cushion" available from the Bank of New England was $200,000, not "several hundred thousand dollars." Moreover, the cross-examination of Ms. Karas revealed that Palm Tree's original cost estimates were $223,000. Thus, Palm Tree's "cushion" was actually $177,000, which was less than what the transmitter site sold for in 1988.

167. Ms. Karas' declaration was also less than candid in that it failed to disclose that Palm Tree's "recalculated" transmitter site estimate was less than half of the owners' asking price. In the same declaration, Michelle Karas represented that she concluded the changed circumstances did not affect Palm Tree's financial qualifications. Nowhere did Palm Tree disclose, however, that conclusion was based upon the unsupported assumption that the transmitter site could be acquired for some $300,000 below the price stated by the owners. Palm Tree's misrepresentations and lack of candor regarding its financial qualifications cannot be excused. They provide an independent basis for the applicant's disqualification. *E.g., Rebecca L. Boedker*, 5 FCC Rcd 2855, 2858-1860 (Rev. Bd. 1990).

Comparative Issue

Diversification

168. Under the diversification criterion, InterMart receives a moderate diversification demerit because of the other media interests held by its 100% stockholder, James E. Martin, Jr. The remaining applicants in this proceeding do not receive a diversification demerit.

Integration - Quantitative

169. InterMart is entitled to no integration credit. Palm Tree, Southwest and Kight Broadcasting seek 100% credit. For the reasons discussed, *below*, Palm Tree receives no integration credit; Southwest and Kight Broadcasting receive 100% credit.

170. Palm Tree's claim for 100% integration credit for the proposed role of Michelle Karas as station manager is rejected. The record makes plain that Stan Karas, her father, and Alan Landry, a limited partner, have been the driving force behind the Palm Tree application from the start. Ms. Karas played a passive role in the formation of Palm Tree and the prosecution of its application. Not only has Michelle Karas been totally disengaged from the process of obtaining financing, she has had little involvement in Palm Tree's other functions. For example, she played no role in selecting or securing Palm Tree's proposed transmitter site. She has never negotiated with any owner of the site proposed. She played no role in preparing the budget estimates appearing in the *pro forma* prepared by her father, Stan Karas. She had only the most minimal contact with Palm Tree's consulting engineer. She accepted without counterproposal or alteration of any kind the limited partnership structure presented to her. She had no input whatsoever in determining the percentages of ownership or other significant terms. In *Royce International Broadcasting*, 5 FCC Rcd 7063, 7064 (1990), the Commission made clear that no integration credit will be awarded to a nominally active principal who has "exercised little, if any, significant control over the applicant and has not shown any real prospect of doing so." The totality of evidence undermines any claim Ms. Karas will wield significant influence (let along exclusive control) over Palm Tree. Palm Tree is entitled to no integration credit. *See Royce; Fresno FM Limited Partnership*, FCC 91-375, released November 27, 1991.

171. Southwest is entitled to 100% integration credit. The record makes plain that Southwest is solely controlled by J. Lynn Stephens, its general partner. Ms. Stephens, who has been involved in broadcasting both in an ownership capacity and in a management role, proposes to work full time as the station's general manager. There is no evidence in the record which undercuts Ms. Stephens' promise to fulfill her integration proposal. The record establishes that Ms. Stephens is knowledgeable and has been actively involved in the prosecution of Southwest's application. None of Southwest's limited partners has been involved in the prosecution of Southwest's application. Their role has been solely that of investors. Southwest's opponents urge that Southwest should be denied integration credit because of the services provided by Carl Hurlebaus and Capital Radio. However, nothing in the record suggests that Hurlebaus or Capital Radio is an unnamed principal to the application or has had any involvement in the applicant other than providing services as a consultant. Capital Radio's provision of consulting services does not translate into actual or potential control of Southwest. Relying on assistance from a paid consultant is not, by itself, reason to deny integration credit. Absent evidence that a principal other than Ms. Stephens is in control of Southwest, Southwest's integration proposal will be credited. *See Oliver and MaryAnn Kelly*, FCC 91R-100 (Rev. Bd.), released December 16, 1991.

172. Kight Broadcasting also receives 100% credit. Byron Douglas Kight will serve as General Manager of the proposed station and Mary Johnson will serve as News and Public Affairs Director. Thus, the two general partners will occupy a meaningful managerial role at the proposed station. Each of them will serve on a full-time basis (40 or more hours per week). Neither Kight nor Johnson have other significant business activity which would conflict with the effectuation of their integration pledges.

173. The record makes clear that Kight Broadcasting's ownership structure is *bona fide*. Its limited partner, Philip Memoli, has been properly insulated since the adoption of the applicant's bifurcated ownership structure. The participation of Memoli was limited to a pre-formation meeting with Kight and Johnson regarding the appropriate legal structure for the applicant, and pre-formation assistance in obtaining the February 12, 1988 bank letter upon which the applicant relies. Every significant aspect of the applicant's affairs has been handled either by Kight or Johnson including locating a limited partner, preparing a budget, selecting and retaining FCC counsel and an engineer, and locating the applicant's transmitter site. Also, both general partners have made a meaningful financial contribution to the applicant.

174. Kight Broadcasting's opponents offer no support for their contention that Johnson's integration proposal should be rejected. The findings make clear that Johnson has actively participated in the formation of Kight Broadcasting and the preparation and prosecution of its application. Also, she has made a meaningful financial contribution to the applicant. Further, she will enhance the operation of the station because of her professional background and experience in public affairs. The mere fact that Kight Broadcasting has designated Kight as the controlling vote in the event of a dispute does not justify the rejection of Johnson's integration proposal. Also, the fact that Kight, in his position as General Manager, will supervise Johnson in her role as News and Public Affairs Director is of no consequence. Johnson will be responsible for supervising all aspects of the station's news and public affairs activities. She will hire, supervise, and train a staff of at least four individuals who will be working directly under her at the proposed station. *See* Finding 55. It is, therefore, clear that Johnson will occupy a meaningful managerial role and is entitled to integration credit.

Qualitative[41]

175. Southwest is entitled to qualitative enhancement credit for Stephens' female status, her broadcast experience and her three-year membership on the board of directors of Station WSFP-FM, Fort Myers, Florida. Southwest cannot claim credit for past service area residency in that her home is situated beyond the 1.0 mV/m contour of the proposed station. Furthermore, she is not entitled to credit for any proposed future residence in that she failed to make either a timely or unequivocal

pledge to move within the service area of the station in the event Southwest's application were granted. Southwest is not entitled to any qualitative enhancement credit for Stephens' participation in various Charlotte County civic organizations because Southwest's 1.0 mV/m contour does not extend into Charlotte County, and Southwest has failed to demonstrate a sufficient nexus between those organizations and the needs and interests of the residents within its proposed service area. *Newton Television Limited*, 3 FCC Rcd 553, 559 n. 10 (Rev. Bd. 1988) (no civic enhancement credit where "the hearing record [does not] further describe these activities in a manner that demonstrates a nexus to the *Policy Statement's* concern with the needs, problems and interests of the service area"), *modified in part on other grounds*, FCC 89-87 (released March 24, 1989).

176. Kight's qualitative enhancement credit is superior to that of Southwest. Kight has resided within the proposed service area for the past 18 years. Johnson has resided within the proposed service area for the past 30 years. As discussed, *supra*, Southwest's principal, Stephens, has never resided in the service area. Moreover, Kight Broadcasting's residence credit is significantly enhanced by the civic activities of its principals, particularly that of Johnson. *See Ronald Sorenson*, 6 FCC Rcd 1952, 1952-1953 (1991). Also, Johnson's status as an Hispanic female is equal, if not superior, to Stephens 100% female credit. *See Horne Industries, Inc.*, 98 FCC 2d 601, 602-603 (1984); *Fresno FM Limited Partnership*, FCC 91-375, released November 27, 1991, paragraph 10. Finally, Kight and Johnson, like Stephens, receive credit for broadcast experience. Thus, considered in its qualitative aspects, Kight Broadcasting's integration proposal is superior to Southwest's.

Auxiliary Power

177. All four applicants receive a minor enhancement for their auxiliary power proposals.

Comparative Coverage

178. No applicant will provide 1.0 mV/m service to areas or populations presently receiving less than five aural services. Kight Broadcasting and Southwest, however, each would reach 80,000 plus persons more than either Palm Tree or InterMart. Accordingly, Kight Broadcasting and Southwest are entitled to a very slight coverage preference over InterMart and Palm Tree. *E.g., Susan S. Mulkey*, 4 FCC Rcd 5520, 5521 (1989).

179. *In summary*, neither Kight Broadcasting or Southwest suffer diversification demerits. Also, both are equal with regard to auxiliary power and comparative coverage considerations. Kight Broadcasting and Southwest receive 100% quantitative credit. However, Kight Broadcasting's qualitative advantages make it the preferred applicant in this proceeding.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[42] the application of Byron Douglas Kight & Mary Giglia Martinez Johnson d/b/a Kight Broadcasting Limited Partnership for a construction permit for a new FM Station on Channel 249A in Punta Rassa, Florida IS GRANTED; and the applications of InterMart Broadcasting Gulf Coast, Inc., Southwest Florida FM Broadcasting, Ltd. and Palm Tree FM Limited Partnership ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] *Hearing Designation Order*, DA 90-305 (released March 21, 1990).

[2] Four applicants failed to pay the required hearing fee. By *Order*, FCC 90M-2191 (released July 23, 1990), the Presiding Judge granted Christine Harvel's motion for voluntary dismissal and dismissed her application with prejudice. The application of Patrick Broadcast Associates, Inc. was similarly dismissed pursuant to *Order*, FCC 90M-3698 (released November 21, 1990). The Presiding Judge also granted Peter B. Fulton's motion for the voluntary dismissal of his application. *Order*, FCC 91M-560, released February 12, 1991.

[3] On November 16, 1990, Kight Broadcasting filed a motion seeking specification of an issue to determine whether Palm Tree made material misrepresentations, lacked candor or attempted to deceive or mislead the Commission with respect to whether Palm Tree continued to be financially qualified after its initial certification. Through the petition, Kight Broadcasting challenged the truthfulness of certain statements by Palm Tree in its effort to avoid specification of the above-quoted financial and misrepresentation/candor issues. The Presiding Judge ruled, however, the issues Kight Broadcasting sought through its November 16 petition were subsumed under the issues already added. *Order*, FCC 90M-3869 (released December 7, 1990).

[4] Rizzo handled the transaction when Stephens sold Station WEEJ, Port Charlotte, Florida, in September 1981. Tr. 37, 87.

[5] With one exception, the list of limited partners contained in the affidavit attached to Southwest's limited partnership agreement is identical to those listed in Southwest's April 20, 1990, integration and diversification statement. On the integration statement the name of Eva Nelle Sidden replaces that of Alfred Ray Patton. *See* Kight Ex. 7. Patton sold his limited partnership interest in Southwest to Sidden. Section 8.04 of Southwest's limited partnership agreement states:

> No Limited Partner shall sell, assign, transfer, encumber or convey any or all of his interest in the Partnership unless the Limited Partner has obtained the prior written consent of the General Partner, which consent shall not be unreasonably withheld.

See Southwest Ex. 8, p. 17; Tr. 74. Keller acted as a conduit for the transaction in that Patton sent him the information and the necessary paperwork. Stephens provided oral consent to the sale in her discussions with Keller about the transaction. Tr. 76.

[6] Keller stipulated that the firm of Verner, Liipfert represents Capital Radio in connection with the acquisition of various FM stations and in the on-going representation of those stations. Tr. 102.

[7] Although Stephens believed this letter also included the option of obtaining an interest in the cellular telephone business, the November 13, 1989, letter from Hurlebaus to Keller

does not contain any information regarding a cellular option. Stephens later explained that her understanding regarding this alternative arose in a previous discussion with Keller, and she never saw anything in writing that made reference to the cellular offer. Tr. 67, 98.

[8] The fact that each of Southwest's original limited partners accepted Hurlebaus' refund offer is reflected in the June 12 and June 14, 1990, amendments to Exhibit A of Southwest's limited partnership agreement. Southwest Ex. 8, pp. 56, 59.

[9] Although Southwest amended its application on December 16, 1988, to specify a new transmitter site, the deadline for filing amendments as of right in this proceeding was June 3, 1988. Official notice taken.

[10] The only part of Collier County within Southwest's proposed 1 mV/m contour is a small area in the far southeastern section of the service area.

[11] Ms. Karas' date of birth is November 5, 1963. Tr. 448.

[12] Palm Tree Ex. 5, p. 5 indicates that the limited partners' original contribution was to be $10,800. Ms. Karas testified that figure was a typographical error. The actual figure is $10,200. Tr. 439; *see* Palm Tree Ex. 5, p. 25.

[13] Alan Landry had also met Stan Karas previously. Tr. 1082. At one point, Stan Karas and Alan Landry had discussed the possibility of Alan Landry investing in WKZY-FM, La Belle, Florida. Tr. 355, 357.

[14] Kevin Landry testified, however, he had *never* talked to Ms. Karas. Tr. 1060-1061.

[15] Alan Landry testified, however, that among the reasons he and his brother wanted to be limited partners was to "limit our liability within some reasonable amount." Tr. 1034.

[16] Mr. Karas' *pro forma* study was originally introduced in the record, with all dollar figures redacted, as Kight Ex 11.

[17] Palm Tree's cost estimates for its proposed tower are discussed in greater detail at ¶¶ 111-114, *infra*.

[18] Ms. Karas knows she had at least one additional face-to-face meeting with Alan Landry at Besozzi & Gavin but does not remember whether it was before or after the bank letter was obtained. Tr. 404.

[19] Alan Landry testified that he requested copies of the bills from Michelle Karas directly in the spring of 1990. Tr. 1074-1075.

[20] This address previously was listed by the U.S. Postal Service as 4425 Evans Avenue.

[21] Stan Karas, Ms. Karas' father, is one of the owners of WKZY. TR. 352-353.

[22] Tr. 754-765; *see* Palm Tree Ex. 9, pp. 16-20, 24.

[23] Tr. 66-69, 749-750.

[24] Tr. 769-770.

[25] Tr. 730, 770, 774. Although not addressed in Ms. Karas' cross-examination, since Palm Tree purportedly intends to purchase rather than rent its transmitter site, the tower rent figure of $2,100 could be deducted from the total, leaving a total of $526,282.

[26] Mr. Karas confirmed that the *pro forma* figures did not provide for repayment of a bank loan. Tr. 836-837.

[27] The property in question is located at 3620 Stringfellow Road, St. James City, Florida. Palm Tree Ex. 8, p. 3.

[28] Patrick's petition to enlarge issues was filed May 3, 1990 (official notice of filing date taken).

[29] Palm Tree proffered no contemporaneous documentation demonstrating that Kevin Landry had expressed his willingness in 1988 to personally guarantee the proposed loan.

[30] T.A. Associates is a venture capital firm. Palm Tree Ex. 16, p. 10.

[31] Copies of those personal financial statements were not offered into evidence. Significantly, Woodward testified that at no time had he seen Kevin Landry's personal financial statement. Palm Tree Ex. 16, p. 11.

[32] He also confirmed that his Palm Tree investment is not terribly important in his life. Tr. 1058.

[33] In lieu of live testimony, the transcript of Woodward's November 20, 1990, deposition was admitted into evidence as Palm Tree Ex. 16. Tr. 1106. The documents identified in that transcript as Deposition Exhibits 1 and 2 are, respectively, Kight Ex. 20 and Palm Tree Ex. 17. Tr. 1018-1019, 1025.

[34] Woodward was shown Alan Landry's five-page, handwritten memorandum regarding the Punta Rassa station (Kight Ex. 20), Alan Landry's handwritten note purportedly to Woodward to which was attached a draft bank letter (Palm Tree Ex. 17) and the *pro forma* prepared by Stan Karas (Palm Tree Ex. 9). He did not recall having previously seen any of those items. Palm Tree Ex. 16, pp. 15-16.

[35] Official notice of filing dates taken.

[36] The estimate did not include, *inter alia*, any provision for repayment of the bank loan. Tr. 779.

[37] Ms. Karas never advised the Bank of New England that Palm Tree now planned to buy, rather than lease, the proposed transmitter site. Tr. 412.

[38] But at another point in her cross-examination, Ms. Karas testified she intended to negotiate the purchase price and that her "starting price will be $245,000 cash." Tr. 792.

[39] Initially, Kight Broadcasting objected to the receipt of Mr. Edmunds' deposition testimony into evidence. On the basis of that objection, the Presiding Judge ruled that the testimony would not be received unless Mr. Edmunds was made available for cross-examination. Palm Tree was given until December 7, 1990, in which to provide the parties notice that a Bank of New England official would be made available for cross-examination. Tr. 1112-1114. Subsequently, Kight Broadcasting withdrew its objection to receipt of Edmunds' deposition testimony and it was received into evidence. *Order*, FCC 90M-3980 (released December 17, 1990).

[40] Counsel for the bank, Patrick M. Reagan, who was present at the deposition, objected at this point on the basis of whether Edmunds had authority to bind the bank. *Id.*, p. 19.

[41] Assuming Palm Tree received quantitative credit, it would receive qualitative enhancement for Ms. Karas' gender. Also, it would receive credit for Ms. Karas's limited service area residence, her minimal civic involvement and her broadcast experience. As discussed, *infra*, Palm Tree's qualitative enhancement is inferior to that of Kight Broadcasting.

[42] In the event exceptions are not filed with 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-384

In the Matter of

Amendment of Section 73.202(b), RM-6884
Table of Allotments, RM-7205
FM Broadcast Stations.
(Epworth and Dyersville, Iowa,
and Dodgeville, Wisconsin)[1]

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 31, 1991; Released: January 9, 1992

By the Chief, Allocations Branch:

1. The Commission has before it a *Notice of Proposed Rule Making*[2] issued in response to a Petition for Rule Making filed by Margaret Keefer ("Keefer"), who petitioned for the allotment of Channel 247C3 to Epworth, Iowa as that community's first local broadcast transmission service. Keefer filed timely initial comments expressing her continuing interest in the allotment of Channel 247C3 to Epworth and her intention to apply for a construction permit to operate on that channel, if allotted. Also before us are the separate Petition for Rule Making, treated herein as a counterproposal, filed by Louise E. Hamlin, licensee of Station WDMP-FM, Channel 257A, Dodgeville, Wisconsin ("Hamlin")[3] ; the Reply Comments of Design Homes, Inc., licensee of Station KDST-FM, Dyersville, Iowa ("Design"); and a Motion To Strike those Reply Comments filed by Keefer.

2. In her counterproposal, Hamlin requests the substitution of Channel 257B1 for Channel 257A in Dodgeville and the modification of her license to specify operation on that channel. To accommodate this upgrade, Hamlin also requests the substitution of Channel 247A for Channel 257A at Dyersville, Iowa, and modification of the license for Station KDST-FM, Channel 257A, Dyersville, to specify operation on Channel 247A. Hamlin offers to pay all reasonable and necessary costs that would be incurred by Station KDST-FM in converting from Channel 257A to Channel 247A. We have consolidated Hamlin's petition with this proceeding because of the mutual exclusivity between Keefer's Epworth proposal and Channel 247A at Dyersville, the channel without whose allotment Hamlin cannot obtain her Dodgeville upgrade.

3. In response to Keefer's proposal, Design filed Reply Comments. Design concurs with Hamlin that an alternative allotment in Dyersville is necessary to facilitate the upgrade proposed by Hamlin at Dodgeville. Design acknowledges that the allotment of Channel 247A to Dyersville would facilitate the proposed allotment of Channel 257B1 in Dodgeville by eliminating the shortspacing that would result between Channel 257A at Dyersville and Channel 257B1 at Dodgeville. Design also acknowledges that Hamlin will reimburse Design for all costs it would incur in modifying its facilities to operate on Channel 247A. Design agrees to change Station KDST-FM's frequency to accommodate the proposed Dyersville upgrade.[4]

4. To resolve the mutual exclusivity between the allotment of Channel 247C3 at Epworth and Channel 247A at Dyersville, Design proposes that Channel 291A be allotted to Epworth, eliminating the current short-spacing between Station WDMP-FM and Station KDST-FM and providing a first local service at Epworth. However, Channel 291A is ineligible for consideration because neither Keefer nor any other party has expressed an interest in a lower class channel at Epworth. On the contrary, Keefer has only expressed an interest in a Class C3 channel at Epworth.[5]

5. Since Channel 291A cannot be considered, there remain before us two alternative proposals: the substitution of Channel 257B1 for Channel 257A at Dodgeville, or the allotment of Channel 247C3 to Epworth. The results of a Commission engineering staff study indicate that no Class C3 channel other than Channel 247C3 can be allotted at Epworth; that no alternative adjacent Class B1 channel can be allotted at Dodgeville; and that no alternative Class A channel can be allotted at Dyersville that will accommodate both proposals. Accordingly, the resolution of this proceeding involves only a comparison of the allotment of a first local service at Epworth with the upgrade of an existing station at Dodgeville. The Epworth proposal, an allotment to a community of a first local service, is clearly preferable under applicable Commission allotment priorities.[6] Therefore, we will allot Channel 247C3 to Epworth.[7]

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 24, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, to read as follows:

---

[1] The communities of Dyersville, Iowa, and Dodgeville, Wisconsin, have been added to the caption.

[2] 4 FCC Rcd 6696 (1989).

[3] Public notice of Hamlin's counterproposal was given on December 20, 1989, Report No. 1804.

[4] In view of Design's concurrence to change channels, it was not necessary to issue an Order to Show Cause concerning the modification of the license for Station KDST-FM, Dyersville.

[5] *See* Part 2 of the Appendix that is contained in all Notices of Proposed Rule Making that are released by the Commission at the outset of all allotment proceedings involving the FM service. Since Channel 291A is ineligible for consideration, Keefer's Motion To Strike Design's Reply Comments is moot.

[6] *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982). The FM priorities are (1) first full-time aural service, (2) second full-time aural service, (3) first local service, and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3).

[7] Channel 247C3 can be allotted to Epworth in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction. The coordinates for Channel 247C3 at Epworth are 42-26-42 and 90-55-55.

City	Channel No.
Epworth, Iowa	247C3

7. IT IS FURTHER ORDERED, That Louise E. Hamlin's Petition For Rule Making (RM-7205) IS DENIED.

8. IT IS FURTHER ORDERED, That Margaret Keefer's Motion To Strike IS DISMISSED as moot.

9. The window period for filing applications for Channel 247C3, Epworth, Iowa, will open on **February 25, 1992,** and close on **March 26, 1992.**

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Belford V. Lawson, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-594

In the Matter of

Amendment of Section 73.202(b), RM-7142
Table of Allotments, RM-7318
FM Broadcast Stations.
(Harrisburg and Albemarle,
North Carolina)[1]

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 31, 1991; Released: January 9, 1992

By the Assistant Chief, Allocations Branch:

1. At the request of York David Anthony ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 12 (1990), proposing the allotment of Channel 224A to Harrisburg, North Carolina, as the community's first local FM service. Petitioner filed comments supporting the allotment and restating his intention to apply for the channel, if allotted. Piedmont Crescent Communications, Inc. ("Piedmont"), licensee of Stations WEGO(AM), Concord, North Carolina, and WABZ-FM, Albemarle, North Carolina, filed a counterproposal requesting the substitution of Channel 264A for Channel 265A at Albemarle, North Carolina, the reallotment of Channel 264A to Harrisburg, and the modification of its license for Station WABZ-FM accordingly.[2] Petitioner filed reply comments supporting Piedmont's counterproposal and restating his interest in Channel 224A.

2. Piedmont states that Station WABZ-FM operates with 3 kilowatts of power at 61 meters height above average terrain and is a grandfathered short-spaced station to first adjacent Station WPCM, Channel 266C, Burlington North Carolina, and to Station WWWB, Channel 262C High Point, North Carolina. As a result, it submits tha Station WABZ-FM's present interference-free service are encompasses only 396 square kilometers as compared to fully-spaced 3 kilowatt station's interference-free servic area of 1,809 square kilometers. Further, the station's 6 dBu contour covers an additional 203 square kilometer but this area receives interference from Station WPCM a Burlington. Piedmont states that it has unsuccessfully attempted to relocate the transmitter away from Burlingto and High Point. Therefore, it believes that the publi interest would be served by reallotting Station WABZ-FM to Harrisburg because it would eliminate the short spacings and enable the station to improve its facilitie while also providing Harrisburg with its first local F transmission service. Piedmont claims that the change i community would result in the provision of an additiona FM reception service to approximately 93,200 persons i Cabarrus and Stanly Counties, North Carolina, and additional service to Mecklenburg, Union, Iredell, Anson an Rowan Counties as well.

3. As to the aural service remaining at Albemarle Piedmont states that two full-time AM stations will continue to provide the community with local aural transmis sion service. In addition, Piedmont submits tha Albemarle receives a 60 dBu or greater signal from 1 FM stations and a 500 uV/m or better signal from 15 AM stations. Piedmont also submits that Station WABZ-F will continue to provide service to approximately one third of its present service area. Therefore, it argues tha reallotting Station WABZ-FM to Harrisburg will hav only a minimal effect on the diversity of program choices

4. We have reviewed the proposals before us and fin that the public interest would be served by allotting a least one FM channel to Harrisburg as the community' first local FM transmission and first local aural servic We believe that the public interest is best served b providing this first local FM transmission service by th

---

[1] The community of Albemarle has been added to the caption.

[2] Public Notice of Piedmont's counterproposal was given on March 15, 1990, Report No. 1810. Piedmont originally filed comments supporting the allotment of Channel 224A at Harrisburg and stating an intention to apply for the channel. These comments were withdrawn with the filing of its counterproposal.

A counterproposal is a proposal for an alternative and mutually exclusive allotment or set of allotments in the context of the proceeding in which the proposal is made. *See, e.g., Implementation of BC Docket 89-90 to Increase the Availability of FM Broadcast Assignments*, 5 FCC Rcd 931 (1990). In this case, there is no technical conflict between the two requests. However, the proposals are interrelated, as both proposals seek to provide Harrisburg with its first local FM transmission service. The grant or denial of either request would change the character of the remaining request. Therefore, we must determine whether the public interest is served by providing Harrisburg with its first local transmission service or its first and second local transmission service. Further, if only one allotment can b justified, a decision on whether the first local service should b provided by granting the drop-in proposal or the reallotmen proposal must be made. Therefore, we believe these proposal should be considered simultaneously. For administrative eas we have considered this proposal as a "counterproposal" for th purpose of giving public notice and setting forth a respons period.

After the record closed, the Trustees of Davidson Colleg ("Trustees"), licensee of noncommercial educational FM Statio WDAV, Davidson, North Carolina, filed an Informal Objectio to Piedmont's counterproposal. Petitioner and Piedmont jointl filed a Motion to Strike and Reply to Objection of Davidso College. However, in light of the Trustees' subsequent withdrawal of their Informal Objection, these pleadings will not b considered.

allotment of Channel 224A. There is no technical impediment or opposition to the allotment and petitioner has restated his intention to apply for the channel.[3]

5. We now turn to Piedmont's request to substitute Channel 264A for Channel 265A at Albemarle and reallot the channel to Harrisburg. The Commission evaluates the public interest benefits pursuant to the FM allotment priorities. These priorities are (1) first aural service, (2) second aural service, (3) first local service, and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982). Piedmont does not claim any first or second aural service benefit from the allotment of Channel 265A to Harrisburg and the community will receive its first local service when Channel 224A is activated. Therefore, Piedmont's request will be analyzed within the context of the fourth priority, other public interest matters.

6. In comparing the two communities, we find that Harrisburg has a 1980 U.S. Census population of 1,433 persons and is located 21.4 kilometers (13.3 miles) northeast of Charlotte, North Carolina. Harrisburg, which has no operating local aural transmission services, receives aural service from 13 FM and 10 AM services. Albemarle, on the other hand, has a population of 15,100 persons and is located 61.8 kilometers (38.4 miles) east of Charlotte. Albemarle receives local aural transmission service from one FM and two AM stations and reception service from 13 FM and 3 AM services. Based on our review of Piedmont's proposal, we find that the reallotment of Channel 264A to Harrisburg would offer public interest benefits. It would remove grandfathered short-spacings to Stations WPCM and WWWB and it would permit Station WABZ-FM to operate as a six kilowatt Class A station. In addition, a Commission staff engineering analysis indicates that the change in community, in conjunction with the operation of Station WABZ-FM as a six kilowatt facility, would permit Station WABZ-FM to serve some 327,012 additional persons in Rowan, Cabarrus, Mecklenburg, Stanly and Union Counties.

7. However, our analysis also indicates that removal of the station from Albemarle will result in a loss of service to some 56,396 persons in Stanly, Rowan, Davidson and Montgomery Counties. Furthermore, the vast majority of persons residing within the gain area, approximately 291,000 of the 327,012 persons, are in Cabarrus and Mecklenburg Counties, and are presently served by thirteen full-time aural reception services. Therefore, only 36,012 persons in the gain area are currently served by fewer than thirteen reception services. In addition, although Piedmont claims that it has been unsuccessful in improving service at its present location, we note that it has an application pending to relocate its transmitter and improve its facilities.[4] According to the engineering supplement to Piedmont's counterproposal,[5] the application fully complies with the Commission's Rules and, if granted, will enable Station WABZ-FM to operate with 6 kW of power and provide interference free service to an area of 1,000 square kilometers instead of its present 396 square kilometers.

8. The Commission has stated," The public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallotting of a channel from one community to another." *See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094, 7097 (1990); *see also Report and Order (Eatonton and Sandy Springs, Georgia; Anniston and Lineville, Alabama)*, 6 FCC Rcd 6580 (1991), *app. for rev. pend.* In this instance, the public interest benefits of Piedmont's proposal are counterbalanced by the fact that over 56,000 persons would lose Station WABZ-FM's signal. The benefits are further diminished by the fact that approximately 89 percent of the gain area that would result from the change in community is currently served by thirteen full-time aural reception services. We do not believe that the public interest would be served by allotting Harrisburg its second local FM transmission service by removing the third local aural transmission service from Albemarle, a community 10 times larger, and the consequent loss of reception service to over 56,000 persons. Therefore, we will deny Piedmont's proposal.

9. Channel 224A can be allotted to Harrisburg in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.3 kilometers (2.7 miles) northwest to avoid short-spacings to Station WKRR, Channel 222C, Asheboro, North Carolina, and Station WZNS, Channel 225C, Dillon, South Carolina.[6]

10. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 24, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Harrisburg, North Carolina	224A

11. The window period for filing applications will open on **February 25, 1992,** and close on **March 26, 1992.**

12. IT IS FURTHER ORDERED, That the counterproposal of Piedmont Crescent Communications, Inc., to substitute Channel 265A for Channel 264A at Albemarle, North Carolina, reallot Channel 265A to Harrisburg, North Carolina, and modify the license of Station WABZ-FM accordingly (RM-7318), IS DENIED.

---

[3] We recognize that the engineering portion of Piedmont's counterproposal was prepared by the petitioner and contains the statement that the counterproposal is to be considered "either in lieu of, or in addition to," petitioner's proposal. However, because the petitioner filed both comments and reply comments supporting the allotment of Channel 224A to Harrisburg and reiterated his intention to apply for the channel, we believe that this statement does not constitute a withdrawal of the petitioner's proposal.

[4] Piedmont's application has been accepted for filing (File No. BPH-900412IG).

[5] *See* Engineering Supplement to Piedmont's counterproposal, p.2, n.1-2.

[6] The coordinates for Channel 224A at Harrisburg are North Latitude 35-20-28 and West Longitude 80-41-30.

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**Before the
Federal Communications Commission
Washington, D.C. 20554**

MM Docket No. 91-296

In the Matter of

Amendment of Section 73.202(b), RM-6090
Table of Allotments,
FM Broadcast Stations.
(Christiansted, Virgin Islands)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 30, 1991; Released: January 9, 1992

By the Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making* in this proceeding, 6 FCC Rcd 5781 (1991), proposing the substitution of Channel 228B for Channel 228A at Christiansted, Virgin Islands, and modification of the construction permit of Station WAVI, Christiansted, Virgin Islands, to specify operation on Channel 228B.[1] St. Croix Wireless Co., Inc., permittee of Station WAVI and petitioner for the Channel 228B upgrade at Christiansted, filed comments reaffirming its interest in the proposed upgrade. No other comments or reply comments were filed.

2. We believe that the public interest would be served by the substitution of Channel 228B for Channel 228A at Christiansted, and modification of the Station WAVI construction permit to specify operation on Channel 228B, because it will provide Christiansted with a wide coverage area FM service. Channel 228B can be allotted to Christiansted in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.0 kilometers (2.5 miles) east.[2]

3. Accordingly, pursuant to the authority found in Section 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 24, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

Community	Channel No.
Christiansted, Virgin Islands	228B, 236B, 258B, 262B, 291B

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communication's Act of 1934, as amended, the construction permit of St. Croix Wireless Co., Inc., for Station WAVI, Christiansted, Virgin Islands, IS MODIFIED, to specify operation on Channel 228B in lieu of Channel 228A, subject to the following conditions:

> (a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for construction permit (FCC Form 301), specifying the new facility;
>
> (b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Rules; and
>
> (c) Nothing contained herein shall be construed to authorize a change in transmitter location or avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

---

[1] Station WAVI was formerly assigned to Channel 232A. On August 22, 1991, as a result of international negotiations, we modified the Station WAVI construction permit to specify operation on Channel 228A. *See Order (Christiansted, Virgin Islands)*, 6 FCC Rcd 5215 (1991). In view of this modification of the underlying construction permit, we are processing the petition for rule making as a request for a Channel 228A to Channel 228B upgrade.

[2] The reference coordinates for the Channel 228B allotment at Christiansted, Virgin Islands, are 17-44-07 and 64-40-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Telephone Companies — Transmittal No. 428

Revisions to Tariff F.C.C. No. 4

MEMORANDUM OPINION AND ORDER

Adopted: December 23, 1991; Released: December 26, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On September 30, 1991, the BellSouth Telephone Companies (BellSouth) filed Transmittal No. 428 to introduce LightGate Service. US Sprint Communications Company Limited Partnership (Sprint) petitioned to reject, or in the alternative, to suspend and investigate, BellSouth's transmittal on October 15, 1991. On October 25, 1991, BellSouth replied. For reasons stated below, we herein reject BellSouth's Transmittal 428.

2. LightGate Service is a restructure of BellSouth's existing high capacity DS3 service.[1] LightGate Service includes alternative route protection as a feature of the offering. BellSouth Tariff F.C.C. No. 4., Section 7.2.9(A). The tariff also provides that where alternate routing is not available, "a special construction charge for expediting construction of the alternately routed protection facilities will apply." *Id.*

3. In its petition, Sprint claims certain of the terms and conditions of LightGate Service are unreasonable in violation of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). Specifically, Sprint contends that BellSouth's application of special construction charges for alternate routing is discriminatory, and that customers may be unfairly penalized or forced to pay special construction charges. Sprint believes that these facilities should be part of the basic service. Sprint Petition at 5.[2] BellSouth does not address Sprint's allegation of discrimination; however, BellSouth maintains that its special construction alternative is reasonable. BellSouth Reply at 1112.

4. BellSouth Transmittal 428 specifies alternate routing as a feature of LightGate Service, and establishes charges for the service based on this feature. However, alternate routing will not be available to all Lightgate customers. The tariff nonetheless imposes the same rate for all customers, whether or not they receive alternate routing. We conclude that charging the same price to customers wh are offered different services is unreasonable discrimination for purposes of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a).

5. Accordingly, ITS IS ORDERED that BellSout Telephone Companies Tariff F.C.C. No. 4, Transmitta No. 428 IS REJECTED.

6. IT IS FURTHER ORDERED that US Sprint Communications Company Limited Partnership's petition t reject, or alternatively, to suspend and investigate IS GRANTED to the extent indicated above and otherwis IS DISMISSED without prejudice.

7. IT IS FURTHER ORDERED that BellSouth Telephone Companies SHALL ISSUE revisions to the tarif no later than five business days from the release date o this Order removing the rejected material from its tariff These revisions shall be scheduled to become effective o one day's notice.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

---

[1] Transmittal 428 establishes four options for DS3 service: 1 DS3 (LightGate 1), 3 DS3s (LightGate 2), 12 DS3s (LightGate 3), and 24 DS3s (LightGate 4). DS3s which are currently provided on a flat rate basis will be provided on a distance sensitive basis under LightGate. The per system Local Channel charge will include the first one-half air mile; and, additional charges will apply for each additional system one-half air mile. In addition, the six existing DS3 interoffice channel mileage bands will be replaced by three mileage bands. All exiting DS3 service customers will be converted to LightGate Service as of the effective date of Transmittal 428. BellSouth will not apply nonrecurring charges and will waive nonrecurring and termination charge "for DS3 rearrangements or changes in payment plans completed for existing customers during the ninety-day period following the effective date of LightGate service." Description an Justification (D&J) at 2.

[2] Sprint raises other arguments against Transmittal 428. I view of our decision to reject this transmittal on other grounds we need not discuss these arguments at this time.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 3405

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: December 24, 1991; Released: December 24, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 3405 to modify Virtual Telecommunications Network Service (VTNS) Option 34. VTNS modified Option 34 is described as a generally available offering designed and engineered for voice and data communications service among stations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. The revisions to Option 34: decrease the Basic Charge and modify the Service Elements included in the Basic Charge; increase the Minimum Annual charge; introduce an International Usage Volume Pricing Plan; modify certain Changes provisions; expand the Domestic Data Transmission Capability and Voice Transmission Capability Volume Pricing Plan; and make certain textual changes. AT&T Transmittal No. 3405 Description and Justification (D&J) at 2-5. Transmittal 3405 is scheduled to take effect on December 25, 1991.

2. MCI Telecommunications Corporation (MCI) filed a petition to reject the transmittal, and US Sprint Communications Company Limited Partnership (Sprint), Williams Telecommunications Group. Inc. (Williams), and Competitive Telecommunications Association (CompTel) filed petitions to reject or suspend and investigate the transmittal on September 11, 1991. AT&T filed a reply on September 20, 1991.

3. Petitioners argue that the Commission's action in CC Docket 90-132,[1] prohibits the Commission from accepting the revisions to Option 34.[2] In that Order, the Commission prohibited the bundling of inbound service in Tariff 12 Options but exempted existing options from the prohibition. Petitioners argue that the Commission intended to grandfather only those options on file as of August 1. MCI Petition at 4; Sprint Petition at 4-5; Williams Petition at 3; CompTel Petition at 2. The petitioners contend that the proposed revisions substantially alter Option 34, which they assert establishes that AT&T is using revisions as a way of avoiding the 800 bundling restriction. *See* MCI Petition at 3; Sprint Petition at 1; Williams Petition at 3; CompTel Petition at 1. Sprint and Williams allege that these modifications expand the scope of 800 service bundling in Option 34 and should not be permitted. *See* Sprint Petition at 2-3; Williams Petition at 3.

4. Williams argues that AT&T has failed to demonstrate that modified Option 34 is an integrated service package that is "unlike" its component services and thus has failed to justify the discrimination between this option and AT&T's other services. Williams Petition at 5-7. Williams asserts that even if Option 34 could qualify as an integrated service package, its rates vary without justification from other options under Tariff 12 and are thus discriminatory. *Id.* at 7-9. Williams further alleges Tariff 12 cannot be justified under the principles enunciated in the *Tariff 12 Remand* and *Sea-Land* decisions, claiming that those cases require that the tariff filing or contract provide sufficient information to ensure compliance with statutory antidiscrimination provisions. *Id.* at 9-13. Williams also insists that discounted prices, even if generally available, are not automatically reasonable under Section 202(a) of the Communications Act. *Id.* at 14-15.

5. AT&T replies that this filing makes no fundamental change to Option 34; the rate elements, rate structure and functionality remain essentially as originally filed. AT&T Reply at 1. AT&T also asserts that Transmittal 3405 makes no modifications whatever in the rates for any inbound capabilities. *Id.* at 2. AT&T also argues that grandfathering involves a balancing of interests, and allowing these "routine" tariff revisions to become effective will in no way impede the Commission's Docket 90-132 policies. *Id.* at 5-6. Rather, says AT&T, it will prevent inequity to the initial Option 34 customer who has made a substantial investment in its VTNS network in reasonable reliance on the continued availability of tariff revisions. *Id.* at 6.

6. AT&T argues that petitioners repeat the same arguments they have raised since the inception of Tariff 12, alleging that Option 34 is unlawfully discriminatory. *Id.* AT&T asserts that these claims have been made before, without success, and should be rejected here as being patently without merit. *Id.* at 6-7.

7. The Commission's *Interexchange Order* precluded AT&T from including any inbound service in new Tariff 12 options until 800 numbers become portable, but "grandfathered" existing Tariff 12 options containing such service. *Interexchange Order* at para. 149. The Commission reasoned that, while this action would inconvenience customers who were in negotiations for Tariff 12 options, such customers would not have to reconfigure their existing service offerings, which existing customers would be required to do in the absence of the grandfathering provision. *Id.* at n. 237. On November 25, 1991, the Commission released an Order extending the grandfathering

---

[1] Competition in the Interstate Interexchange Marketplace, Report and Order, 56 Fed. Reg. 55235 (Oct. 25, 1991), 6 FCC Rcd 5880 (1991) (*Interexchange Order*).

[2] These petitions were filed prior to the release of the *Interexchange Order*. Consequently, the discussions in the petitions rely upon the Commission's News Release and statements made at the August 1 meeting. AT&T claims that such reliance is improper. Since the *Interexchange Order* has been released, we will not address AT&T's concerns that the petitioners' claims were "premature at best."

provision of the *Interexchange Order* to include the additional Tariff 12 options that had been filed with the Commission before September 1, 1991.[3]

8. The Common Carrier Bureau has reviewed AT&T Transmittal No. 3405, the revisions, and the appropriate pleadings. We conclude that this transmittal must be rejected because these revisions substantially change Option 34, which includes inbound service, and are therefore inconsistent with the Commission's decision in CC Docket 90-132 to prohibit any further bundling of inbound services in Tariff 12 Packages and in contract-based tariffs.[4]

9. Accordingly, IT IS ORDERED that American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3405, IS REJECTED.

10. IT IS FURTHER ORDERED that the petition to reject American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3405, filed by MCI Telecommunications Corporation, and the petitions to reject or suspend and investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3405, filed by US Sprint Communications Company Limited Partnership, Williams Telecommunications Group, Inc., and Competitive Telecommunications Association, ARE GRANTED to the extent indicated herein, and otherwise ARE DENIED.

11. IT IS FURTHER ORDERED that such revisions should be filed within five working days of the release of this Order to be effective on one day's notice. For this purpose, Special Permission No. 91-1156 is assigned and Sections 61.58 and 61.59 of the Commissions Rules, 47 C.F.R. §§ 61.58, 61.59, are waived.

12. IT IS FURTHER ORDERED that American Telephone and Telegraph Company SHALL ISSUE revisions to the tariff no later than five business days from the release of this Order removing the rejected material and reinstating currently effective material. These revisions shall be scheduled to become effective on not less than one day's notice.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

---

[3] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Memorandum Opinion and Order, FCC No. 91-390, Mimeo 38289, (released Nov. 25, 1991).

[4] *See Interexchange Order, supra,* note 1; *id.*; *see also* American Telephone and Telegraph Company, Transmittal No. 3375, DA 91-1577 (released Dec. 19, 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-324

In the Matter of

Advanced Technology Cellular
Telecommunications

ORDER
Proceeding Terminated

Adopted: December 23, 1991; Released: December 23, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On November 8, 1991, we released orders directing certain operator service providers (OSPs) to demonstrate that their rates are just and reasonable and to begin announcing, at the beginning of each call, that their rates are available upon request.[1] The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) authorizes the Commission to impose either or both of these requirements on any OSP whose rates and charges filed pursuant to that Act appear, upon review, to be unjust or unreasonable. *See* 47 U.S.C. § 226(h)(2).

2. On December 18, 1991, Advanced Technology Cellular Telecommunications (ATCT) filed revisions to its informational tariff which reduce its rates substantially. In an accompanying report of sample prices, ATCT states that its total charge for a sample eight-minute call would be $6.58. In a report filed June 21, 1991, ATCT stated that its total charge for the same call under the rates then in effect would be $7.97. This represents a reduction of more than 17 percent from the highest total charge ATCT reported in its June 21 report. It was on the basis of that report and the rates ATCT then had in effect that we found that ATCT's rates appeared to be unjust and unreasonable. ATCT no longer charges the rates that prompted this proceeding. ATCT therefore need not provide further justification for its rates and charges at this time and is not required to announce, at the beginning of each call that it handles, that its rates are available on request.[2] We hereby terminate the captioned proceeding.

3. Accordingly, IT IS ORDERED that the proceeding initiated in CC Docket No. 91-324 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

---

[1] Advanced Technology Cellular Telecommunications, CC Docket No. 91-324, DA 91-1379, released Nov. 8, 1991 (Com.Car.Bur.); Cherokee Communications, Inc., CC Docket No. 91-325, DA 91-1380, released Nov. 8, 1991 (Com.Car.Bur.); Capital Network Systems, Inc., CC Docket No. 91-326, DA 91-1381, released Nov. 8, 1991 (Com.Car.Bur.); Com Systems, Inc. CC Docket No. 91-329, DA 91-1384, released Nov. 8, 1991 (Com.Car.Bur.); Conquest Telecommunications Services, CC Docket No. 91-327, DA 91-1382, released Nov. 8, 1991 (Com.Car.Bur.); CPS Operator Services, Inc., CC Docket No. 91-328, DA 91-1383, released Nov. 8, 1991 (Com.Car.Bur.); International Pacific, Inc., CC Docket No. 91-330, DA 91-1385, released Nov. 8, 1991 (Com.Car.Bur.); Peoples Telephone Company, Inc., CC Docket No. 91-331, DA 91-1386, released Nov. 8, 1991 (Com.Car.Bur.); South Texas Phone, Inc., CC Docket No. 91-332, DA 91-1387, released Nov. 8, 1991 (Com.Car.Bur.); TelTrust, Inc., CC Docket No. 91-333, DA 91-1388, released Nov. 8, 1991 (Com.Car.Bur.); U.S. Fiberline Communications, CC Docket No. 91-334, DA 91-1389, released Nov. 8, 1991 (Com.Car.Bur.); U.S. Long Distance, Inc., CC Docket No. 91-331, DA 91-1390, released Nov. 8, 1991 (Com.Car.Bur.). (*Rate Review Orders*).

[2] We emphasize that this Order does not represent an affirmative finding that ATCT's rates are just and reasonable.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies
Revisions to Tariff F.C.C. No. 2

Transmittal Nos. 499, 509, 557, and 573

Ameritech Petition for Waiver of
Part 69 of the Commission's Rules

Dedicated Network Access Lines,
Open Network Architecture

MEMORANDUM OPINION AND ORDER

Adopted: December 26, 1991; Released: December 27, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. In this Order, we consider a contingent Ameritech request of a waiver of Part 69 of the Commission's Rules, to tariff dedicated network access lines (DNALs) as switched access rate elements, as well as DNAL-related issues in a series of pending Ameritech transmittals. Other issues involving these transmittals are considered in a companion Order adopted today.

2. On December 18, 1990, the Ameritech Operating Companies (Ameritech) filed Transmittal 499 to initiate implementation of its Open Network Architecture (ONA) plan. By Transmittal 499, Ameritech sought to unbundle various access offerings into Basic Service Elements (BSEs) and Basic Serving Arrangements (BSAs).[1] Prior to that filing, Ameritech requested a waiver of Part 69 of the Commission's Rules, which specifies the access rate elements, to establish new rate subelements for many of its BSEs.[2] Ameritech did not request an access waiver for its dedicated network access lines (DNALs), a BSA intended to carry signalling information, because it assumed its DNALs were special access services. [3] D&J at 7-8. Subsequently, Ameritech filed several other tariff transmittals which, among other things, supplemented Ameritech's DNAL cost support. These transmittals preceded the Commission's *Part 69 ONA Order*, adopted on July 11, 1991, which adopted ONA-based modifications to the Part 69 Rules, and established a November 1, 1991, deadline for tariff filings. [4] On August 23, 1991, Ameritech filed Transmittal No. 557 to conform its ONA filing to the requirements of the *Part 69 ONA Order.*

3. DNALs provide dedicated channels between the customer's premises and an Ameritech central office and are used to transmit network information or network control information between an ESP and Ameritech's network. Ameritech includes two types of DNALs in its ONA tariff filings. The first type is the Circuit Switch Facility Control (CSFC) DNAL. [5] The second type consists of two subtypes, the Simplified Message Desk Interface (SMDI), and the Simplified Message Desk Interface/Expanded (SMDI/E) DNALs. [6] In addition, the Ameritech transmittal would offer various BSEs for use with DNAL BSAs.[7]

4. On October 4, 1991, the Bureau rejected a tariff transmittal filed by GTE, which sought to tariff as special access a service similar to Ameritech's DNALs.[8] On October 29, 1991, Ameritech amended Transmittal No. 557 to offer its DNALs as transport. On October 30, 1991, Ameritech filed a contingent petition for waiver of Part 69 of the Commission's Rules to establish subelements in the switched transport element for its DNALs. Specifically, Ameritech seeks a waiver to establish two rate elements, one for its CSFC DNAL, and one for its SMDI DNAL.

---

[1] For a discussion of the definitions of "BSA" and "BSE", see Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 6 FCC Rcd 4524, 4525 (1991) (*Part 69 ONA Order*).

[2] Ameritech Petition for Waiver of Sections 69.106(b) and 69.205(c) of the Commission's Rules, filed June 26, 1990.

[3] Ameritech Transmittal No. 557, D&J, at 4-6.

[4] The *Part 69 ONA Order* requires BOCs to offer one lineside and one trunkside switched access BSA. Additional switched access BSAs, or the unbundling of switched access elements other than an unbundling of a BSE, requires a Part 69 waiver. *Part 69 ONA Order*, 6 FCC Rcd at 4527.

[5] Ameritech Transmittal 499, D&J at 7-8. The CSFC DNAL can be either a two-wire or a four-wire analog voice grade channel functionally identical to those available under Ameritech's special access tariffs. The CSFC DNAL is used in combination with the Make Busy Arrangement (BSE). *Id.* at 18-19.

[6] Ameritech intends to offer a variety of DNALs with different transmission capacities. *See* Ameritech Transmittal No. 499, 4th Revised Page 454.24, 4th Revised Page 454.24.1. (issued December 18, 1990, currently scheduled to become effective December 31, 1991). Another variety of DNAL, a 56 kbps DS0 channel, can also be used to provide interconnection to Ameritech's CCS network. However, Ameritech's CCS interconnection DNALs are not at issue in this proceeding.

[7] SMDI is a DNAL used to deliver Remote Activation of Message Waiting and Call History Package Delivery as BSE services. Ameritech requires its customers to purchase a separate DNAL for each end office at which they wish to order those BSEs. Ameritech Transmittal 499, D&J at 7-8. SMDI/E is a DNAL used to deliver the same BSEs, but makes those BSEs available at any Ameritech end office connected to Ameritech's CCS network. Ameritech Transmittal 509, D&J at 1-3. The SMDI and SMDI/E DNALs are 1200 baud, four-wire voice channels with modem terminations not available with the Circui Switch Facility Control DNAL.

[8] General Telephone Operating Companies, Revisions to Tarif F.C.C. No. 1, 6 FCC Rcd 6109, (Com.Car.Bur. 1991) (*GTE LIDI Order*). The Bureau has also granted Southwestern Bell a waive of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, t establish a subelement in the Dedicated Transport rate elemen for a service similar to Ameritech's DNAL. Southwestern Bel Telephone Companies Petitions for Waiver of Part 69 of th Commission's Rules, 6 FCC Rcd 6095, 6099 (Com.Car.Bur. 1991 (*Southwestern LIDB Order*).

II. PLEADINGS

5. Ameritech states in its waiver petition that it is requesting a waiver to comply with the *Part 69 ONA Order.*[9] No oppositions to Ameritech's petition were filed. However, in its petition against Ameritech Transmittal 557, Ad Hoc argues that DNALs are not special access elements, but an inseparable element of switched communications, and that Ameritech's special access structure for its DNALs should be rejected.[10] Ameritech responds that no waiver is required for these BSAs because they should be classified by analogy to WATS lines and FX closed ends.[11] Other pleadings also pre-date the filing of this waiver petition, and argue that a waiver is necessary.[12]

III. DISCUSSION

A. Classification of DNALs

6. Ameritech's argument, that its proposed DNALs should be considered special access facilities, is not supported by Ameritech's description of these "DNALs," and the Part 69 Rules. Both of these DNALs are offered to transmit information relevant only to the provision of services using local switching. Transmission facilities associated with local switching are generally not classified as special access by the Part 69 Rules.[13] Ameritech's argument that these facilities should be considered special access by analogy to WATS and FX is not persuasive. These transmission facilities will not perform analogous functions.[14]

7. In addition, this issue has already been addressed. In the *Part 69 ONA Order,* the Commission stated that DNALs associated with switched services appear to require Part 69 waivers.[15] In the *Southwestern LIDB Order* and the *GTE LIDB Order,* the Bureau examined rate structures for facilities similar to Ameritech's DNALs and reached the same conclusions. Specifically, at issue in those proceedings was the proper classification of the 56 kilobit per second (kbps) DS0 line used to connect an interexchange carriers's common channel signalling network to a local exchange carrier's common channel signalling network. The Bureau found that, since those facilities are "used to deliver, or facilitate the delivery of, switched access service," those facilities should be tariffed as transport.[16]

8. Based on this test, it appears that the Ameritech DNALs are also transport. Ameritech notes that all the BSEs available with these DNALs "are provided using equipment in the central office which is assigned to the Local Switching category," and "work in conjunction with Switched Access services."[17] Since these BSEs are unbundled from the Local Switching category, the DNALs in question are "used to deliver, or facilitate the delivery of, switched access service." Hence, under the test established in the *GTE LIDB Order* and the *Southwestern LIDB Order,* these DNALs should be tariffed as switched access.

B. Waiver Request

9. The Commission in the *Part 69 ONA Order* explained that ONA was designed to promote efficient and innovative use of the network by enhanced service providers (ESPs), while preventing BOCs from discriminating against independent ESPs in favor of BOC ESP operations.[18] The Commission required that carriers creating an additional switched access BSA must obtain a waiver of Part 69.[19] In the *Part 69 ONA Order,* the Commission found also that DNALs designated as BSAs "appear to require" Part 69 waivers.[20] ONA should also promote efficient use of the network, both by Ameritech and independent ESPs, thus actively promoting the efficient provision of enhanced services.[21]

10. In this case, the use of DNALs permitting ESPs to transmit information directly into Ameritech's switched network may well provide valuable new capabilities to ESPs. It will also make it possible for Ameritech to provide the BSEs associated with those DNALs. Based upon these considerations, and the fact that the waiver petition is unopposed, we find good cause, pursuant to Section 1.3 of the Commission's Rules, for waiving Part 69 to permit the establishment of transport subelements for the two DNALs proposed by Ameritech.

C. Transport Issues

11. Ameritech argues in its waiver petition that the costs of these DNALs should be recovered on a flat, monthly basis. [22] In the *Transport Rulemaking,*[23] the Commission established three goals for transport pricing. Any rules governing transport rates should promote efficient use of facilities by allowing the LECs to price in the

---

[9] Ameritech Petition at 2. Ameritech characterizes its waiver petition as "contingent" upon a determination that a waiver for DNALs is "deemed necessary." Ameritech Petition at 1.

[10] Ad Hoc Petition (557) at 8-10. Ad Hoc filed its petition before Ameritech filed its waiver.

[11] Ameritech Transmittal 557, D&J, at 4-6, Ameritech Reply (September) at 22-23.

[12] Allnet Petition (557) at 7-8; Ad Hoc Petition (557) at 8-10. *See also* Ameritech Reply (September) at 22-23.

[13] *See, e.g.,* Sections 69.305, 69.111, and 69.112 of the Commission's Rules, 47 C.F.R. §§ 69.305, 69.111, 69.112.

[14] Ameritech has not demonstrated that "DNALs" have some shared characteristic that make them similar to each other and different from other kinds of facilities. In other words, it is not clear that DNALs possess some categorical "essence" which can be used to distinguish the class of all DNALs from the class of all non-DNALs.

[15] *Part 69 ONA Order,* 6 FCC Rcd at 4527 n. 29.

[16] *GTE LIDB Order,* 6 FCC Rcd at 6110; *Southwestern LIDB Order,* 6 FCC Rcd at 6099. Ameritech maintains that the Commission erred in the *Part 69 ONA Order,* and the Bureau erred in both the *GTE LIDB Order* and the *Southwestern Bell LIDB Waiver Order.* Specifically, Ameritech asserts that its DNALs should be tariffed as special access services. Ameritech Petition at 3-8. A petition for waiver of Part 69 of the Commission Rules to establish new rate subelements, however, is not the appropriate vehicle to request reconsideration of several prior Commission and Bureau Orders. *See* Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106; Section 1.741 of the Commission's Rules, 47 C.F.R. § 1.741.

[17] Ameritech Transmittal 499, D&J, at 5 n.2; Ameritech Transmittal 557, D&J, at 6.

[18] *Part 69 ONA Order,* 6 FCC Rcd at 4525.

[19] *Part 69 ONA Order,* 6 FCC Rcd at 4527.

[20] *Part 69 ONA Order,* 6 FCC Rcd at 4527 n. 29.

[21] Filing and Review of Open Network Architecture Plans, CC Docket 88-2, Phase I, 4 FCC Rcd 1, 16 (1988).

[22] Ameritech Petition at 3-7.

manner that best reflects the way in which costs are incurred, should be conducive to full and fair interexchange competition, and should not interfere with the development of access competition.[24] Flat rate charges for the DNALs before us satisfy those goals.

12. First, a flat rate appears to reflect the manner in which costs are incurred, since DNALs are dedicated to the use of a single customer, and its costs do not appear to be usage-sensitive. A flat rate should thus promote efficiency. Second, a flat rate will not interfere with full and fair interexchange competition, because these DNALs are designed primarily for use by ESPs and will be available to all. Their use by interexchange carriers is likely to be small and should not adversely affect competition. Finally, because these DNALs will probably not be used for local exchange service, a flat rate will not interfere with the development of access competition, and therefore, the Commission's third goal is also satisfied.

13. When the Commission applied these goals to the transmission services at issue in the *Transport Rulemaking*, it concluded that pricing should remain on a per-minute basis pending further Commission action. In reaching that conclusion, the Commission had to strike a balance among its three goals, since some goals would be satisfied by flat rate pricing, while other goals would be better served by a usage-based rate structure. In this case, however, there is no need to balance countervailing considerations in evaluating whether to price DNALs on a flat rate basis, since flat rate pricing satisfies all three of the Commission's goals. Thus, while the result differs from that of the Order in the *Transport Rulemaking*, pricing these DNALs on a flat rate basis does not conflict with the Commission's goals in the *Transport Rulemaking*. Finally, we note that no one opposed Ameritech's waiver request. We accordingly waive the requirements of that Order to the extent necessary to enable Ameritech to tariff the two DNALs discussed in this Order, *supra*. We note, however, that this waiver is subject to the Commission's ultimate decision in the *Transport Rulemaking* on the appropriate rate structure for transport.

IV. ORDERING CLAUSE

14. Accordingly, IT IS ORDERED that the petition for waiver of Part 69 of the Commission's Rules, filed by the Ameritech Operating Companies, to establish subelements in the transport rate element for its Circuit Switch Facility Control dedicated network access line and its Simplified Message Desk Interface dedicated network access line, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

---

[23] MTS and WATS Market Structure, CC Docket No. 78-72 and Transport Rate Structure and Pricing, CC Docket No. 91-213, released August 30, 1991 (*Transport Rulemaking*).

[24] *See Southwestern Bell LIDB Order*, 6 FCC Rcd at 6099-6100, paras. 31-33.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 27, 1991

COMPTEL FILES MOTION FOR INTERIM ORDER REQUIRING AT&T TO CEASE FURTHER DISTRIBUTION OF PROPRIETARY CIID CARDS AND PERMIT VALIDATION AND BILLING OF EXISTING CARDS

Pleading Cycle Established

COMMENTS: February 10, 1992
REPLY COMMENTS: March 11, 1992

On December 20, 1991 the Competitive Telecommunications Association (CompTel) and 19 of its member companies filed a motion, requesting that the Commission issue an interim order requiring American Telephone and Telegraph Company (AT&T) to halt the further issuance of proprietary calling cards in the Card Issuer Identifier (CIID) format and permit all interexchange carriers to validate and bill AT&T's proprietary CIID cards until the Commission releases a final decision in Docket No. 91-115.

Interested parties may file comments regarding the CompTel motion no later than **February 10, 1992.** Reply comments may be filed no later than **March 11, 1992.**

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with Downtown Copy Center, the Commission's duplicating contractor, at its office in Room 246, 1919 M Street, N.W., Washington, D.C. 20554, and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

Copies of the motion and other related documents may be obtained from Downtown Copy Center. The documents are also available for public inspection and copying in Room 518, 1919 M Street, N.W. Washington, D.C. 20554.

For further information, contact Wanda M. Harris, Tariff Division, Common Carrier Bureau, (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 3422

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: December 26, 1991; Released: December 27, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 3422 to modify Virtual Telecommunications Network Service (VTNS) Option 21. VTNS modified Option 21 is described as a generally available offering designed and engineered for voice and data communications service among stations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. The revisions to Option 21: increase the Basic Charge; modify certain Measured Charges; modify the Domestic Usage Volume Pricing Plan; modify the International Usage Volume Pricing Plan; increase the Minimum Annual Charge; modify the Installation Charge waiver and introduce a credit for Data Transmission Capability (DTC) access components used in conjunction with Measured Ports; modify the minimum Service Element requirement for Ports and DTCs; modify the Credit Allowance; delete Add/Delete charges for certain international Service Elements; delete Installation Charges for Authorization Codes; modify the DTC and Voice Transmission Capabilities (VTCs) Volume Pricing Plan; introduce an international DTC, VTC, and Satellite Transmission Capability Volume Pricing Plan; and delete certain Optional Features. AT&T Transmittal No. 3422 Description and Justification (D&J) at 25. Transmittal 3422 is scheduled to take effect on December 28, 1991.

2. MCI Telecommunications Corporation (MCI) filed a petition to reject Transmittal 3422, and US Sprint Communications Company Limited Partnership (Sprint), Williams Telecommunications Group, Inc. (Williams), and Competitive Telecommunications Association (CompTel) filed petitions to reject or suspend and investigate Transmittal 3422 on September 16, 1991. AT&T filed a reply on September 26, 1991.

3. Petitioners argue that the Commission's action in CC Docket 90-132,[1] prohibits the Commission from accepting the revisions to Option 21.[2] In that Order, the Commission prohibited the bundling of inbound service in Tarif 12 Options but exempted existing options from the prohibition. Petitioners argue that the Commission intende to grandfather only those options on file as of August 1 MCI Petition at 4; Sprint Petition at 4-5; Williams Petitio at 3; CompTel Petition at 2. The petitioners contend tha these revisions substantially alter Option 21, which petitioners assert establishes that AT&T is using revisions as way of avoiding the 800 bundling restriction. *See* MC Petition at 3; Sprint Petition at 1; Williams Petition at 3 CompTel Petition at 1. Sprint and Williams allege tha these modifications expand the scope of 800 service bundling in Option 21 and should not be permitted. *Se* Sprint Petition at 2-3; Williams Petition at 3.

4. Williams argues that AT&T has failed to demonstrat that modified Option 36 is an integrated service packag that is "unlike" its component services and thus has faile to justify the discrimination between this option an AT&T's other services. Williams Petition at 5-7. William asserts that even if Option 21 could qualify as an integrated service package, its rates vary without justificatio from other options under Tariff 12 and are thus discriminatory. *Id.* at 7-9. Williams further alleges Tariff 12 cannot be justified under the principles enunciated in th *Tariff 12 Remand* and *Sea-Land* decisions, claiming tha those cases require that the tariff filing or contract provide sufficient information to ensure compliance wit statutory anti-discrimination provisions. *Id.* at 9-13. Williams also insists that discounted prices, even if generall available, are not automatically reasonable under Sectio 202(a) of the Communications Act. *Id.* at 14-15.

5. AT&T replies that this filing makes no fundamenta change to Option 21; the rate elements, rate structure an functionality remain essentially as originally filed. AT& Reply at 1. AT&T also asserts that Transmittal 3422 make no modifications whatever in the rates for any inboun capabilities. *Id.* at 2. AT&T also argues that grandfatherin involves a balancing of interests, and allowing these "routine" tariff revisions to become effective will in no wa impede the Commission's Docket 90-132 policies. *Id.* a 5-6. Rather, says AT&T, it will prevent inequity to th initial Option 21 customer who has made a substantia investment in its VTNS network in reasonable reliance o the continued availability of tariff revisions. *Id.* at 6.

6. AT&T argues that petitioners repeat the same arguments they have raised since the inception of Tariff 12 alleging that Option 21 is unlawfully discriminatory. *Id* AT&T asserts that these claims have been made before without success, and should be rejected here as bein patently without merit. *Id.* at 6-7.

7. The Commission's *Interexchange Order* preclude AT&T from including any inbound service in new Tari 12 options until 800 numbers become portable, bu "grandfathered" existing Tariff 12 options containing suc service. *Interexchange Order* at para. 149. The Commissio reasoned that, while this action would inconvenience customers who were in negotiations for Tariff 12 option such customers would not have to reconfigure their existing service offerings, which existing customers would b

---

[1] Competition in the Interstate Interexchange Marketplace, Report and Order, 56 Fed. Reg. 55235 (Oct. 25, 1991), 6 FCC Rcd 5880 (1991) (*Interexchange Order*).

[2] These petitions were filed prior to the release of the *Interexchange Order*. Consequently, the discussions in the petitions rely upon the Commission's News Release and statemen made at the August 1 meeting. AT&T claims that such relian is improper. Since the *Interexchange Order* has been release we will not address AT&T's concerns that the petitioner claims were "premature at best."

required to do in the absence of the grandfathering provision. *Id.* at n. 237. On November 25, 1991, the Commission released an Order extending the grandfathering provision of the *Interexchange Order* to include the additional Tariff 12 options that had been filed with the Commission before September 1, 1991.[3]

8. The Common Carrier Bureau has reviewed AT&T Transmittal No. 3422, the revisions, and the appropriate pleadings. We conclude that this transmittal must be rejected because these revisions substantially change Option 21, which includes inbound service, and are therefore inconsistent with the Commission's decision in CC Docket 90-132 to prohibit any further bundling of inbound services in Tariff 12 packages.[4]

9. Accordingly, IT IS ORDERED that American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3422, IS REJECTED.

10. IT IS FURTHER ORDERED that the petition to reject American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3422, filed by MCI Telecommunications Corporation, and the petitions to reject or suspend and investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3422, filed by US Sprint Communications Company Limited Partnership, Williams Telecommunications Group, Inc., and Competitive Telecommunications Association, ARE GRANTED to the extent indicated herein, and otherwise ARE DENIED.

11. IT IS FURTHER ORDERED that such revisions should be filed within five working days of the release of this Order to be effective on one day's notice. For this purpose, Special Permission No. 91-1157 is assigned and Sections 61.58 and 61.59 of the Commissions Rules, 47 C.F.R. §§ 61.58, 61.59, are waived.

12. IT IS FURTHER ORDERED that American Telephone and Telegraph Company SHALL ISSUE revisions to the tariff no later than five business days from the release of this Order removing the rejected material and reinstating currently effective material. These revisions shall be scheduled to become effective on not less than one day's notice.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

---

[3] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Memorandum Opinion and Order, FCC No. 91-390, Mimeo 38289, (released Nov. 25, 1991).

[4] *See Interexchange Order*, *supra*, note 1; *id.*; *see also* American Telephone and Telegraph Company, Transmittal No. 3375, DA 91-1577 (released Dec. 19, 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COLUMBIA
COMMUNICATIONS
CORPORATION

File Nos. CSS-90-010
CSS-90-011

Application for Authority to Use
and Offer for Lease the C-Band
Transponders on the NASA TDRSS
Satellites at 41^0 W.L. and 174^0 W.L.
for the Provision of International
Fixed-Satellite Services

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: December 30, 1991; Released: December 31, 1991

By the Commission:

1. We have before us for consideration an application filed by Columbia Communications Corporation (Columbia) on August 6, 1990, for authority to use and offer for lease, for the provision of international and foreign domestic fixed-satellite services, twelve C-Band transponders located on National Aeronautics and Space Administration (NASA) Tracking and Data Relay Satellite System (TDRSS) spacecraft presently on station at the 41^0 West Longitude (TDRS-41) and 174^0 [1] West Longitude (TDRS-174) orbital locations. No oppositions to Columbia's application were filed. Pan American Satellite (PAS) filed comments regarding the potential for adverse interference between the TDRS-41 satellite and PAS's planned PAS-2 satellite at 43^0, but PAS stated that it is not seeking denial of the Columbia application.

2. On December 18, 1991, the Department of State advised the Federal Communications Commission that the obligations of the United States under Article XIV(d) of the INTELSAT Agreement have been satisfied with regard to the use of the TDRS-41 and TDRS-174 satellites for the provision of communications not interconnected with the public switched network.[2] For the reasons set forth below, we grant Columbia final authorization to construct, launch and operate the above-mentioned TDRS satellites.

I. THE APPLICATION

A. The TDRSS System

3. The TDRSS is owned by NASA, and is comprised of two operational spacecrafts and one spare spacecraft. The operational spacecrafts are the TDRS-41 satellite and the TDRS-174 satellite. Both TDRS-41 and TDRS-174 are on station, operational, and available for Columbia's use. The spare is an in-orbit spacecraft located at 171^0 West Longitude. Three separate and distinct payloads are incorporated into each of the spacecraft: S-Band, Ku-Band, and C-Band. The C-Band payload on each of the TDRSS satellites consists of twelve 36 MHz transponders utilizing 5.5 watt amplifiers. Each transponder is multi-directional and will operate on the following frequency bands: Earth-to-Space (Uplink) -- 5.925 to 6.425 GHz; and Space-to-Earth -- (Downlink) -- 3.700 to 4.200 GHz. Both the TDRS-41 and TDRS-174 satellites have a remaining estimated useful life of 12 years.

4. Pursuant to contract with NASA, Contel Federal Systems (Contel) is responsible for tracking, telemetry, and control (TT&C) functions for the TDRSS system and for data transmission to and from the S-Band and Ku-Band payloads on board. Contel provides these services through its TT&C facilities in White Sands, New Mexico. The TT&C functions of Columbia's TDRSS system C-Band capacity are fully encrypted and can only be operated via the existing TDRS Control Ground Station at White Sands, New Mexico. It operates on government frequencies at Ku-Band with an S-Band backup. The operating frequencies, polarization, bandwidth and power into the antenna are covered by a government allocation. No separate TT&C link for C-Band service is required or possible, and thus, the TT&C system for Columbia's TDRSS system C-Band transponders will not cause harmful interference to other authorized space and terrestrial radio stations. C-Band operations will be controlled by Columbia through its monitoring and control ground station facilities. Columbia will have the capability to turn the TDRSS satellite's C-Band transponders on and off through a communications interface with the TDRSS Ground Control Station. According to Columbia, Contel is also responsible for the TT&C functions of the TDRSS spacecraft C-Band capacity. However, access to and from the satellite's C-Band capacity, and monitoring of the C-Band payload for compliance with the Commission's requirements, is the responsibility of Columbia.

B. Proposed Use of the C-Band Services

5. Columbia's TDRS-41 C-Band services will be provided on a transatlantic basis, between the United States and Europe and Nothern Africa. Columbia's TDRS-174 services will be provided on a transpacific basis, between the United States and the Pacific Rim (from Hong Kong in the south to Korea in the north), Asia. Columbia contemplates that its services will be used primarily by broadcasters, news agencies, video programmers and cable systems, and multinational corporations and other international organizations.

6. Columbia explains that once it secures all necessary domestic and international regulatory approvals, it will have the exclusive right to provide services over these satellites' C-Band transponders. Columbia asserts that the C-Band transponders on each of the TDRSS satellites are equivalent in technical performance to the C-Band transponders on most of the U.S. domestic satellites currently in geostationary orbit over the United States. Each of the transponders operates in 36 MHz of bandwidth, and utilizes 5.5 watt amplifiers. Uplinking to the TDRSS C-Band capacity will be acheived through earth stations ranging from 5 meters to 11 meters in diameter, and downlinking will be acheived through the use of receive earth stations ranging from 2 meters to 5 meters in diameter.

7. Columbia will use the C-Band transponders to provide a variety of video, voice, and data transmission services -- including, but not limited to, high-speed facsimile,

video teleconferencing, computer-to-computer telecommunications, teletext, videotext, electronic mail, and data collection and distribution services. Columbia will market the TDRSS C-Band capacity on a non-common carrier, long-term lease basis. Further, Columbia intends to offer only space segment services. Columbia's customers will be responsible for making their own ground segment arrangements.

II. DISCUSSION

8. In reviewing an application for an international telecommunications satellite system separate from INTELSAT, we must determine whether the proposal is consistent with our *Separate Systems* decision[3]; that is, whether the applicant possesses the requisite legal, technical and financial qualifications, and whether the grant of the request would be in the public interest. We find that Columbia meets these requirements and issue it a final authorization to construct, launch and operate its proposed international satellite system.

9. *Freeze Order*. Columbia's application for the TDRS-41 satellite is subject to the Commission's *Freeze Order* imposed on the acceptance of any newly filed applications for space stations requesting orbital positions within the 30° W.L. and 60° W.L. orbital arc.[4] In 1985, the Commission instituted the "freeze" to create a static orbital deployment plan to facilitate technical coordination under the International Radio Regulations[5] and technical consultations under the INTELSAT Agreement[6] for the space stations for which applications already had been filed.[7] Columbia requests waiver of the Commission's freeze to permit the filing of its TDRS-41 satellite application.

10. Based upon the three factors set forth below, we find that the grant of Columbia's waiver request for the filing of the TDRS-41 satellite application will serve the public interest and will not frustrate the underlying purpose of the freeze.[8] First, Columbia is seeking to operate unused commercial capacity on TDRS-41, a satellite already in operation in a NASA-assigned orbital position. Second, the lease of the C-band capacity of the TDRS-41 satellite will provide approximately $61 million to the U.S. Federal Treasury over the term of the lease. Finally, Columbia states that it will accept a license to operate conditioned upon its cessation of use of the TDRS-41 satellite's C-band capacity once a U.S.-licensed domestic or separate system spacecraft is placed into service.[9]

11. We reaffirm in this decision that the presence of an in-orbit satellite is, in itself, a factor insufficient to justify waiver of the freeze.[10] In the instant application, however, we find that the public interest benefits presented here - the use of currently idle capacity on an in-orbit satellite to increase competitive options of customers, a significant infusion of funds into the U.S. Federal Treasury, and that Columbia is willing to have its authorization conditioned as discussed above - together persuade us that it is in the public interest to grant Columbia a waiver of the Commission's *Freeze Order*.

12. Regarding the last of the three factors, we find that a condition imposed on the use of the TDRS-41 satellite, subject to certain modifications, will safeguard the policy of the *Freeze Order* by eliminating any possible restriction on future orbital position or frequency band assignments that may be required for pending international satellite applications filed prior to the freeze.[11] *See* para. 15-17 *infra*. In this context, we will condition Columbia's authorization subject to its cessation of use of the TDRS-41 satellite immediately upon Commission request. Additionally, we will not take into consideration Columbia's conditionally assigned frequency bands and orbital slot for purposes of future consultations necessary for any pending satellite system application filed prior to the freeze.

13. *Technical Qualifications*. Technical consultation has been completed between INTELSAT and the United States, the United Kingdom and Hong Kong. We will condition Columbia's license on operation of the facilities in accordance with the parameters and conditions agreed to during the INTELSAT technical consultation.

14. Regarding the potential interference with PAS, we are encouraged that PAS and Columbia appear to have resolved their technical differences.[12] In this context, we note that the Commission has stated on numerous occasions in the context of both international and domestic fixed-satellite service that we expect satellite operators to resolve potential interference problems because they can best weigh the technical and economic tradeoffs involved in negotiating a coordination agreement.[13] The Commission will intervene in the event the parties demonstrate that a coordination agreement cannot be reached after an exhaustive good faith effort. Finally, we note that we continue to retain jurisdiction to impose operational constraints on an operator's system as necessary.

15. *Full Frequency Reuse*. Columbia has satisfied all the technical requirements of the *Separate Systems* decision, except for full frequency reuse. Each of Columbia's proposed satellites is equipped with 12 operational 36 MHz receive and transmit channels. In its application, Columbia seeks a waiver of the Commission's full frequency reuse requirement. The full frequency reuse requirement is a technical "performance" or "capacity" standard based on certain assumptions concerning the characteristics of a reasonable state-of-the-art space station.[14] The full frequency reuse requirement was established by the Commission to ensure that the orbit/spectrum resource is used in the most efficient manner. In the *Separate Systems* decision, however, the Commission recognized that this type of frequency reuse may be impossible or inappropriate for some systems. Therefore, the Commission explicitly stated that any applicants proposing not to employ such reuse demonstrate why the reuse criteria should or should not apply to them. It further stated that such applications would be considered on a case-by-case basis.[15]

16. We find that grant of Columbia's request for waiver of the reuse requirements is appropriate under the circumstances of this case. In the Pan American Satellite Corporation *Modification Order*,[16] the Commission stated that it would view a waiver of the full frequency reuse requirement favorably as long as the non-compliant satellite is making some use of the orbit/spectrum resource which otherwise would not be used, and as long as such use does not preclude the use of the resource by a satellite which meets the Commission's full frequency reuse requirements. Judged under these criteria, we find that the operation of the C-Band capacity on the TDRSS satellites would put to use otherwise idle orbital/spectrum resource. Moreover, since the satellites are already launched and occupying an orbital slot, it would be impossible for Columbia to redesign the communications system of the TDRSS satellites in order to meet the full frequency reuse requirements. Finally, grant of a waiver of the full fre-

quency reuse requirement in this case would not preclude the use of the resource by a satellite which meets the Commission's requirements.

17. Finally, the grant of this waiver of the Commission's full frequency reuse requirement is conditional. Should the Commission find that another satellite facility operating on the subject frequencies would be able to meet the full frequency reuse requirements, and that such operation would be incompatible with the operation of the TDRSS satellites, Columbia would be required to cease operation on those frequencies.[17]

18. *Legal Qualifications*. The Commission already has found that Columbia possesses the necessary legal qualifications to be a Commission licensee.[18] Columbia proposes no change in ownership or control of its separate system. Therefore, we find Columbia legally qualified under Title III of the Communications Act to provide international satellite services.

19. *Financial Qualifications*. Columbia notes that the Columbia TDRSS system C-Band capacity has been constructed and successfully launched. Columbia thus states that, accordingly, it will not incur any construction or launch costs in connection with this application. Columbia's costs for operating the TDRSS system for one year, including the cost of acquiring and operating the Columbia monitoring station, as discussed in the application, are $11,512,000.

20. In the *Separate Systems* decision, the Commission adopted the domestic satellite financial qualification standard,[19] with certain procedural variations, for review of international separate satellite systems applications. The Commission held that an international separate satellite system applicant must demonstrate its financial preparedness to assume the first year's costs and liabilities involved in constructing, launching and operating its satellite system for one year in order to be granted final authorization for its proposed system. The Commission applied this standard in authorizing PAS and Orion Satellite Corporation to construct, launch and operate separate satellite systems.[20]

21. In the *Separate Systems* decision, the Commission stated that, generally, an otherwise qualified applicant will be granted permission to begin construction of the proposed system only upon a demonstration of: (1) the estimated costs of proposed construction and launch, and any other initial expenses for the proposed space stations; (2) the estimated operating expenses for one year after launch of the proposed space stations; and (3) the applicant's current financial ability to meet both the costs of construction and launch and operating expenses for one year after launch.[21] The Commission further stated that in order to meet the third requirement, new entrants[22] " . . . shall submit an exhibit indicating the estimated income or revenues anticipated from the proposed operation of the satellite system necessary to meet the estimated costs of construction, launch and operation, along with any additional information required by the Commission which would include: (1) scheduled debt financing or stock issues; (2) established lines of credit; or (3) other forms of internal financing."[23]

22. In this context, Columbia states that it will pay NASA $61,386,576, in six annual payments, for the lease of TDRS-41 and TDRS-174 capacity. Columbia asserts that it can therefore project with a high degree of accuracy its major cost during the first year of operation -- the annual lease payment of approximately $10.2 million. Columbia further states that it does not intend to provide earth station services. Columbia intends to lease transponder capacity, on a long-term basis; it also intends that its customers will provide their own earth station uplinks and downlinks. Accordingly, Columbia maintains that other costs of providing TDRS-41 and TDRS-174 service are limited to monitoring use of the system, legal and technical support functions, administrative costs, and other reasonable and customary miscellaneous business expenditures. At present, Columbia estimates that its annual costs, other than lease payments to NASA, will range between $ 1.3 and $2.2 million.

23. We find that Columbia has satisfied the Commission's final financial qualifications requirement. On December 20, 1991, Columbia filed a commitment letter from TRW to Columbia that states that TRW confirms that it will provide Columbia with the sum of $12.4 million in return for Columbia's agreement to enter into a long-term lease of some of the C-Band transponders on the Columbia-TDRS satellites located at 41^0 West and 174^0 West longitude. The sole condition placed on TRW's agreement to provide these funds to Columbia is Columbia's receipt of final FCC authorization to construct, launch and operate the C-Band portions of the TDRS satellites.[24] Additionally, Columbia submitted a consolidated financial statement of TRW that shows that, as of December 31, 1990, TRW had assets totalling $2.23 billion, with cash and equity equivalents totalling $72 million, enough to meet its $12.4 million commitment to Columbia.

24. *Public Interest Benefits*. In the *Separate Systems* decision, the Commission found that separate systems would stimulate technological innovation and service development, improve network efficiencies, reduce user costs and create new business and trade opportunities through international communications.[25] The Commission concluded that separate systems will enable users with special communications needs to meet those needs with new methods for packaging and transmitting information.

25. Columbia notes that the market for U.S. programming overseas continues to grow steadily, and U.S. cable systems and broadcast entities are looking for new markets into which to expand. Columbia states that it is the right time to be bringing the TDRS-41 satellite's C-Band capacity on line due to its excellent coverage of the newly liberalized countries of Eastern Europe. Further, Columbia asserts that the TDRSS system C-Band capacity will also be appropriate for numerous private corporations and other data services users that desire the opportunity to custom-tailor their services in a manner not possible through INTELSAT. By selling and leasing its space segment capacity on a non-tariffed basis, Columbia will offer its customers the ability to make long-term plans for the use of the facilities and will be able to reduce user costs. It will offer customers who purchase capacity the added benefit of financial investments. Columbia's TDRSS system C-Band facilities may also serve to alleviate C-Band capacity shortages in overseas domestic markets. Columbia is also prepared to lease capacity for foreign domestic communications as the market may demand.

26. Columbia has decided that it will not offer any gateway earth station services. Its capacity will be space segment only. Columbia notes that, at some point, as data services become a major part of Columbia's business -- particularly in the Pacific Ocean Region -- Columbia may elect to provide a gateway earth station facility for access

to the TDRSS system's C-Band capacity. At present, the only earth station Columbia will provide is the monitoring station which it will operate to ensure that the TDRSS system C-Band capacity is performing in accordance with Commission requirements. Based on these and the above considerations, we find that the grant of this application will serve the public interest

III. ORDERING CLAUSES

27. We find that Columbia is legally, financially and technically qualified, under Title III of the Communications Act, and the *Separate Systems* decision, to hold final authority to provide its proposed international fixed-satellite services.[26]

28. Accordingly, IT IS ORDERED pursuant to Sections 4(i) and (j), 308, 309, and 319 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 4(i) and (j), 308, 309 and 319, that the application filed by Columbia Communications Corporation, File Nos. CSS-90-010 and CSS-90-011, IS GRANTED and Columbia Communications Corporation IS AUTHORIZED to operate the C-band capacity on the in-orbit TDRS-41 and TDRS-174 satellites for the purpose of providing international communications services, subject to the terms and conditions set forth below.

29. IT IS FURTHER ORDERED that this Order only applies to Columbia's provision of service between the United States and the United Kingdom and Hong Kong in accordance with the parameters summarized in the INTELSAT Board of Governors document entitled "Article XIV(d) Consultation Concerning the Proposed Use of the Comumbia Satellite System", BG-90-67E, 27 August 1991. Any communications between the United States and other locations will require additional consultations under Article XIV(d) of the INTELSAT Agreement.

30. IT IS FURTHER ORDERED that the authority granted herein is specifically conditioned on operation of the Columbia networks in accordance with the technical parameters and conditions described in the INTELSAT Board of Governors document entitled "Article XIV(c) and (d) Technical Consultations Concerning the Columbia Satellite System", BG 90-33E, 23 August 1991 and the attachments thereto.

31. IT IS FURTHER ORDERED that the operation of the TDRSS satellites' C-band capacity is limited to the provision of services through the sale or long-term lease of transponders or space segment capacity for communications not interconnected with the public switched network (except for emergency restoration service).

32. IT IS FURTHER ORDERED that the Commission shall retain jurisdiction over the use of all space segment within Columbia's system to ensure compliance with the conditions of this authorization and with the Commission's rules, regulations and policies.

33. IT IS FURTHER ORDERED that Columbia shall comply with the Commission's *Separate Systems* decision, 101 F.C.C. 2d 1046 (1985), as amended in the reconsideration orders, FCC 84-144 (released April 17, 1986) and FCC 86-471 (released October 31, 1986).

34. IT IS FURTHER ORDERED that Columbia is temporarily assigned the orbital location at 41^0 West Longitude and 174^0 West Longitude for operation of the C-band capacity on the TDRSS satellites.

35. IT IS FURTHER ORDERED that the temporary assignment of any orbital locations to Columbia Communications Corporation is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right of the use of the orbit or spectrum. Such a change may be ordered, *inter alia*, in the event that the national security or the public interest so requires, or to implement any of the objectives or policies set forth in the Commission's *Separate Systems* order, 101 FCC 2d 1046 (1985). Neither this authorization nor any right granted by this authorization, shall be transferred, assigned or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

36. IT IS FURTHER ORDERED that Columbia shall file with the Commission copies of any operating agreements entered into by Columbia within 30 days of execution.

37. IT IS FURTHER ORDERED that Columbia Communications Corporation's request for waiver of the Commission's *Freeze Order* IS GRANTED subject to the condition that Columbia shall be required to cease use of the TDRS-41 satellite immediately upon the request of the Commission.

38. IT IS FURTHER ORDERED that Columbia Communications Corporation's request for a waiver of the full-frequency-reuse requirement IS GRANTED subject to the condition that Columbia shall be required to cease operation of its C-band capacity if the Commission finds that operation of another satellite facility complying with the full frequency reuse requirements would be incompatible with the operation of the TDRSS satellites on these frequencies.

39. Columbia Communications Corporation is afforded 45 days from the date of release of this order to decline this authorization as conditioned. Failure to respond within that period will constitute formal acceptance of the authorization as conditioned.

40. This Memorandum Opinion, Order and Authorization is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Partly in order to facilitate Columbia's consultation with INTELSAT, NASA agreed to relocate the Pacific Ocean Region satellite to 174^0 from its original position at 174.3^0 West Longitude (W.L.). Letter to Wendell R. Harris, Assistant Bureau Chief/International, Common Carrier Bureau from Raul R. Rodriguez, Counsel to Columbia (December 9, 1991).

[2] Letter from Steven W. Lett, Deputy Director for Satellite and Cable Policy, Bureau of International Communications and Information Policy, to George Li, Chief, International Facilities Division, Common Carrier Bureau (December 18, 1991).

[3] *Establishment of Satellite Systems Providing International Communications (Separate Systems)*, 101 FCC 2d 1046 (1985), *on recon.*, 61 R.R. 2d 649 (1986), *further recon.*, 1 FCC Rcd 439 (1986).

[4] *See Processing of Pending Applications for Space Stations to Provide International Communications Service*, FCC 85-296 (released June 6, 1985)(hereinafter *Freeze Order)*. Specifically, the bands to which the order applies are the 4, 6, 11, 12 and 14 Ghz bands. Columbia correctly asserts that the portion of its application which requests authority to operate the C-band capacity on the TDRS-174 satellite is not subject to the *Freeze Order*.

[5] Radio Regulations, Geneva 1979, ratified by the United States in September, 1983.

[6] INTELSAT Intergovernmental Agreement, August 20, 1971, 23 U.S.T. 3813, TIAS No. 7532.

[7] *Freeze Order, supra* at para. 3.

[8] The U.S. Court of Appeals for the District of Columbia stated that a general rule, deemed valid because its overall objectives are in the public interest, may not be in the "public interest" if extended to an applicant that proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

[9] Application, Section II-12.

[10] *Systematics General Corporation*, 2 FCC Rcd 5406 (1987). We distinguish Columbia's waiver request from the relief sought by Systematics General Corporation (SGC) by the unique combination of factors present in the instant waiver request. In weighing the balanced policy goals of the freeze against the public interest benefits asserted by SGC in lifting the freeze, the balance was in favor of adherence to the freeze policy. By contrast, due to the particular factors in Columbia's request (discussed in the text), the public interest benefits outweigh adherence to the freeze policy, especially in light of the strict conditions imposed herein.

[11] *Columbia Communications Corporation*, File No. 932-DSS-P/LA-84.

[12] *See* Letter from Philip A. Rubin, Principal Technical Consultant and David K. Aylward, Columbia to Wendell R. Harris, Assistant Bureau Chief, International, Common Carrier Bureau, FCC (March 11, 1991).

[13] *See Pan American Satellite*, 6 FCC Rcd at 5133; *Orion Satellite Corp.*, 5 FCC Rcd 4937 (1990).

[14] *See Licensing of Space Stations in the Domestic Fixed - Satellite Service*, 54 R.R. 2d 577 (1983)(hereinafter *Reduced Orbital Spacing)*. In this decision, the Commission set forth its full frequency reuse standards for domestic satellites in terms of a satellite's capacity. The Commission required that a 4/6 GHz space station have a capacity equivalent to that which is provided by a space station having transponders that use 864 MHz of a 1000 MHz (with two-times frequency reuse) assignment and provide a total power of 192 watts. A 12/14 GHz space station is required to have a capacity equivalent to a space station having transponders that use 860 MHz of a 1000 MHz (with two-times frequency reuse) assignment and provide a total power of 400 watts.

[15] *See Separate Systems*, 101 FCC 2d at 1172.

[16] *Pan American Satellite Corporation*, FCC 86-257 at para. 47 (released May 21, 1986).

[17] We grant Columbia a waiver of the full frequency reuse requirements conditioned on these terms rather than on a special temporary authorization. *Compare Systematics General Corporation*, 2 FCC Rcd 5406 (released August 31, 1987); *Systematics General Corporation*, DA 87-1699 (adopted November 19, 1987). We make this decision taking into account the fact that the separate systems industry is not established and a waiver would serve as a means of encouraging industry growth. Further, since special temporary authorizations cover six month periods, we believe that a grant of a waiver will better serve the public interest by avoiding otherwise adverse effects on Columbia's efforts to market the satellite capacity on a long-term basis. *See* Pan *American Satellite Corporation*, 3 FCC Rcd 677, n. 18 (1988).

[18] *See Columbia Communications Corporation*, 1 FCC Rcd 1202, 1203 (1986).

[19] *See also Separate Systems*, Reconsideration Order, 61 R.R. at para. 40.

[20] *See Pan American Satellite*, 2 FCC Rcd 7011 (1987), *Orion Satellite Corp.*, 6 FCC Rcd 4201 (1991).

[21] *See Separate Systems*, 101 FCC 2d at 1171, para 234.

[22] The Commission distinguishes between two classes of entities for purposes of demonstrating the applicant's current finanial ability to meet both the costs of construction and launch and operating expenses for one year after launch. The first consists of established entities with existing assets and operating income sufficient to meet the estimated construction, launch and operating costs. For these entities, the Commission requires the submission of a verified balance sheet together with supporting documentation showing that current assets and existing operating income are sufficient to meet estimated costs. The second group identified by the Commission consists of "newly established entities unable to submit a current balance sheet." *Id.* at 1172, para. 235. Columbia falls into this latter class.

[23] *Id.*

[24] *See* Letters from H. E. Cypert, Vice President, TRW Space and Technology Group to Clifford Laughton, President, Columbia (December 20 and 24, 1991).

[25] *See Separate Systems*, 101 FCC 2d at 1177.

[26] In granting Columbia final authorization pursuant to the *Separate Systems* decision, we note that one of the conditions mandated by that decision, namely, the prohibition of interconnection by separate systems with the public switched network, is currently under review by the Commission. *See* Letter from James A. Baker, II, Secretary of State, and Robert Mosbacher, Secretary of Commerce, to Alfred C. Sikes, Chairman, FCC (November 27, 1991). Pending the outcome of that review, we will continue to disallow such interconnection, except for emergency restoration service and except as otherwise authorized by this Commission.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE & WIRELESS
COMMUNICATIONS, INC.,
Complainant,

v.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	E-90-428
BELL TELEPHONE COMPANY OF PENNSYLVANIA,	E-90-429
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	E-90-430
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	E-90-431
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	E-90-432
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	E-90-433
THE DIAMOND STATE TELEPHONE COMPANY,	E-90-434
NEW JERSEY BELL TELEPHONE COMPANY,	E-90-435
NEW YORK TELEPHONE COMPANY,	E-90-436
CAROLINA TELEPHONE AND TELEGRAPH COMPANY,	E-90-437
INDIANA BELL TELEPHONE COMPANY,	E-90-439
MICHIGAN BELL TELEPHONE COMPANY,	E-90-440
OHIO BELL TELEPHONE COMPANY,	E-91-19
WISCONSIN BELL, INC.,	E-91-20
PACIFIC BELL TELEPHONE COMPANY,	E-91-21
NEVADA BELL TELEPHONE COMPANY,	E-91-22
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-91-23
SOUTH CENTRAL BELL TELEPHONE COMPANY,	E-91-24
SOUTHWESTERN BELL TELEPHONE COMPANY,	E-91-25
CINCINNATI BELL TELEPHONE COMPANY and	E-91-26
GTE SOUTHWEST, INC.,	E-91-27

Defendants.

ORDER

Adopted: December 20, 1991; Released: January 8, 1992

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On January 25, 1991, the Enforcement Division, Common Carrier Bureau, issued an Order holding the captioned cases in abeyance pending further Commission consideration of certain issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit.[1] *Order*, 6 FCC Rcd 697 (Com.Car.Bur. 1991).

2. On October 15, 1991, the Commission adopted a decision acting upon the Court's remand. *Decision on Remand*, CC Docket No. 86-497, FCC 91-324 (released October 31, 1991) (*Rate Base Decision*). In light of the Commission's *Rate Base Decision*, there is no further need to hold the captioned cases in abeyance. Accordingly, the pleading and discovery schedules will recommence upon release of this Order. Dates for filing pleadings should be calculated, based on the timetable provided in the rules, from the release date.[2]

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

---

[1] *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990).

[2] For example, in a proceeding where no answer has been filed, an answer would be due 30 days from release of this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI COMMUNICATIONS CORPORATION,
Complainant,

v.

CINCINNATI BELL TELEPHONE COMPANY, E-90-423
NEW YORK TELEPHONE COMPANY and E-90-442
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, E-90-443
Defendants.

ORDER

Adopted: December 20, 1991; Released: January 8, 1992

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On January 25, 1991, the Enforcement Division, Common Carrier Bureau, issued an Order holding the captioned cases in abeyance pending further Commission consideration of certain issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit.[1] *Order*, 6 FCC Rcd 696 (Com.Car.Bur. 1991).

2. On October 15, 1991, the Commission adopted a decision acting upon the Court's remand. *Decision on Remand*, CC Docket No. 86-497, FCC 91-324 (released October 31, 1991) (*Rate Base Decision*). In light of the Commission's *Rate Base Decision*, there is no further need to hold the captioned cases in abeyance. Accordingly, the pleading and discovery schedules will recommence upon release of this Order. Dates for filing pleadings should be calculated, based on the timetable provided in the rules, from the release date.[2]

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

---

[1] *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990).

[2] For example, in a proceeding where no answer has been filed, an answer would be due 30 days from release of this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICALL SYSTEMS OF LOUISVILLE,
Complainant,

v.

CINCINNATI BELL TELEPHONE COMPANY,	E-91-006
SOUTH CENTRAL BELL TELEPHONE COMPANY,	E-91-007
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-91-008
SOUTHWESTERN BELL TELEPHONE COMPANY,	E-91-009
INDIANA BELL TELEPHONE COMPANY,	E-91-010
MICHIGAN BELL TELEPHONE COMPANY,	E-91-011
NEW YORK TELEPHONE COMPANY,	E-91-012
OHIO BELL TELEPHONE COMPANY,	E-91-013
BELL TELEPHONE COMPANY OF PENNSYLVANIA and	E-91-014
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	E-91-015

Defendants.

ORDER

Adopted: December 20, 1991; Released: Janaury 8, 1992

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On January 25, 1991, the Enforcement Division, Common Carrier Bureau, issued an Order holding the captioned cases in abeyance pending further Commission consideration of certain issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit.[1] *Order*, 6 FCC Rcd 698 (Com.Car.Bur. 1991).

2. On October 15, 1991, the Commission adopted a decision acting upon the Court's remand. *Decision on Remand*, CC Docket No. 86-497, FCC 91-324 (released October 31, 1991) (*Rate Base Decision*). In light of the Commission's *Rate Base Decision*, there is no further need to hold the captioned cases in abeyance. Accordingly, the pleading and discovery schedules will recommence upon release of this Order. Dates for filing pleadings should be calculated, based on the timetable provided in the rules, from the release date.[2]

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

---

[1] *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990).

[2] For example, in a proceeding where no answer has been filed, an answer would be due 30 days from release of this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
CICI, INC. d/b/a
IDB INTERNATIONAL
GTE HAWAIIAN
TELEPHONE COMPANY, INC.
MCI INTERNATIONAL, INC.
TRT/FTC COMMUNICATIONS, INC.
US SPRINT COMMUNICATIONS
COMPANY LIMITED
PARTNERSHIP, and
WORLD COMMUNICATIONS, INC.

File No. SCL-91-001

Joint Application for a License to Land
and Operate a High Capacity Digital
Submarine Cable System Extending Between
the United States, Germany and the
Netherlands

CABLE LANDING LICENSE

Adopted: December 19, 1991; Released: January 10, 1992

By the Commission:

1. On May 28, 1991 seven United States International Service Carriers (hereinafter referred to as Joint Applicants)[1] filed the above-captioned Joint Application[2] requesting authority pursuant to "An Act Relating to the Landing and Operation of Submarine Cables in the United States", 47 U.S.C. §§34-39, to land and operate a high capacity digital submarine cable system known as TAT-10 Cable System (TAT-10), extending from the United States mainland to Germany and the Netherlands. A Petition to Deny the application was filed by Submarine Lightwave Cable Company (SLC); the Joint Applicants[3] filed an Opposition in response, to which SLC filed a Reply and Clarification. The German Ministry for Post and Telecommunications (Ministry) intervened in this proceeding by submitting to the Department of State a letter, which was made part of the record.[4] SLC responded to the Ministry's letter.[5] The Ministry then submitted a second letter[6], which in turn prompted a further response from SLC.[7]

The TAT-10 Cable System

2. TAT-10 will land at Green Hill, Rhode Island in the U.S. and extend to Norden, Germany and then Alkmaar, Netherlands. The proposed cable system consists of six segments. Segments A, C and F are, respectively, the cable stations at Green Hill, Rhode Island (U.S.), Norden, Germany and Alkmaar, Netherlands. Segment E is the intermediate repeater station at the Island of Terschelling, Netherlands, located between Segments C and F. Segment B consists of the whole of the submarine cable system, provided between and including the System Interfaces at Segments A and C. Segment D consists of the whole of the submarine cable system, provided between and including the System Interfaces at Segments C and F.

3. TAT-10, comprised of three fiber pairs, will employ 1.55 micron laser technology operating at 560 Mbit/s on each working fiber pair. The capacity on each fiber pair is provided in four 140 Mbit/s streams, with each 140 Mbit/s stream containing 63 Minimum Investment Units (MIUs).[8] The capacity of TAT-10 will be 252 MIUs per fiber pair. For voice services, digital circuit multiplication system (DCMS) can be employed to derive approximately 150 virtual voice paths from each MIU.

4. The proposed cable system will be owned by the Joint Applicants and a number of foreign telecommunications entities. The telecommunications entities in the following locations will participate as owners: Australia, Austria, Belgium, Canada, Denmark, Finland, Germany, Hong Kong, Ireland, Japan, Korea, Mexico, the Netherlands, New Zealand, Norway, the Philippines, Poland, Singapore, Spain, Sweden, Switzerland, Taiwan, Turkey and the United Kingdom.

Pleadings

5. SLC filed a Petition to Deny the Joint Applicants' Cable Landing License application.[9] First, SLC contends that the TAT-10 application is in violation of the reciprocity provisions of the Cable Landing License Act because alleged inappropriate conduct on the parts of officials of the German administration, specifically the Ministry, the PTT - Deutsche Bundespost (DBP) - and AT&T has resulted in the failure of SLC, and its German partner - Preussen-Elektra Telekom GmbH (PET), to secure a cable landing license or its equivalent to land its private cable system in Germany. According to SLC, the Ministry and DBP were involved in detailed meetings concerning its own private US -Germany cable project and AT&T, as a manufacturer, had been involved in the cable project. Because the German administration has authorized the landing of the TAT-10 cable system, in which AT&T and DBP are owners, and has not granted reciprocal landing rights for SLC's private cable, SLC believes that the instant application should be denied for lack of reciprocity in accordance with the provisions of the Cable Landing License Act. SLC also is concerned that it has no assurance that the cable system will be free of DBP's alleged discriminatory tariff structure. Therefore, SLC believes that DBP's interest in TAT-10 might result in lower customer charges for DBP's landline facilities connecting with TAT-10 than for those connecting with the proposed SLC-PET cable terminal.

6. SLC also contends that the TAT-10 application is in violation of the public interest requirements of the Communications Act. SLC believes that AT&T's involvement in the planning, procurement, manufacturing, construction, operation, ownership and usage of transatlantic cable is contrary to the public interest. In this instance, SLC points out that AT&T's dominance has defeated the Commission's Private Cable Policy[10] since both the SLC cable and a proposed MCI-BT cable project have been thwarted. Thus, SLC believes that the instant application, as well as applications to land and operate the TAT-11 cable system, must be denied to prevent independent cable providers

and manufacturers from being placed at a competitive disadvantage. According to SLC, grant of the application would result in restrained competition, higher consumer costs, and limitations on technological advances. In this regard, SLC argues that TAT-10 provides no technical innovations, no intra-cable restoration capacity, and raises serious antitrust issues. For these reasons, SLC requests denial of the application and/or the separation of AT&T's international business service and its submarine cable manufacturing business.

7. With respect to SLC's reciprocity concerns, the Joint Applicants[11] state that the only relevant question for jointly-owned common carrier cable systems is whether U.S. participants have received reciprocal treatment from foreign administration partners.[12] In this case, the Joint Applicants note that this concern has been satisfied by virtue of the joint ownership nature of common carrier systems. The Joint Applicants assert that the purpose of the reciprocity requirements is not to secure business opportunities for U.S. private cable companies, but to ensure that U.S. interests abroad are not jeopardized vis-a-vis similar foreign interests in the U.S. In addition, AT&T denies both its domination of transatlantic cable projects and the adversity of its role in cable projects to U.S. public interest.

8. AT&T asserts that SLC's real complaint is its failure in marketing the private cable system to end users and its lack of prospects of common carrier use of its proposed cable system by DBP due to the advent of TAT-10. The Joint Applicants note that any private transoceanic cable system must "succeed or fail on its own merits and not through Commission action that would guarantee common carrier use of the systems." They argue that Commission policy with respect to private cable systems precludes the consideration of the comparative merits of SLC's proposed private system and the Joint Applicants' TAT-10 common carrier system.

9. Finally, the Joint Applicants assert that SLC should not be able to bootstrap the Petition to Deny the TAT-10 Cable Landing License into a broader proceeding against the TAT-10 and TAT-11 Section 214 applications as well as the TAT-11 Cable Landing License. AT&T asserts that SLC is not an interested party with respect to the Section 214 applications under Section 63.52 of the Commission's Rules. SLC contends that it is an interested party since its proposed cable will be competitive with TAT-10 and that it would suffer an adverse impact because of the lack of reciprocity.

10. The German Ministry filed a letter with the State Department in response to SLC's Petition to Deny.[13] The Ministry stated that SLC had not completed its application by filing necessary information. In response, SLC acknowledged that it did not file the information, stating that it was competitively sensitive and would have been available to DBP, which was involved in the proposed TAT-10.[14] In its subsequent letter[15], the Ministry provided a detailed response to the events and allegations contained in SLC's pleadings; this in turn prompted a letter from SLC.[16]

Discussion

11. Under the Cable Landing License Act no person is permitted to land or operate a submarine cable directly or indirectly connecting the United States with any foreign country unless a written license to land and operate such cable has been issued by the President of the United States.[17] The Cable Landing License Act provides that the President may withhold or revoke such a license "when he shall be satisfied after due notice and hearing that such action will assist in securing rights for the landing or operation of cables in foreign countries, or in maintaining the rights or interests of the United States or of its citizens in foreign countries, or will promote the security of the United States, or may grant such license upon such terms as shall be necessary to assure just and reasonable rates and service in the operation and use of cable so licensed." Thus, the Cable Landing License Act's consideration of reciprocity goes beyond the narrow consideration as to whether in a particular instance, as here, there is joint ownership between a foreign administration on one end of the cable system and its U.S. partners on the other end.

12. Pursuant to our obligations under 47 U.S.C. §§34-39, the Department of State has been notified and, after having coordinated with both the National Telecommunications and Information Administration and the Defense Information Systems Agency, has approved the landing of TAT-10 in the United States.[18]

13. SLC seeks denial of the application based on lack of reciprocity in connection with its inability to obtain a license from the German Administration for its private cable system. SLC states that it was informed by a DBP official that its cable landing project would be approved by the Ministry if DBP were interested. Because DBP and AT&T subsequently became involved in the joint planning of the TAT-10, SLC assumes that improper conduct must have occurred in the interim to undermine its project.

14. The Ministry has acknowledged that an agreement regarding the appropriate application procedure under German law was reached with SLC; specifically, it was agreed that no landing license application would be required, but rather a license application for the setting up and the operation of the cable across German territory would be required. According to the Ministry, it stated that an application for this license should include certain information, such as ownership structure, routing, restoration concept and landing points. The Ministry noted that it has received nothing from either SLC or PET, despite a subsequent request to PET for the aforementioned information. In its response to the Ministry's letter, SLC does not dispute the Ministry's account of events. Rather, SLC states that at the September meeting when the information was requested, it was becoming clear that DBP was no longer interested in the cable project. Thus, SLC asserts that there was growing reluctance to provide confidential information to the Ministry because of fear that such information would be disclosed to DBP, a partner in a competing cable system.

15. We find no basis to deny the application for lack of reciprocity by the German administration. SLC does not deny that it never completed its application. Nor does SLC argue that the information requested by the Ministry was somehow improper or otherwise designed to impede the progress of its proposal. Indeed, the information requested is similar to the information routinely filed in applications before the Commission for the construction of common carrier and non-common carrier cables. SLC does not elaborate on how it ascertained that DBP was no longer interested in its cable project, although SLC may have drawn this conclusion from DBP's planned participation in the TAT-10 project. From this sequence of

events, it appears that SLC's failure to secure appropriate authority from the German administration is the result of its conscious decision not to supply the necessary information required to complete its application.[19]

16. We also reject SLC's contention that the TAT-10 application violates the public interest requirements of the Communications Act.[20] SLC provides no support for its assertion that the TAT-10 project has defeated the Private Cable policy and both the SLC cable and MCI-BT cable projects. With respect to the Private Cable policy, the Commission has repeatedly emphasized that private cable projects are risk ventures that will succeed or fail on their own merits without any guarantee of common carrier traffic. It was never this Commission's intent in formulating the Private Cable policy to impede the continuing planning and construction of common carrier cable facilities.[21] We also note that AT&T's continued participation in common carrier cable projects did not defeat the PTAT private cable in the Atlantic or the NPC private cable in the Pacific. In fact, with the growing demand for digital cable facilities, AT&T has acquired capacity in both cable systems. Finally, we note that MCI and BT are owners of TAT-10. Neither has responded to SLC's claims that the decision to forego their planned cable system was the result of TAT-10. However, even if their decision to forego the cable system was the result of the planning of TAT-10, there is no basis to impute an improper motive merely because AT&T has continued to plan cables which results in the abandonment or postponement of some proposals for other cable systems. In fact, the inference could be drawn that MCI and BT's participation in TAT-10 is the result of a business decision that it would be more economical to invest in a cable system with costs spread among several owners as opposed to among two owners.

17. SLC also criticizes TAT-10 as containing no technological innovations or intra-cable restoration and involving serious antitrust concerns. Although technological innovation and restoration concerns are factors in considering the need for new cable facilities, these factors, standing alone, are rarely of decisional significance. Instead, the Commission places greater reliance on the actual need for the cable based on projected customer requirements. In a companion order authorizing the construction and operation of TAT-10, we have determined that TAT-10 is necessary in order to satisfy the increasing need for digital cable facilities. We also note that the technology employed on TAT-10 is the same new technology that TAT-9 will employ when it becomes operational in mid-February, 1992. Finally, SLC has failed to specify the nature of its antitrust concerns, other than its suggestion that AT&T's international business service and its submarine cable manufacturing business should be separate operations. Concerns with respect to the Commission's regulation of AT&T and whether its corporate structure should be changed are not properly before us in this proceeding.

18. Based on the information provided by the Joint Applicants, we conclude that the grant of the requested authorization will not have a significant effect on the environment as defined in Section 1.1307 of the Commission's Rules and Regulations implementing the National Environmental Policy Act of 1969, 42 U.S.C. §§4321-4335 (1976).[22] Consequently, no environmental assessment is required to be submitted with this Joint Application under Section 1.1311 of the Commission's Rules.

19. Concurrent with consideration of this application, this Commission has granted the Joint Applicants authority under Section 214 of the Communications Act of 1934, as amended, to construct and operate TAT-10 (FCC 91-, adopted 1991, File No. I-T-C-91-135). In conjunction with the authorization of the TAT-10 Section 214 application and having fully considered the Petition to Deny, we find that this application requesting a cable landing license should be granted.

Ordering Clauses

20. Accordingly, this Commission HEREBY GRANTS AND ISSUES under the provisions of "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39, and pursuant to authority delegated to this Commission under Executive Order No. 10530, dated May 10, 1954, 3 C.F.R. 1954-1958 Comp., p.189 (1961), *reprinted in* 3 U.S.C.A. §301 at 1052 (1985), to the applicants (AT&T, IDB International, HTC, MCII, TRT/FTC, US Sprint and Worldcom) a license to land and operate one high capacity digital submarine cable, having a capacity of 1680 Mbit/s (560 Mbit/s per pair), extending between Green Hill, Rhode Island, the United States and Norden, Germany and Alkmaar, Netherlands. This license is subject to: (1) "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39; (2) the Communications Act of 1934, as amended, 47 U.S.C. §§151-609; (3) subsequent applicable acts; (4) all relevant rules and regulations of the Federal Communications Commission; (5) any treaties or conventions relating to communications to which the United States of America is now or may hereafter become a party; (6) any actions by the Commission or the Congress of the United States of America rescinding, changing, modifying, or amending any rights accruing to any person; and (7) the following conditions:

> (1) The location of the cable within the territorial waters of the United States of America, its territories and possessions, and upon the foreshore thereof, shall be in conformity with plans approved by the Secretary of the Army, and the cable shall be moved or shifted by the Licensees at their expense upon the request of the Secretary of the Army whenever he or she considers such course necessary in the public interest, for reasons of national defense, or for the maintenance or improvement of harbors for navigational purposes;
>
> (2) The Licensees shall at all times comply with any requirements of United States Government authorities regarding the location and concealment of the cable facilities, buildings, and apparatus with a view to protecting and safeguarding the cable from injury or destruction by enemies of the United States of America;
>
> (3) The Licensees or any persons or companies controlling them or controlled by them do not enjoy and shall not acquire any right, for the purpose of handling traffic to or from the United States, its territories or possessions, to land, connect or operate cables or landlines, to construct or operate radio stations, or to interchange traffic, which is denied to any other United States company by reason of any concession, contract, understanding, or

working arrangement to which the Licensees or any persons or companies controlling them or controlled by them are parties;

(4) Neither this license, nor the rights granted herein, shall be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of or disposed of indirectly by transfer of control of the Licensees to any persons, unless the Federal Communications Commission shall give prior consent in writing;

(5) This license is revocable after due notice and opportunity for hearing by the Federal Communications Commission in the event of breach or nonfulfillment of any requirements specified in Section 2 of "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39, or for failure to comply with the terms of the authorization;

(6) The Licensees shall notify the Commission in writing of the date on which the cable is placed in service; and this license shall expire 25 years from that date, unless renewed or extended upon proper applications duly filed no less than six months prior to the expiration date; and, upon expiration of the license, all rights granted under it shall be terminated; and

(7) The terms and conditions upon which this license is given shall be accepted by the Licensees by filing a letter with the Secretary, Federal Communications Commission, Washington, D.C. 20554, within 30 days of the release of this order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The Joint Applicants include American Telephone and Telegraph Company (AT&T), CICI, Inc. d/b/a IDB International (IDB International), GTE Hawaiian Telephone Company (HTC), MCI International, Inc. (MCII), TRT/FTC Communications Corporation (TRT/FTC), US Sprint Communications Company Limited Partnership (US Sprint), and World Communications, Inc. (Worldcom).

[2] On October 2, 1991, Joint Applicants supplemented their application by adding new owners and by attaching an amended map to reflect a change in the configuration of the system.

[3] Worldcom and US Sprint did not join in this reply.

[4] Letter from the German Ministry for Post and Telecommunications to Ambassador Bradley P. Holmes, Department of State, dated July 26, 1991.

[5] Letter from Robert E. Conn, counsel for SLC, to the Honorable Alfred C. Sikes, Chairman of the Federal Communications Commission (FCC), dated August 20, 1991.

[6] Letter from the German Ministry for Post and Telecommunications to the Honorable Alfred C. Sikes, Chairman of the FCC, dated October 16, 1991.

[7] Letter from Robert C. Conn, counsel for SLC, to the Honorable Alfred C. Sikes, Chairman of the FCC, dated October 21, 1991.

[8] A MIU, which is used for purposes of ownership allocation, is a 2.048 Mbit/s digital stream jointly assigned between two parties or wholly assigned to a party.

[9] SLC states that its petition also applies to the companion TAT-10 214 application and the TAT-11 applications.

[10] *Tel Optik Limited* (Private Submarine Cable), 100 F.C.C. 2d 1033 (1985).

[11] Worldcom and US Sprint did not join in this Reply.

[12] SLC argues that the fundamental premise of reciprocity applies irrespective of whether submarine cable circuits are owned end-to-end by one party or jointly owned.

[13] *See* n.4 *supra*.

[14] *See* n.5 *supra*.

[15] *See* n.6 *supra*.

[16] *See* n.7 *supra*.

[17] The Federal Communications Commission was delegated the responsibility of both processing applications and issuing licenses, subject to the proviso that the Commission may not grant or revoke licenses without first obtaining approval of the Secretary of State and any advice from any executive branch department of establishment of the Government as it may deem necessary. Executive Order No. 10530, May 10, 1954.

[18] Letter from Kenneth W. Bleakely, Senior Deputy U.S. Coordinator and Director for the Bureau of International Communications and Information Policy, Department of State to George S. Li, Chief, International Facilities Division, Common Carrier Bureau, Federal Communications Commission (October 16, 1991).

[19] We also find SLC's argument concerning the potential for discrimination in tariff charges for terrestrial connecting facilities too speculative to address under the circumstances. SLC is concerned about such discrimination in the provision of terrestrial facilities when the record indicates that it has not even completed its application which would allow it to land the proposed cable in German territory.

[20] We note that public interest considerations separate from reciprocity concerns are not properly raised in the context of a cable landing license application. However, since SLC claims that its arguments should be applied to the Section 214 applications for both TAT-10 and TAT-11, we will dispose of its contentions here.

[21] *Tel Optik Limited* (Private Submarine Cable), 100 F.C.C. 2d at 1049; *Pacific Telecom Cable, Inc.*, 2 FCC Rcd 2686, 2690, n.15 (Com. Car. Bur. 1987); *clarified*, 4 FCC Rcd 4454, 4455 (Com. Car. Bur. 1989). *Inquiry into the Policies to be Followed in the Authorization of Common Carrier Facilities to Meet North Atlantic Needs During the 1991-2000 Period*, 3 FCC Rcd 3979, 3989-90 (1988)(*North Atlantic Facilities Planning).*

[22] *See* Section 214 Application, File No. I-T-C-91-135, at p.12.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
CICI, INC. d/b/a
IDB INTERNATIONAL
GTE HAWAIIAN
TELEPHONE COMPANY, INC.
MCI INTERNATIONAL, INC.
TRT/FTC COMMUNICATIONS, INC.
US SPRINT COMMUNICATIONS
COMPANY LIMITED
PARTNERSHIP, and
WORLD COMMUNICATIONS, INC.

File No. SCL-91-002

Joint Application for a License to Land
and Operate a High Capacity Digital
Submarine Cable System Extending Between
the United States, the United Kingdom and
France

CABLE LANDING LICENSE

Adopted: December 19, 1991; Released: January 10, 1992

By the Commission:

1. On May 28, 1991 seven United States International Service Carriers (hereinafter referred to as Joint Applicants)[1] filed the above-captioned Joint Application[2] requesting authority pursuant to "An Act Relating to the Landing and Operation of Submarine Cables in the United States", 47 U.S.C. §§34-39, to land and operate a high capacity digital submarine cable system known as TAT-11 Cable System (TAT-11), extending from the United States mainland to the United Kingdom and France. The application was placed on public notice on June 5, 1991. No comments were received.[3]

The TAT-11 Cable System

2. TAT-11 will land at Manahawkin, New Jersey in the U.S. and extend to Swansea, the United Kingdom and St. Hilaire, France. The proposed cable system consists of four segments. Segments A, B and C are, respectively, the cable station at Manahawkin, New Jersey; the cable station at Swansea, United Kingdom; and the cable station at St. Hilaire, France. Segment D is the whole of the submarine cable system linking Segments A, B and C.

3. TAT-11, comprised of three fiber pairs, will employ 1.55 micron laser technology operating at 560 Mbit/s on each working fiber pair. The capacity on each fiber pair is provided in four 140 Mbit/s streams, with each 140 Mbit/s stream containing 63 Minimum Investment Units (MIUs).[4] The transatlantic capacity of TAT-11 will be 252 MIUs per fiber pair. For voice services, digital circuit multiplication system (DCMS) can be employed to derive approximately 150 virtual voice paths from each MIU.

4. The proposed cable system will be owned by the Joint Applicants and a number of foreign telecommunications entities. The telecommunications entities in the following locations will participate as owners: Belgium, Canada, France, Hong Kong, Ireland, Italy, Japan, Mexico, New Zealand, the Philippines, Portugal, Singapore, Spain, Switzerland, Taiwan and the United Kingdom.

5. Pursuant to our obligations under 47 U.S.C. §§34-39, the Department of State has been notified and, after having coordinated with the National Telecommunications and Information Administration and the Defense Information Systems Agency, has approved the landing of TAT-11 in the United States.[5]

6. Based on the information provided by the Joint Applicants, we conclude that the grant of the requested authorization will not have a significant effect on the environment as defined in Section 1.1307 of the Commission's Rules and Regulations implementing the National Environmental Policy Act of 1969, 42 U.S.C. §§4321-4335 (1976).[6] Consequently, no environmental assessment is required to be submitted with this Joint Application under Section 1.1311 of the Commission's Rules.

7. Concurrent with consideration of this application, this Commission has granted the Joint Applicants authority under Section 214 of the Communications Act of 1934, as amended, to construct and operate TAT-11 (FCC 91-____, adopted ____ 1991, File No. I-T-C-91-136). In conjunction with the authorization of the TAT-11 Section 214 application and having found absent any reason to the contrary, we find that this application requesting a cable landing license should be granted.

Ordering Clauses

8. Accordingly, this Commission HEREBY GRANTS AND ISSUES under the provisions of "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39, and pursuant to authority delegated to this Commission under Executive Order No. 10530, dated May 10, 1954, 3 C.F.R. 1954-1958 Comp., p.189 (1961), *reprinted in* 3 U.S.C.A. §301 at 1052 (1985), to the applicants (AT&T, IDB International, HTC, MCII, TRT/FTC, US Sprint and Worldcom) a license to land and operate one high capacity digital submarine cable, having a capacity of 1680 Mbit/s (560 Mbit/s per pair), extending between Manahawkin, New Jersey, the United States and St. Hilaire, France and Swansea, the United Kingdom. This license is subject to: (1) "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39; (2) the Communications Act of 1934, as amended, 47 U.S.C. §§151-609; (3) subsequent applicable acts; (4) all relevant rules and regulations of the Federal Communications Commission; (5) any treaties or conventions relating to communications to which the United States of America is now or may hereafter become a party; (6) any actions by the Commission or the Congress of the United States of America rescinding, changing, modifying, or amending any rights accruing to any person; and (7) the following conditions:

(1) The location of the cable within the territorial waters of the United States of America, its territories and possessions, and upon the foreshore thereof, shall be in conformity with plans approved by the Secretary of the Army, and the cable shall be moved or shifted by the Licensees at their expense upon the request of the Secretary of the Army whenever he or she considers such course necessary in the public interest, for reasons of national defense, or for the maintenance or improvement of harbors for navigational purposes;

(2) The Licensees shall at all times comply with any requirements of United States Government authorities regarding the location and concealment of the cable facilities, buildings, and apparatus with a view to protecting and safeguarding the cable from injury or destruction by enemies of the United States of America;

(3) The Licensees or any persons or companies controlling them or controlled by them do not enjoy and shall not acquire any right, for the purpose of handling traffic to or from the United States, its territories or possessions, to land, connect or operate cables or landlines, to construct or operate radio stations, or to interchange traffic, which is denied to any other United States company by reason of any concession, contract, understanding, or working arrangement to which the Licensees or any persons or companies controlling them or controlled by them are parties;

(4) Neither this license, nor the rights granted herein, shall be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of or disposed of indirectly by transfer of control of the Licensees to any persons, unless the Federal Communications Commission shall give prior consent in writing;

(5) This license is revocable after due notice and opportunity for hearing by the Federal Communications Commission in the event of breach or nonfulfillment of any requirements specified in Section 2 of "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39, or for failure to comply with the terms of the authorization;

(6) The Licensees shall notify the Commission in writing of the date on which the cable is placed in service; and this license shall expire 25 years from that date, unless renewed or extended upon proper applications duly filed no less than six months prior to the expiration date; and, upon expiration of the license, all rights granted under it shall be terminated; and

(7) The terms and conditions upon which this license is given shall be accepted by the Licensees by filing a letter with the Secretary. Federal Communications Commission, Washington, D.C. 20554, within 30 days of the release of this order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

---

[1] The Joint Applicants include American Telephone and Telegraph Company (AT&T), CICI, Inc. d/b/a IDB International (IDB International), GTE Hawaiian Telephone Company (HTC), MCI International, Inc. (MCII), TRT/FTC Communications Corporation (TRT/FTC), US Sprint Communications Company Limited Partnership (US Sprint), and World Communications, Inc. (Worldcom).

[2] On June 17 and October 2, 1991, Joint Applicants filed amended cable system maps to reflect changes in the configuration and landing point of TAT-11.

[3] In the accompanying TAT-10 orders, a petition to deny was filed by Submarine Lightwave Cable Company (SLC) against the TAT-10 Cable Landing License, File No. SCL-91-001. According to the petitioner, the petition to deny was meant to address the TAT-11 Section 214 authorization and Cable Landing License applications as well. Without deciding the appropriate scope of SLC's petition, we note that SLC's arguments are addressed and the petition is denied in a companion order authorizing the Joint Applicants' cable landing license application for TAT-10.

[4] A MIU, which is used for purposes of ownership allocation, is a 2.048 Mbit/s digital stream jointly assigned between two parties or wholly assigned to a party.

[5] Letter from Kenneth W. Bleakely, Senior Deputy U.S. Coordinator and Director for the Bureau of International Communications and Information Policy, Department of State to George S. Li, Chief, International Facilities Division, Common Carrier Bureau, Federal Communications Commission (October 16, 1991).

[6] *See* Section 214 Application, File No. I-T-C-91-136, at p.12.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
CICI, INC. d/b/a/ IDB INTERNATIONAL
GTE HAWAIIAN TELEPHONE COMPANY, INC.
MCI INTERNATIONAL, INC.
TRT/FTC COMMUNICATIONS, INC.
US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP, and
WORLD COMMUNICATIONS

File No. I-T-C-91-136

Joint Application for Authorization
Under Section 214 of the
Communications Act of 1934, as
Amended, to Construct, Acquire Capacity
in and Operate a High Capacity Digital
Submarine Cable System between the United
States and the United Kingdom and France

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: December 19, 1991; Released: January 10, 1992

By the Commission:

1. The Commission has under consideration the above-captioned Joint Application[1] filed on May 28, 1991 by American Telephone and Telegraph Company ("AT&T"), CICI, Inc. d/b/a/ IDB International, Inc. ("IDB International"), GTE Hawaiian Telephone Company ("HTC"), MCI International, Inc. ("MCII"), TRT/FTC Communications, Inc. ("TRT/FTC"), US Sprint Communications Company Limited Partnership ("US Sprint"), and World Communications ("Worldcom") (hereinafter collectively called the Joint Applicants). The Joint Applicants seek authority, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214 (1982), to construct and operate a high capacity digital optic fiber submarine cable system, known as the TAT-11 Cable System (TAT-11), extending between Manahawkin, New Jersey in the United States on the west and Swansea, United Kingdom and St. Hilaire, France on the east. TAT-11 will be jointly owned by the Joint Applicants and nineteen foreign telecommunications administrations and carriers. The Joint Applicants propose that TAT-11 be operational by August 1993.

2. The Joint Applicants also seek authority to: (a) acquire capacity in the TAT-11 Cable System; (b) acquire, by lease or on an Indefeasible Right of User (IRU) basis, such extension facilities as may be required to extend capacity in TAT-11; (c) convey to its correspondents, or to non-owners, half interests in Minimum Investment Units (MIUs)[2] on an IRU basis; and (d) activate and operate capacity in TAT-11 and in the afore-mentioned extension facilities for the provision of their respectively authorized telecommunications services.

3. The Joint Application was placed on public notice on June 5, 1991. No comments were received.[3]

I. APPLICATION

4. The Joint Applicants will use the TAT-11 Cable System to supplement their existing facilities providing the services which each is currently furnishing or which each may subsequently furnish.[4] TAT-11 capacity will be extended by suitable facilities to the borders of other TAT-11 Cable System participating countries or to other terminals of other international communications systems, including other cable terminals and satellite earth stations, enabling the provision of services between the United States, the United Kingdom and France, as well as to points beyond in both the east and the west.

5. The TAT-11 Construction and Maintenance Agreement (C&MA)[5], initialed on April 25, 1991, defines the proposed cable system on terms of segments for ownership purposes. TAT-11 will consist of four segments. Segments A, B and C are, respectively, the cable stations at Manahawkin, New Jersey (U.S.) on the west and Swansea, United Kingdom and St. Hilaire, France on the east. Segment D is the whole of the submarine cable system, provided between and among and including the System Interfaces at the cable stations in the United States, the United Kingdom and France. The System Interface is defined as the 140 Megabits per second (Mbits/s) digital input/output ports on the digital distribution frame (excluding the digital distribution frame itself) where the 139,264,000 bits per second digital line section connects with other transmission facilities.

6. The transatlantic configuration of TAT-11 is based upon a three fiber pair system. TAT-11 will operate at a bit rate of 560 Mbits/s per fiber pair. The capacity on each of the three fiber pairs is provided in four 140 Mbit/s streams, with each 140 Mbit/s stream containing 63 MIUs. The transatlantic capacity of TAT-11 will be 252 MIUs per fiber pair. For voice services, digital circuit multiplication systems can be employed to derive approximately 150 virtual voice paths from each MIU.

7. The estimated total cost of TAT-11 is $280 million. The Joint Applicants' share of costs is $126.96 million and the proportion of that total allocated to each U.S. owner is based upon the ownership percentage interests contained in Appendix 1. The estimated total costs do not include the U.S. carriers' costs for interest during the construction, currently projected at $12.9 million for the cable system. Nor do these estimated costs include the cost of circuit multiplication equipment as such equipment is not considered part of the cable system. The fixed costs (98%) include the sub-system and cable activities, repeaters, acceptance tests and terminal equipment. Owners' costs (2%) include the route survey, project administration and inspection. There are no supplier's cost-incurred items. The estimated original capital cost per half MIU is $278,000 over the life of the cable without multiplexing.

8. As indicated in Appendix 1 (Schedule B of the C&MA), the Joint Applicants' collective ownership interest in TAT-11 is 45.2%. Appendix 2 (Schedule C of the C&MA) shows allocation of capital, operating and maintenance costs of Segments A, B, and C of TAT-11. Appendices 3A, 3B and 3C (Schedules D-1, D-2 and D-3 of the C&MA) show the capacity in TAT-11 that is assigned to each of the owners, upon which costs are based.[6] These capacity assignments contemplate each Joint Applicant's proposed utilization of circuit multiplication equipment. Both prior and subsequent to the System Ready for Customer Service (RFCS) date (August 1993), carriers, including non-owners of the TAT-11 Cable System, may acquire TAT-11 capacity by IRU, lease or other mutually agreed upon arrangements.

9. The Joint Applicants state that the placing into service of the TAT-10 Cable System (File No. I-T-C-91-135) is expected to be followed by a rapid increase in demand for reliable, secure, and economically-priced telecommunications services based upon digital lightwave technology which has resulted in the total forecasted utilization of the TAT-10 Cable System; in addition, recent political events in Eastern Europe and within Germany have created an unprecedented traffic demand to Europe, one which is expected to increase further. The Joint Applicants note that the reliability of telecommunications services and their usefulness to customers is in part a function of the availability of comparable facilities for diverse routing and service restoration. In further support of their application, the Joint Applicants point out that the Commission, in the *TPC-4 Order* [7], indicated that competitive conditions conditions, the elimination of circuit loading guidelines, and the implementation of price cap regulation of AT&T, have made it appropriate to give U.S. international carriers wider latitude in determining what facilities to construct and when to place such facilities in service. The Joint Applicants also contend that TAT-11 will be able to provide dedicated capacity for restoration purposes to restore other cable systems in the Atlantic and adjoining regions, primarily in connection with the TAT-10 cable system. According to Joint Applicants, all of the above factors serve to ensure that TAT-11 is in the public interest.

II. DISCUSSION

10. The Joint Applicants seek authority to construct and operate the digital TAT-11 cable system to begin service in late 1993 to meet their telecommunications capacity needs and those of their correspondents in the Atlantic Ocean Region (AOR) during the 1993-1997 time frame. We have reviewed the Joint Application under the public convenience and necessity standard of Section 214 of the Communications Act of 1934, as amended, and conclude that implementation of TAT-11 in 1993 will serve the public interest. Accordingly, we grant the Joint Application subject to certain conditions.[8]

A. The Need for the TAT-11 Cable System

11. Section 214 of the Communications Act requires that the Commission make a finding that the public convenience and necessity will be served by authorization of the facilities requested. The standard we employ is "whether the specific facility chosen and the use to be made of that facility are required by the public convenience and necessity."[9] In making this determination, we traditionally have considered such factors as demand, cost, media and route diversity, restoration, intramodal and intermodal competition, technological innovations and international comity.[10]

1. Demand and Capacity

12. Under the traditional form of demand analysis that we have applied in authorizing the construction and operation of submarine cable systems, we conclude that projected circuit demand, along with other factors, supports the operation of TAT-11 in 1993 to meet the telecommunications needs of the Joint Applicants and their correspondents in the AOR during the 1993-1995 time frame. The Commission has recognized that user demand is determined not only by the need for raw transmission capacity, but also by such user requirements as digital technology, route and media diversity, digital cable restoration capability, security and cost-effectiveness.

13. The Joint Applicants have provided their forecasted circuit demand for TAT-11[11], which is scheduled to be placed in operation in 1993. In 1993, the Joint Applicants project a need for 14,648 half-MAUOs[12]. Of this total 8,324 will be routed via TAT-9, resulting in 81% of TAT-9's capacity being utilized. The Commission has traditionally recognized that an 80% fill rate on a given facility is sufficient to justify the construction of additional facilities. In 1993, 4,325 digital cable circuits are projected to be routed via TAT-10, resulting in approximately a 41% utilization of the U.S. owners' share (10,590 MAUOs) of TAT-10 capacity. The remaining 1,999 digital cable circuits projected for 1993 would be routed over TAT-11, resulting in a 21% fill rate for that cable. If the circuits projected for use on TAT-11 were routed on TAT-10, the fill rate for TAT-10 would increase to approximately 60% of the Joint Applicants' ownership share of capacity. It is unlikely that the Joint Applicants' ownership share in TAT-10 facilities could be substantially increased.[13] In 1994, the combined demand for digital cable facilities to be routed over TAT-10 and TAT-11 would be 10,156 or approximately 96% of the Joint Applicants' ownership of TAT-10 capacity. Based on the projected growth in demand for digital cable facilities the only question is when TAT-11 will be required. Using the Commission's traditional 80% fill rate to determine the need for new facilities, a new cable facility would be required by 1994. Thus, although the Joint Applicants' total demand for digital cable facilities could be satisfied in 1993 via TAT-10 alone, we find that introduction of TAT-11 in 1993 is supported by those additional-factors discussed below.

2. Quality of Service

14. *Media and Route Diversity.* We previously have found that increasing media and route diversity to strengthen service reliability is of decisional significance in our public interest determination to authorize the construction of transoceanic facilities.[14] Media diversity enhances service reliability through the use of more than one transmission medium, satellite or cable, to carry a correspondent's traffic. As a result, an increase in media diversity protects against the systemic failure of one medium. Route, or path, diversity enhances service reliability by increasing the number of independent routes that carry traffic to a given location. It is closely related to the ability to restore circuits in case of a facility failure. As a rule, the more independent routes serving a given loca-

tion, the greater the ability to restore one that fails. Thus, an increase in route or path diversity is the natural consequence of the introduction of another facility into a region.

15. We conclude that the introduction of TAT-11 as proposed will enhance route diversity by adding another independent cable route. Service reliability would be improved since the number of circuits affected by a service interruption on a particular route or routes would be minimized and the ability to restore service via another digital cable facility would be enhanced.

16. With respect to media diversity, as of December 31, 1990 the Joint Applicants were providing a total of 29,487 circuits, consisting of 20,255 submarine cable and 9,232 satellite circuits to the countries and territories initially proposed to be served by TAT-11. While the Commission has never specified what a preferable cable/satellite ratio would be, the traditional approach to the concept of media diversity is that too much traffic over a particular medium could result in a significant disruption of traffic should that medium suffer an outage. Since a significant percentage of traffic in the AOR is routed via cable facilities in addition to satellite facilities, the failure of any one cable system would not likely result in a significant disruption in service since restoration could be effected through use of other cable facilities in addition to the satellite facilities.

17. *Restoration*. Restoration pertains to the ability to maintain service in the event of a facility outage. TAT-11 will provide restoration capability for AOR facilities in general, and particularly the digital TAT-8, TAT-9 and TAT-10 cable systems. The Commission has previously recognized that, although satellite capacity provides a satisfactory restoration alternative for cable. absolute reliance on satellite facilities to meet restoration needs and increased demand may not be in the best interests of users that may have specific communications requirements that may best be accommodated by fiber optic cable facilities.[15]

18. The introduction of TAT-11 in 1993 to accommodate demand for digital cable facilities would provide an additional restoration alternative. In 1993, the in-service date of TAT-11, both TAT-8 and TAT-9 will be effectively filled. As a result, there would be no digital cable facility available for the restoration of TAT-10. TAT-11 would also provide a viable restoration alternative for TAT-8 and TAT-9 since the fill rate for TAT-10 would have already reached 41% by its second year of operation. Thus, TAT-11 would enhance service reliability since an additional digital fiber optic cable route would be available for restoration if digital services are disrupted by an outage.

3. Cost Analysis

19. The Joint Application estimates the total cost of TAT-11 to be $280 million, with the Joint Applicants' share projected to be $126.96 million and the capital cost per half-MIU $278,000. The estimated original capital cost of a 64 Kbit/s half-circuit (half-MAUO) is approximately $9,600. The Joint Application notes that the unit cost of a virtual voice path in TAT-11 will be further reduced through the addition and use of digital circuit multiplication technology. A comparison of the costs for previously authorized digital cable facilities in the AOR demonstrates that TAT-11 will continue the trend of providing increased capacity while reducing circuit costs. For example, the cost of a TAT-8 half-MAUO between the U.S. and U.K. is $22,200. The cost for a similar unit of capacity on TAT-9 differed depending on the landing point, with a $10,000 half-MAUO cost between the U.S. and the U.K., $13,000 between the U.S. and France and $14,000 between the U.S. and Spain. The estimated cost for a half-MAUO on TAT-10 is $10,000.

4. Technological Innovations

20. In determining the need for additional facilities in a region, the Commission typically considers to what extent the proposed facilities will introduce new technology. In some instances, the effect of introducing new technology in the region is compelling, such as introducing digital fiber optic technology for the first time. In other cases, the technological innovations may not be as significant, such as improvements in laser technology in an area where digital fiber optic technology is already available. In this case, the need for TAT-11 is based on projected demand for digital cable circuits and not solely on technological innovation. Digital fiber optic cable technology is already available in the AOR on the TAT-8 cable system. We note, however, that there have been improvements in digital cable technology since TAT-8. For example, TAT-8 employed 1.3 micron laser and 280 Mbit/s technology. TAT-9 improved on this technology by using 1.55 micron laser and 560 Mbit/s technology, which is the technology used on TAT-10. The cumulative effect of these improvements is twice the capacity and cheaper per circuit costs. The same technology will be employed on TAT-11.

5. Competition Considerations

21. We previously have recognized that the enhancement of both intermodal and intramodal competition can be expected to spur providers of both international satellite and cable services to keep their services innovative and their prices low.[16] We find that introduction of TAT-11 will enhance intramodal competition in the AOR and encourage both private and common carrier cable operators to innovate and price their offerings in a manner that is calculated to attract and retain customers. We also find that introduction of TAT-11 will increase intermodal competition with INTELSAT and potential separate satellite system providers and thereby spur existing providers of both cable and satellite capacity to respond competitively. Such competition will give service providers and other users greater choice in selecting facilities and thus will enable them to maintain, or improve and enhance the economy and efficiency of their operations. The opportunity to choose among a range of facilities further allows service providers to be more responsive to customer needs in terms of price, service quality, and service availability.

6. International Comity

22. Our decisions authorizing the construction and operation of transoceanic submarine cable systems historically have recognized that correspondent acceptance is an important public interest factor.[17] Nineteen foreign administrations and telecommunications entities from sixteen foreign locations have agreed that the TAT-11 system design and 1992 service date will meet the projected service needs of their customers. Thus, we conclude that TAT-11 will promote international comity.

B. The Effect of Price Cap Regulation

23. Having determined that there is a need for the introduction of the TAT-11 cable system in late 1992, we also note that current competitive conditions and regulatory approaches provide the Joint Applicants with the incentive to make rational economic decisions and not engage in unnecessary construction of facilities.[18] In our *TPC-4 Decision*, we stated that the price caps system of regulation is a disincentive for carriers to engage in the construction of unnecessary facilities since the burden of such investment would fall on stockholders and not ratepayers.[19] Thus, the Joint Applicants' decision on what facilities to construct and when to place such facilities in service should be based on these factors.[20]

III. CONCLUSION AND ORDERING CLAUSES

24. In view of the foregoing, we find that the present and future public convenience and necessity require the construction of the TAT-11 Cable System, having a capcity of 1680 Mbit/s (560 Mbit/s per pair), to become operational in 1993.

25. Based on the information provided by the Joint Applicants, we conclude that the grant of the requested authorization will not have a significant effect on the environment as defined in Section 1.1307 of the Commission's Rules and Regulations implementing the National Environmental Policy Act of 1969, 42 U.S.C. §§4321-4335 (1976).[21] Consequently, no environmental assessment is required to be submitted with this Joint Application under Section 1.1311 of the Commission's Rules.

26. Accordingly, IT IS ORDERED that, pursuant to Section 214, 47 U.S.C. §214 (1982), the application, File No. I-T-C-91-136, of the Joint Applicants (AT&T, IDB International, HTC, MCII, TRT/FTC, US Sprint and Worldcom) IS GRANTED, subject to the following terms, conditions, and limitations and the Joint Applicants are authorized to:

(a) construct and operate the TAT-11 Cable System as proposed herein;

(b) acquire and activate capacity in the TAT-11 Cable System, on an ownership basis, in accordance with the interests specified in Appendix 3;

(c) acquire capacity, by lease, in such connecting facilities as may be required to extend capacity in the TAT-11 Cable System;

(d) utilize digital circuit multiplication systems (DCMS) to derive additional voice paths from the circuits (MIUs) authorized herein in accordance with the appropriate Commission authorizations; and

(e) activate and operate capacity in TAT-11 and aforementioned extension facilities for the provision of the Applicants' authorized telecommunications services.

27. IT IS FURTHER ORDERED that Applicants other than AT&T are authorized to acquire, by lease, appropriate connecting facilities between the Manahawkin, New Jersey cable station and their respective operating offices in the United States.

28. IT IS FURTHER ORDERED that when a given Applicant seeks to acquire or transfer an ownership or IRU interest in the TAT-11 capacity, the reimbursement it receives shall be on the basis of depreciated original cost (or the pro-rated accumulated cost of such circuit if the systems are not then operational) or in conformance with such policy as the Commission shall develop in the future regarding the price at which IRUs will be made available.

29. IT IS FURTHER ORDERED that the Joint Applicants shall make available half-interests in the TAT-11 capacity to such present and future U.S. carriers as may be authorized by the Commission to acquire such capacity.

30. IT IS FURTHER ORDERED that the Commission retains jurisdiction to reallocate U.S. carriers' interests in capacity herein authorized, as the public interest may require to accomodate additional carriers or otherwise, with, where required, the concurrence of the foreign administration or carriers concerned, and further, jurisdiction is retained by the Commission over all matters relating to the Joint Applicants' ownership, management, maintenance, and operation of the cable system as authorized herein, to ensure the most efficient use not only of this cable system, but of all means of communications between the U.S. and the Atlantic Ocean Region.

31. IT IS FURTHER ORDERED that the Commission retains jurisdiction to review the DCMS, multiplexing and interworking arrangements and attribution of the costs thereof and to require such changes in the provision of these services and equipment as may be necessary.

32. IT IS FURTHER ORDERED that no Applicant, that is deemed a dominant carrier pursuant to the Commission's decision in CC Docket No. 85-107,[22] herein shall dispose of any ownership interest in TAT-11 capacity it is authorized to acquire in any way without prior authorization by the Commission.

33. IT IS FURTHER ORDERED that the Joint Applicants shall include TAT-11 facility use in the monthly Status Reports filed pursuant to the Commission's Orders. These reports shall be filed no later than the 20th day of each month providing the information for the preceeding month.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The Joint Applicants supplemented their Section 214 Application by filing individual circuit activation figures under separate cover and under requests for confidentiality, pursuant to Sections 0.457 and 0.459 of the Commission Rules. On July 26, October 2 and October 22, 1991, Joint Applicants filed supplemental information, including revised Schedules to the Construction and Maintenance Agreement to reflect revised capacity assignments, ownership interests, system configuration and landing point.

[2] A MIU, which is used for purposes of ownership allocation, is a 2.048 Mbit/s digital stream jointly assigned between two parties or wholly assigned to a party.

[3] In the accompanying TAT-10 orders, a petition to deny was filed by Submarine Lightwave Company (SLC) against the TAT-10 Cable Landing License, File No. SCL-91-001. According to the petitioner, the petition to deny was meant to address the TAT-11 Section 214 authorization and Cable Landing License applications, as well. Without deciding the appropriate scope of SLC's petition, we note that SLC's arguments are addressed and the petition is denied in a companion order authorizing the Joint Applicants' cable landing license for TAT-10.

[4] Initially, all Applicants may not be certified to serve directly all countries or territories which the facilities covered by this Application are capable of serving. Each individual applicant proposing extension of its services into such territories by means of the TAT-11 Cable System facilities will seek such appropriate authorization as may be required when it proposes to activate the facilities.

[5] *See* Attachment B to the Joint Application (filed May 28, 1991).

[6] The total number of half-MIUs available to be assigned, which is 1008, is referred to as the Notional Capacity. The remaining capacity between the Notional Capacity and the total Design Capacity is referred to as the Restoration Capacity, and will be available for contribution toward transatlantic cable restoration. Notional capacity will not exceed 1008 half-MIUs until follow on transatlantic cables with sufficient restoration capacity for TAT-10 and TAT-11 Cable Systems are available.

[7] *American Telephone and Telegraph Co. et al.*, 4 FCC Rcd 8042 (1989).

[8] In a separate decision, we also grant the Joint Applicants' request for a cable landing license (File No. S-C-L-91-002) pursuant to the Cable Landing License Act.

[9] *AT&T et al., (TAT-7 Order)*, 73 F.C.C. 2d 248, 256 (1979).

[10] *See, e.g., AT&T et al. (TAT-9 Order)*, 4 FCC Rcd 1129, 1131 (Com.Car.Bur. 1988). *See also Policies to be Followed in the Authorization of Common Carrier Facilities to Meet Pacific Telecommunications Needs during the Period 1981-1985 (POR Planning)*, 102 F.C.C. 2d 353, 355 (1985).

[11] *See* n. 1 *supra*.

[12] A MAUO is an equivalent voice channel (circuit) operating at 64,000 bits per second with an additional 9,684,656 bits per second required for multiplexing for a total of 73,684,656 bits per second in each direction at the System Interface locations. 30 MAUOs are the equivalent of 1 MIU.

[13] TAT-10 is fully subscribed and any increase in capacity for U.S. carriers' needs would, in all likelihood, require foreign administrations to surrender their interests in order to allow service to other locations.

[14] *See North Atlantic Facilities Planning*, 3 FCC Rcd 3979, 3986 (1988); *All America Cable and Radio Inc., et. al.*, 67 F.C.C. 2d 451, 469 (1978).

[15] *North Atlantic Facilities Planning*, 3 FCC Rcd at 3987.

[16] *Id.* at 3989.

[17] *See id.* at 3989.

[18] *See Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, 4 FCC Rcd 2873 (1989) (*Price Caps Order)*.

[19] *See American Telephone & Telegraph, et. al.*, 4 FCC Rcd 8042, 8045 (1989) (TPC-4 Decision).

[20] *Id.* at 8046.

[21] *See* Section 214 Application, File No. I-T-C-91-136, at p.12.

[22] *See International Competitive Carrier*, 102 F.C.C. 2d 812, 82 (1985).

APPENDIX 1

SCHEDULE B
29-Oct-91

OWNERSHIP INTEREST IN THE TAT-11 CABLE SYSTEM

PARTIES	PERCENT
BT (UK)	7.43243
BTE (Ireland)	1.46396
CPRM (Portugal)	0.33784
FT (France)	14.86486
ITC (Italy)	1.23874
MCL (UK)	20.83333
RTT (Belgium)	0.90090
SPTT (Switzerland)	1.35135
TLFN (Spain)	0.78829
AT&T	31.41892
HKTI (Hong Kong)	1.12613
HTC	0.11261
IDB	0.33784
IDC (Japan)	0.45045
ITDC (Taiwan)	0.22523
ITJ (Japan)	0.67568
KDD (Japan)	0.56306
MCII	7.65766
PLDT (Philippines_	0.33784
TAS (Singapore)	0.45045
TLGB (Canada)	1.46396
TLMX (Mexico)	0.11261
TNZI (New Zealand)	0.11261
TRT/FTC	1.57658
USSP	3.94144
WCOM	0.22523
TOTAL	100.00000

APPENDIX 2

SCHEDULE C
29-Oct-91

ALLOCATION OF CAPITAL, OPERATING, AND MAINTENANCE COSTS OF SEGMENTS A, B, AND C OF THE TAT-11 CABLE SYSTEM

PARTIES	SEGMENT A (PERCENT) NOTE 1	SEGMENT B (PERCENT) NOTE 2	SEGMENT C (PERCENT) NOTE 3
BT	0.67568	20.25723	0.00000
BTE	0.45045	3.53698	0.00000
CPRM	0.00000	0.00000	2.25564
FT	8.10811	0.00000	72.18044
ITC	0.00000	0.00000	8.27068
MCL	4.72973	52.73312	0.00000
RTT	0.00000	1.60772	2.25564
SPTT	0.90090	0.00000	6.01504
TLFN	0.00000	1.92926	0.75188
AT&T (NOTE 4)	46.84682	19.93569	6.76692
HKTI	2.25225	0.00000	0.00000
HTC	0.22523	0.00000	0.00000
IDB	0.67568	0.00000	0.00000
IDC	0.90090	0.00000	0.00000
ITDC	0.45045	0.00000	0.00000
ITJ	1.35135	0.00000	0.00000
KDD	1.12613	0.00000	0.00000
MCII	15.31532	0.00000	0.00000
PLDT	0.67568	0.00000	0.00000
TAS	0.90090	0.00000	0.00000
TLGB	2.92793	0.00000	0.00000
TLMX	0.22523	0.00000	0.00000
TNZI	0.22523	0.00000	0.00000
TRT/FTC	3.15315	0.00000	0.00000
USSP	7.43243	0.00000	1.50376
WCOM	0.45045	0.00000	0.00000
TOTAL	100.00000	100.00000	100.00000

APPENDIX [illegible]

Notes to Schedule C
Page 1 of 1

NOTES:

1. The percentages shown on Schedule C for Segment A are derived from Schedule D-3 based on the relevant Western Access Party half MIU assignments divided by the Notional Capacity shown on Schedule D-3.

2. The percentages shown on Schedule C for Segment B are derived from Schedule D-1 based on the relevant Lyme Bay Access Party half MIU assignments divided by the Notional Capacity shown on Schedule D-1.

3. The percentages shown on Schedule C for Segment C are derived from Schedule D-2 based on the relevant St. Hilaire Access Party half MIU assignments divided by the Notional Capacity shown on Schedule D-2.

4. For the purpose of this agreement TPCI shall own the percentage listed against AT&T/TPCI for the portion of Segment D of the TAT-11 Cable System within France and the U.K. and their territorial waters through which the cable system traverses. AT&T shall own the percentage listed against AT&T/TPCI for the remainder of Segment D.

SCHEDULE D-1
29-Oct-91

TAT-11 CABLE SYSTEM
MIUS ASSIGNED FOR JOINT USE BY THE PARTIES OF THIS AGREEMENT
BETWEEN MANAHAWKIN AND SWANSEA

SWANSEA ACCESS PARTIES	MANAHAWKIN ACCESS PARTIES																	
	AT&T	BT	DTE	HKTI	IDB	IDC	ITDC	ITJ	KDD	MCII	MCL	PLDT	TAS	TLGB	TRT/FTC	USSP	UCOM	TOTAL
AT&T	62	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	62
BT	21	3	0	0	0	0	1	2	3	21	0	1	0	0	3	8	0	63
DTE	4	0	2	0	0	0	0	0	0	4	0	0	0	0	0	1	0	11
MCL	84	0	0	10	3	1	1	2	2	12	21	0	3	4	9	11	1	164
RTT	1	0	0	0	0	0	0	0	0	2	0	0	0	0	0	2	0	5
TLFN	2	0	0	0	0	0	0	0	0	2	0	0	0	2	0	0	0	6
TOTAL	174	3	2	10	3	1	2	4	5	41	21	1	3	6	12	22	1	311

SCHEDULE B-2
29-Oct-91

TAT-11 CABLE SYSTEM
MIUS ASSIGNED FOR JOINT USE BY THE PARTIES OF THIS AGREEMENT
BETWEEN MANAHAWKIN AND ST. HILAIRE

ST. HILAIRE ACCESS PARTIES	MANAHAWKIN ACCESS PARTIES															
	AT&T	FT	HTC	IDC	ITJ	MCII	PLDT	SPTT	TAS	TLGB	TLMX	TNZI	TRT/FTC	USSP	WCOM	TOTAL
AT&T	9	0	0	0	0	0	0	0	0	0	0	0	0	0	0	9
CPRM	1	0	0	0	0	0	0	0	0	2	0	0	0	0	0	3
FT	21	36	1	2	2	21	1	0	1	4	0	0	2	5	0	96
ITC	2	0	0	1	0	5	1	0	0	1	0	0	0	0	1	11
RTT	1	0	0	0	0	0	0	0	0	0	0	0	0	2	0	3
SPTT	0	0	0	0	0	1	0	4	0	0	0	1	0	2	0	8
TLFN	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	1
USSP	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0	2
TOTAL	34	36	1	3	2	27	2	4	1	7	1	1	2	11	1	133

SCHEDULE B-3
29-Oct-91

TAT-11 CABLE SYSTEM
MIUS ASSIGNED FOR JOINT USE BY THE PARTIES OF THIS AGREEMENT
BETWEEN MANAHAWKIN, SWANSEA, AND ST. HILAIRE

WESTERN ACCESS PARTIES

EASTERN ACCESS PARTIES	AT&T	BT	BTE	FT	HKTI	HTC	IDB	IDC	ITDC	ITJ	KDD	MCII	MCL	PLDT	SPTT	TAS	TLGB	TLNK	TMZI	TRT/FTC	USSP	VCOM	TOTAL
AT&T	71	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	71
BT	21	3	0	0	0	0	0	0	1	2	3	21	0	1	0	0	0	0	0	3	8	0	63
BTE	4	0	2	0	0	0	0	0	0	0	0	4	0	0	0	0	0	0	0	0	1	0	11
CPRM	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0	0	0	0	0	3
FT	21	0	0	36	0	1	0	2	0	2	0	21	0	1	0	1	4	0	0	2	5	0	96
ITC	2	0	0	0	0	0	0	1	0	0	0	5	0	1	0	0	1	0	0	0	0	1	11
MCL	84	0	0	0	10	0	3	1	1	2	2	12	21	0	0	3	4	0	0	9	11	1	164
RTT	2	0	0	0	0	0	0	0	0	0	0	2	0	0	0	0	0	0	0	0	4	0	8
SPTT	0	0	0	0	0	0	0	0	0	0	0	1	0	0	4	0	0	0	1	0	2	0	8
TLFN	2	0	0	0	0	0	0	0	0	0	0	2	0	0	0	0	2	1	0	0	0	0	7
USSP	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0	2
TOTAL	208	3	2	36	10	1	3	4	2	6	5	68	21	3	4	4	13	1	1	14	33	2	444

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE HAWAIIAN TELEPHONE COMPANY, INC. File No. I-T-C-92-021

Application for authority to acquire
and operate facilities in the Asean
Optical Fiber Submarine Cable Network
(AOFSCN).

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 31, 1991; Released: January 9, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-021 IS GRANTED, and GTE Hawaiian Telephone Co., Inc. is authorized to acquire, on an Indefeasible Right of User (IRU) basis, a one-half interest in and operate six circuits in the Brunei-Malaysia-Philippines (BMP) segment, the Kuantan-Kota-Kinabalu (KK-KTN) segment and the Malaysia-Thailand (MT) segment of the AOFSCN and activate the six half-circuits in TPC-3 and G-P-T cables for the provision of its regularly authorized services between Hawaii and Thailand and beyond.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between the applicant and its correspondent, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP — File No. I-T-C-92-02

Application for authority to acquire and operate facilities for direct service between the U.S. and Romania

Application for authority to acquire and operate facilities for direct service between the U.S. and Egypt — File No. I-T-C-92-028

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 31, 1991; Released: January 9, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Romania and Egypt by US Sprint Communications Company Limited Partnership (US Sprint).

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-92-027 and I-T-C-92-028 ARE GRANTED, and US Sprint is authorized to:

> a. lease from Comsat and operate 66 voice-grade satellite circuits between the Etam, West Virginia earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and earth stations in Romania and Egypt furnished by US Sprint's correspondents in Romania and Egypt;
>
> b. lease from AT&T and operate 66 voice-grade circuits in the Etam, West Virginia earth station;
>
> c. lease from AT&T and operate 66 voice-grade circuits between the Etam, West Virginia earth station and US Sprint's operating center in New York; and
>
> d. use said facilities to provide US Sprint's regularly authorized services, including switched voice services, between the U.S. and Romania (24 circuits) and Egypt (42 circuits) and beyond.

3. The Commission retains jurisdiction over this matte to reallocate circuits in the satellite system among th various international common carriers and other authorized users as required to ensure nondiscriminatory us of, and equitable access to, the communications satellit system.

4. No material changes inconsistent with this or an other relevant Commission order shall be made befor final execution of operating agreements between the applicant and its correspondents, and copies of the agreements shall be filed with the Commission within 30 day of their execution.

5. IT IS FURTHER ORDERED that the applicant shal file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of th Commission's Rules, 47 C.F.R. Part 61, for the servic authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shal file the annual reports of overseas telecommunication traffic required by Section 43.61 of the Commission' Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the applicant shal file semi-annual circuit reports pursuant to Sectio 63.10(b) of the Commission's Rules, 47 C.F.R. Sectio 63.10(b).

8. This order is issued under Section 0.291 of th Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission' Rules may be filed within 30 days of the date of publi notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

COMMUNICATIONS SATELLITE CORPORATION File No. I-T-C-92-030

For authority pursuant to Section 504(c) of the International Maritime Satellite Communications Act of 1978 and Section 214 of the Communications Act of 1934, as amended, to upgrade its Southbury, Connecticut ground earth station (WA-28) facilities with Inmarsat Standard M and Standard B Network Coordination Stations and the related control and channelization equipment necessary for the provision of Inmarsat Standard M and Standard B capability and to provide Inmarsat Standard M and Standard B services in the Atlantic Ocean Region-East and in the Atlantic Ocean Region-West

COMMUNICATIONS SATELLITE CORPORATION File No. I-T-C-92-031

For authority pursuant to Section 504(c) of the International Maritime Satellite Communications Act of 1978 and Section 214 of the Communications Act of 1934, as amended, to upgrade its Santa Paula, California ground earth station (KB-34 and KA-31) facilities with Inmarsat Standard M and Standard B Network Coordination Stations and the related control and channelization equipment necessary for the provision of Inmarsat Standard M and Standard B capability and to provide Inmarsat Standard M and Standard B services in the Pacific Ocean Region

MEMORANDUM, OPINION, ORDER AND AUTHORIZATION

Adopted: December 30, 1991; Released: January 9, 1992

By the Chief, International Facilities Division:

1. On November 1, 1991, the Communications Satellite Corporation (Comsat), through its Comsat Mobile Communications Division, filed the above-captioned applications requesting authority pursuant to Section 504(c) of the International Maritime Satellite Communications Act of 1978, 47 U.S.C. § 753(c), and Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, to upgrade its Southbury, Connecticut and Santa Paula, California ground earth station facilities with Inmarsat Standard M and Standard B Network Coordination Stations (NCSs) and the related control and channelization equipment necessary for the provision of Inmarsat Standard M and Standard B capability and to provide Inmarsat Standard M and Standard B communications services in the Atlantic Ocean Region-East (AOR-E), Atlantic Ocean Region-West (AOR-W) and Pacific Ocean Region (POR). Comsat requests authority to provide Inmarsat Standard M and B maritime satellite service and certain international land mobile satellite services (LMSS). The applications were placed on public notice on November 6, 1991. No petitions or comments were received. For the reasons set forth below, we grant the applications insofar as they request authority for maritime services, subject to certain conditions. We defer consideration of the use of Inmarsat Standard M and B for LMSS pending Commission action on Comsat's application File No. I-T-C-91-139.

2. Comsat seeks authority to install the NCSs and control and channelization equipment at Southbury and Santa Paula necessary for the provision of voice frequency and telegraph transmission facilities for access to Inmarsat space segment. Comsat describes Inmarsat Standard B as an all-digital system that preserves the signal quality standards and reliability of Standard A service, while consuming less satellite power and bandwidth per voice channel. According to Comsat, this will result in reduced communications charges and an improved grade of service. Comsat's Inmarsat Standard B will include telephony using 16 Kbps digital voice coding, telex, duplex and simplex, digital facsimile at 9.6 Kbps, and data at speeds of up to 9.6 Kbps. In the future, Comsat expects to offer credit card operation for telephony, 9.6 Kbps telephony, 14.4 and 16 Kbps data, and shore-to-ship simplex group calls. With a somewhat larger ship earth station antenna, Inmarsat Standard B service will include high-speed data at 64 Kbps and above and high-quality television.

3. Comsat states that Inmarsat Standard M is based on low-cost lightweight mobile earth stations offering 4.8 Kbps voice and low speed (2400 bits per second) data/facsimile services. Inmarsat Standard M services will include direct dial telephone interconnection with the fixed public switched telephone network (PSTN) using 6.4 Kbps digital voice coding, direct dial and auto answer Group 3 facsimile interconnected with the PSTN, circuit switched duplex data via the PSTN or public switched data networks, and voice, data, and facsimile group call services which allow a single transmission to be received by many users belonging to assigned groups.

4. Comsat states that the NCSs will be responsible for coordinating all Inmarsat control and access activities between all coast earth stations and ship earth stations in the POR, AOR-E and AOR-W. The NCS equipment is composed of a control processing unit, a monitor and control subsystem, common equipment, C-band communications equipment, and L-band equipment. For the provision of Inmarsat Standard M and B services, Comsat will also add channelization equipment to provide the voice frequency and data transmission facilities for access to Inmarsat's space segment and access and control equipment which includes redundant processors containing the stored program and associated CRT consoles. The cost of the equip-

ment required for the AOR-E and AOR-W NCS is estimated to be $4.1 million and for the POR NCS $2.1 million. The cost of the control and channelization equipment at Southbury is estimated to be $6 million and at Santa Paula $5 million. The total cost of the upgrade at Southbury is estimated to be $10.1 million and at Santa Paula $7.1 million. Comsat states that Inmarsat Standard M and B service will be available pursuant to cost-based tariffs which Comsat will file with the Commission in the near future.

5. Comsat states that the operation of the Standard M and B NCSs and the equipment described above will enable the assignment of space segment capacity to users on a demand basis and will ensure more efficient use of the Inmarsat system. Grant of these applications will also permit the orderly introduction of Inmarsat Standard M and B service, thereby greatly extending the advantages and reliability of satellite communications to a host of new users. Comsat also claims that Inmarsat Standard M service will provide maritime satellite safety communications links for a large number of smaller vessels that otherwise could not realize this benefit. Comsat adds that the unit cost of mobile communications will be reduced and U.S. competitiveness will be enhanced.

6. We conclude that it will be in the public interest to allow Comsat to provide Inmarsat Standard M and B service. Inmarsat Standard M and B service will make available to some maritime users a type of communication not previously available. The record in this proceeding fails to demonstrate any reason for denial of these applications. Furthermore, we believe that U.S. policy should be designed to ensure timely and effective U.S. entry into the markets for new services. We conclude that this goal will be furthered by grant of the instant applications.

7. Comsat also asks to provide Inmarsat Standard M and B international LMSS to land-based mobile terminals in foreign countries via the Inmarsat first and second generation satellites. The international LMSS would include communications within and between foreign countries excluding North America and communications between fixed points in North America and mobile terminals located outside of North America. In a related proceeding, File No. I-T-C-91-139, Comsat has requested blanket authority to provide international LMSS via the Inmarsat system and its regularly authorized ground earth stations. Because the issue of Inmarsat use for international LMSS will be considered in File No. I-T-C-91-139, we need not here address Comsat's request to provide Inmarsat Standard M and B international LMSS. We therefore defer action on that portion of Comsat's application that requests authority to provide Inmarsat Standard M and B international LMSS to File No. I-T-C-91-139.

8. Accordingly, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Section 504(c) of the International Maritime Satellite Telecommunications Act of 1978, 47 U.S.C. § 753(c), IT IS ORDERED that the applications of the Communications Satellite Corporation, File Nos. I-T-C-92-030 and I-T-C-92-031, ARE GRANTED IN PART and Comsat is authorized to provide Inmarsat Standard M and B satellite services described herein in the Atlantic Ocean Region-East, Atlantic Ocean Region-West and Pacific Ocean Region and to upgrade the Southbury, Connecticut, ground earth station (WA-28) and Santa Paula, California, ground earth stations (KB-34 and KA-31) with Inmarsat Standard M and B Network Coordination Stations and the relate control and channelization equipment necessary for th provision of Inmarsat Standard M and Standard B capa bility.

9. IT IS FURTHER ORDERED that Comsat's reques to provide international LMSS via Inmarsat is deferre and will be considered in Application File No. I-T-C 91-139.

10. IT IS FURTHER ORDERED that Comsat shal pursuant to Section 203 of the Communications Act, 4 U.S.C. §203, and Part 61 of the Commission's Rules, 4 C.F.R. Part 61, file a tariff for the services authorized i this order before offering services to the public.

11. This order is issued under Section 0.291 of th Commission's Rules and is effective upon adoption. Peti tions for Reconsideration under Section 1.106 or applica tions for review under Section 1.115 of the Commission' Rules may be filed within 30 days of public notice of thi order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MIDWEST CABLE AND SATELLITE, INC. File No. I-T-C-92-026

For authority pursuant to Section 214
of the Communications Act to extend
its satellite transmission/reception
services to include services between
the U.S. and Canada and Mexico, using
U.S. and non-U.S satellites.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: December 30, 1991; Released: January 10, 1992

By the Chief, International Facilities Division:

1. The Commission has under consideration the above-captioned uncontested[1] application seeking authority under Section 214 of the Communications Act of 1934, as amended, to provide transborder services via U.S. domestic, Canadian and Mexican satellites between the U.S. and Canada and Mexico. We find that a final grant of the application is in the public interest.

2. Midwest Cable and Satellite, Inc. (MCS) is a domestic, non-dominant common carrier presently offering various television programming distribution and reception, video conferencing, and occasional use video services through the operation of a Ku-band earth station in Minneapolis, Minnesota. Additionally, MCS has been authorized to provide C-band television services domestically and between the U.S. and transborder locations in Mexico and Canada. By the present application MCS requests authority to extend its Ku-band earth station services to include the transmission and reception of television programming between the U.S. and Canada and Mexico using satellite systems that have been consulted for transborder services under Article XIV(d) of the INTELSAT Agreement.

3. MCS' application requests authority to provide services identical to those previously authorized under the Commission's transborder policy and consulted under Article XIV(d) of the INTELSAT Agreement for the satellites it intends to utilize. We have previously recognized that where an application involves the extension of existing or planned domestic networks to provide video or business services between the United States and Canada and Mexico using U.S. domestic satellites, as well as the Anik and Morelos satellites, the grant of transborder authority is consistent with the Commission's Transborder policy.[2] In such cases we have determined that use of the INTELSAT system would be both clearly impractical and uneconomical.[3] In addition, we find here that MCS' request is in accord with current INTELSAT Article XIV(d) consultations and therefore will cause neither technical interference nor significant economic harm to the global system.

4. Accordingly, IT IS ORDERED that application File No. ITC-92-026 IS GRANTED, and MCS is authorized to establish channels of communication with U.S. satellites listed in Attachment 1, as well as the Anik and Morelos satellites listed in Attachment 2, to provide transmission and reception of television programming between the U.S. and Canada and Mexico, consistent with Attachments 1 and 2.

5. IT IS FURTHER ORDERED that any earth stations used by MCS to establish channels of communications with non-U.S. satellites for transborder service must be authorized under Title III of the Communications Act, as amended, for such communications.

6. IT IS FURTHER ORDERED that no final authority will be granted for communication with the Anik E-A or Anik E-B satellites until MCS submits an operating agreement and the Commission determines that the agreement is in the public interest and consistent with the Commission's Transborder Policy.

7. This authorization constitutes the final step with respect to the provision of transborder services only insofar as the U.S. regulatory process is concerned. It does not dispense with any requirements that may be imposed by other countries involved.

8. This order shall not be construed as authorizing the distribution of programming where the appropriate copyright clearances have not been obtained or where the U.S. Government has determined that appropriate copyright protection does not otherwise exist.

9. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.1115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] The application was placed on public notice on November 6, 1991. No comments were received.

[2] *See* Transborder Satellite Video Services, 88 FCC 2d 258, 280 (1981) (Duplication of services over INTELSAT would involve terrestrial links or multi-hop satellite connections, increase costs and result in an inefficient use of the available radio spectrum); Satellite Business Systems, 88 FCC 2d 195 (1981) (Commission authorized the provision of two-way business communications between the U.S. and Canada where the extension of an existing U.S. domestic network was involved). *See also*, Eastern Microwave, Inc., *et al.*, File Nos. I-T-C-84-095 *et al.*, Mimeo No. 6425, released September 11, 1984 (application of Atlantic Teleport Company); RCA American Communications, Inc., *et al.*, File Nos. I-T-C-86-002, *et al.*, Mimeo No. 2578, released February 14,

1986 (application of Upsouth Corp); National Cable and Satellite Corp., *et al.,* File Nos. 417-DSE-ML-86, et al., Mimeo No. 5220, released June 20, 1986 (application of Satellite Transmission and Reception Specialists).

[3] *Id.*

ATTACHMENT 1

U.S. Satellites Consulted Pursuant to Article XIV(d)

Satellites

*AURORA (SATCOM C-5)
COMSTAR D-4
CONTEL ASC-I
CONTEL ASC-II
GALAXY I
GALAXY II
GALAXY III
GALAXY IV-R
GALAXY V-R
GALAXY VI (WESTAR VI-S)
GSTAR I
GSTAR II
GSTAR IV
SATCOM IR
SATCOM IIR
*SATCOM C-1
*SATCOM C-3
*SATCOM C-4
SATCOM IV
SATCOM K-1
SATCOM K-2
SBS II
SBS III
SBS IV
SBS V
SBS VI
SPACENET I
SPACENET II
SPACENET III
TELSTAR 301 (TELSTAR 3A)
TELSTAR 302
TELSTAR 303
WESTAR IV
WESTAR V

* Consulted for service between the U.S. and Canada only.

ATTACHMENT 2

SUMMARY OF INTELSAT CONSULTATION (see note 5)

Country	Service[s]	Satellite[s]
Anguilla	T.V., audio and data receive-only	all satellites listed in Attachment 1
Antigua and Barbuda	T.V., audio and data receive-only	all satellites listed in Attachment 1
Bahamas	T.V., audio and data receive-only	all satellites listed in Attachment 1
Barbados	T.V. receive-only	all Galaxy, Satcom and Westar satellites listed in Attachment 1
Belize	T.V., audio and data receive-only	all satellites listed in Attachment 1
Bermuda	T.V., audio and data receive-only	all satellites listed in Attachment 1
British Virgin Islands	T.V., audio and data receive-only	all satellites listed in Attachment 1
Canada	reception of T.V. programming; occasional point-to-point video services; business services including data and electronic document distribution, video teleconferencing and voice communications	all satellites listed in Attachment 1 plus ANIK B, C1, C2, C3, D1 and D2, E-A and E-B (see note 4)
Cayman Islands	T.V., audio and data receive-only	all satellites listed in Attachment 1
Dominica	T.V., audio and data receive-only	all satellites listed in Attachment 1
Grenada	T.V., audio and data receive-only	all satellites listed in Attachment 1
Grenadines	T.V., audio and data receive-only	all satellites listed in Attachment 1
Mexico	incidental reception of video and audio programming; occasional use T.V.; business services including data and electronic document distribution video teleconferencing and voice communications	all satellites listed in Attachment 1 plus the Morelos I and II satellites

Monsterrat	T.V., audio and data receive-only	all satellites listed in Attachment 1
Netherlands Antilles	T.V. receive-only	Galaxy I, Satcom III-R and IV, Westar IV and V and Comstar D-4
St. Christopher-Nevis	T.V., audio and data receive-only	all satellites listed in Attachment 1
St. Lucia	T.V., audio and data receive-only	all satellites listed in Attachment 1
St. Vincent	T.V., audio and data receive-only	all satellites listed in Attachment 1
Turks & Caicos	T.V., audio and data receive-only	all satellites listed in Attachment 1
Venezuela	T.V. receive-only data receive-only	all satellites listed in Attachment 1

Notes

1) All services authorized to Latin American/Caribbean locations are receive-only (i.e. can be received as a by-product of or incidental to U.S. domestic transmissions). All services (i.e. T.V., audio and data receive-only) can be provided to any Latin American/Caribbean point over any of the satellites listed in Attachment 1 even through only certain services and satellites were initially requested. This can be accomplished through notifying INTELSAT with no additional consultation required.

2) Attachment 1 contains only those satellites that have been technically consulted with INTELSAT.

3) Attachment 2 does not contain all of the Latin American/Caribbean countries which have been included in previous charts. Attachment 2 contains only those countries that associated with the most recent INTELSAT Article XIV(d) consultation in October 1989 (AP-15-23E). Other countries will be added to the list once they associate with that consultation.

4) No final authority will be granted for the use of the Anik E-A and E-B satellites until an applicant submits an operating agreement and the Commission determines that the agreement is in the public interest and consistent with the Commission's Transborder Policy.

5) This chart updates and supersedes previous charts listing countries, services and satellites consulted with INTELSAT for the provision of transborder services. The chart is current as of October 1989 and incorporates the most recent consultations approved by the INTELSAT Assembly of Parties in AP-15-3E (See AP-15-23E, AP-15-24E, AP-1534E).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS	Transmittal Nos. 3380, 3537, 3542, and 3543

Revisions to Tariff F.C.C. No. 1

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1991; Released: December 19, 1991

By the Chief Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On August 16, 1991, AT&T filed Transmittal No. 3380, which modifies the terms and conditions of the Call Home and Card Options of AT&T's Block-of-Time (Reach Out America) optional calling plan (OCP). Under Transmittal 3380, only AT&T CIID/891 (CIID) cards will qualify for the OCP discounted pricing as of January 1, 1992.[1] On October 10, 1991, AT&T filed Transmittal No. 3537, limiting its Pro Wats OCP card discount to AT&T CIID card usage. On October 11, 1991, AT&T filed Transmittal No. 3542, limiting its Small Business OCP discount to AT&T CIID card usage, and filed Transmittal No. 3543, which similarly limits its Plan D Customer Network OCP discount to AT&T CIID card usage. In these tariffs, AT&T has tied retention of the customer's existing card option discount to use of the new AT&T CIID card.[2] AT&T will provide the new card to any customer that wants it. Under these transmittals, OCP customers who fail to use the AT&T CIID cards will be dropped as card option customers as of January 1, 1992, so that their next bill for calling card usage will be at the higher, nondiscounted rate. Transmittal 3380 is scheduled to become effective on December 20, 1991. Transmittal 3537 is scheduled to become effective on December 24, 1991. Transmittals 3542 and 3543 are scheduled to become effective on December 25, 1991

II. PLEADINGS

A. Petition

2. On September 3, 1991, MCI Telecommunications Corporation (MCI) filed a petition to reject Transmittal No. 3380.[3] MCI claims that the proposed revisions will remove the tariff provisions that permit AT&T Block-of-Time Calling Plan customers who have the Call Home and Card Option plans to have any calling card other than the AT&T CIID calling cards qualify for inclusion in their OCP. Thus, MCI argues, AT&T is actually proposing "to discontinue, reduce, or impair service" currently being furnished to its customers in the absence of authority to do so under Section 214(a) of the Communications Act, 47 U.S.C. § 214(a), and Section 63.60 *et seq.* of the Commission's Rules, 47 C.F.R. § 63.60 *et seq.* MCI Petition at 1-2.

B. Reply

3. AT&T filed a reply on September 12, 1991 disputing MCI's characterization of its tariff revision as a discontinuance of service which requires prior certification under Section 214 of the Communications Act. AT&T explains that the revisions simply change the terms and conditions applicable to two AT&T calling plan options by requiring that customers who wish to have calling card calls qualify under these options bill them to an AT&T CIID calling card. AT&T Reply at 2. AT&T claims it is "merely eliminating a type of calling card which can be used to qualify for the discounts associated with the plans." *Id.* at 2-3. AT&T argues that at most, its proposed revisions could cause the loss of the discount, in other words, a rate change, for some customers, and that a change in rates has never been held to constitute a discontinuance of service requiring prior Commission authorization. *Id.* at 3, *citing* American Telephone and Telegraph Co. (Termination of TELPAK Service), 64 F.C.C. 2d 959, 965 (1977); Western Union Telegraph Co., 74 F.C.C. 2d 293, 295, 297 (1979). Finally, AT&T contends that its revision merely restricts an available billing arrangement, and that this is similar to the revisions AT&T has previously used to eliminate its dormitory billing arrangement in American Telephone and Company Co., Transmittal No. 1781, 4 FCC Rcd 8582 (Com. Car. Bur. 1989). AT&T notes that MCI opposed that tariff on the same prior certification grounds, and that its argument was rejected by the Bureau.

4. AT&T explains the need for the tariff revisions withdrawing existing OCP card discounts in a footnote, which states: "Due to contractual arrangements with the LECs, which become operational on January 1, 1992 -- the

---

[1] AT&T also performed the required Price Cap adjustments for Basket 1 and states that the new Actual Price Index falls below the Price Cap Index for Basket 1 and the new Service Band Indexes for Operator/Card Services, Reach Out America and Residence fall within the required limits.

[2] AT&T's CIID card is a so-called "proprietary" card. The term "proprietary" card is generally used in the industry to refer to cards the validation data for which is not made generally available to other carriers by the card-issuer. "Proprietary" cards can be contrasted with "joint use" cards. In Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, Notice of Proposed Rule Making, CC Docket No. 91-115, 6 FCC Rcd 3506 (1991) (*Joint Use Card NPRM*), the Commission defined "joint use" cards. LEC joint use cards were defined as cards which bear account numbers supplied by a LEC, are used for the services both of a LEC and an IXC, and are validated by access to data maintained by the LEC. *Id.* at n. 1. *See also* Cinncinnati Bell Telephone, Final Order, CC Docket No. 89-323, FCC 91-117, paras. 2 and 26 (released May 24, 1991). Pleadings filed in response to this Order should conform to this standard usage of the terms "proprietary" cards and "joint use" cards or fully explain any non-standard usage of these terms.

[3] No petitions were filed against Transmittal Nos. 3537, 3542, and 3543.

effective date of the proposed revisions, AT&T will be deprived of the ability to include calls billed to non AT&T CIID/891 calling cards on its optional calling plan bills. The proposed tariff revisions reflect this fact." *Id.* at 2 n. 3.

C. Supplemental Information

5. AT&T has met with Tariff Division staff several times since the filing of the subject transmittals to discuss the operation of its new card call processing system and its effect on OCP customers as of January 1, 1992. At the request of Tariff Division staff, AT&T filed a supplemental statement expanding upon AT&T's justification for the elimination of OCP pricing for non-AT&T CIID card usage.[4] In its oral presentations, as in its Supplemental Statement, AT&T explained (1) how calls made over AT&T's network are processed and billed today; (2) how those processes will change beginning January 1, 1992 and (3) why OCP discounted billing will be infeasible for calls placed with non-AT&T calling cards beginning on that same date. As to the latter point, AT&T has asserted both orally and in writing that there are "operational and technical reasons" why it cannot extend the OCP pricing to non-AT&T CIID cards after December 31, 1991. AT&T states that on that date, the Shared Network Facilities Agreements (SNFAs) between AT&T and the Bell Operating Companies (BOCs) relating to card processing expire. Under the SNFAs, AT&T owned the validation database, and the BOCs owned the systems which maintained and updated it. AT&T claims that as a result of the expiration of this shared arrangement, it had to redesign its entire process of handling a message billed to a calling card.

6. AT&T states that the decision to limit OCPs to calls charged to an AT&T CIID card was a decision which met AT&T's perceptions of what it could reasonably build in view of the technology and systems required to develop, maintain and process calling card calls, which are complicated "even without the added complexity of OCP billing," and also meet "marketing objectives." AT&T Supplemental Statement at 2. AT&T states further that the new card call processing system it developed only gives AT&T access to account data for its own cards, whereas in the shared environment, AT&T had access to account data for both AT&T and LEC cards. According to AT&T, under the new system the essential billing information cannot be collected at the right place or the right time to apply OCP pricing to LEC card calls. AT&T asserts that extensive and expensive changes would have to be made to both the AT&T and LEC systems in order to remedy this limitation, that in no event could these changes be accomplished by January 1, 1992, and, in addition, agreements between AT&T and the LECs would have to be renegotiated. AT&T ultimately maintains that technical difficulties associated with including card calls charged to LEC cards make their inclusion in the OCP discounts infeasible.

III. DISCUSSION

7. We agree with AT&T's contention that Transmittal No. 3380 is not a discontinuance of service for purposes of Section 214 of the Act. We have concluded, however, based on our review of the instant transmittals and the pleadings, that AT&T's tariff revisions raise other issues that warrant investigation. Under Transmittal 3380, AT&T has tied retention of an existing discount exclusively to use of the AT&T CIID card, and has prospectively limited the availability of REACH OUT to only AT&T CIID card users. The same is true with respect to AT&T's other CIID-related filings under Transmittals 3537, 3542 and 3543. In each case, OCP customers are to be charged different rates for what is otherwise the same service, depending on the type of card used for charging the call. Such apparent discrimination in the terms and conditions of service raise serious questions of compliance with the prohibition against unreasonable discrimination contained in Section 202(a) of the Communications Act, 47 U.S.C. § 202(a). The central question we will investigate in this docket is whether any such discrimination is reasonable.

8. To justify this transmittal, AT&T argues that the change-over to its new, proprietary card processing system will occur on January 1, 1992, and that its tariff revisions must be in place by then to reflect this fact. AT&T offers a two-pronged justification for withdrawal of existing card option discounts at that time: (1) contractual arrangements with the LECs and (2) technical and operational difficulties. We have reviewed AT&T's supporting documentation and find it insufficient. AT&T's description of its calling card processing system does not establish that continuation of the existing discounts is impossible nor is that conclusion consistent with information provided by the BOCs regarding the interoperation of their usage tracking systems and AT&T's. Based on the information now before us, we cannot resolve the factual inconsistencies and conflicts in AT&T's justification for these transmittals which would enable us to determine whether the apparent discrimination among card users introduced by these transmittals is reasonable. Therefore, we are instituting an investigation to obtain additional information from interested parties and to analyze the record further.

9. We have also concluded that the issues raised by these four transmittals are complex and warrant exercise of our discretion to suspend them for five months pending investigation. We recognize that suspension is a severe regulatory action because it delays the implementation of new or changed offerings. In deciding whether to suspend, we have balanced the interests of ratepayers, the filing

---

[4] Letter from E. E. Estey to Chief, Tariff Division, Common Carrier Bureau, October 21, 1991. The Estey cover letter states that it transmits a document supplementing information relating to AT&T Transmittal 3380. The information by its nature also relates to Transmittals 3537, 3542, and 3543. AT&T has requested confidential treatment, pursuant to Sections 0.457 and 0.459 of the Commission's Rules, 47 C.F.R. §§ 0.457 and 0.459 and Section 552(c)(4) of the Freedom of Information Act, 5 U.S.C. § 552(c)(4), for portions of the statement containing (1) technical and marketing information concerning AT&T calling cards; (2) descriptions of the manner in which AT&T processes calling card calls made over the AT&T network; and (3) information about AT&T's evaluation of possible modifications to AT&T's system. We do not rule on AT&T's request for confidentiality at this time because we have not relied upon the affected written information in reaching our decision, nor do we disclose that information in this Order.

carrier, and the competitive process. We have determined that the potential for a violation of Section 202(a) of the Communications Act by the instant transmittals, as well as the impact on existing card customers of the transmittals' elimination of existing discounts, outweighs the carrier's interest in the January 1, 1992 withdrawal of the OCP pricing proposed in Transmittals 3380, 3537, 3542, and 3543.

10. AT&T has attempted to justify the apparent discrimination in these tariffs on the grounds that: (1) it has entered into contractual arrangements with the LECs that deprive AT&T of the ability to continue to OCP pricing for non-AT&T CIID cards; and (2) there are technical and operational difficulties and limitations in its proprietary card call processing system.

In order to determine whether AT&T's justification for the discrimination introduced by these transmittals is valid, we require AT&T to answer the following questions:

A. What contractual arrangements with the LECs become operational on January 1, 1992 which affect AT&T's ability to continue to extend OCP pricing to non-AT&T CIID card usage? Who initiated the proposed contractual arrangements? Were reasonable alternatives explored or available? In what way do those contractual agreements affect AT&T's ability to continue OCP pricing for non-AT&T card usage?

B. Do technical and operational difficulties exist which affect AT&T's ability to continue to extend OCP pricing to non-AT&T CIID card usage? If so,

1. What are these difficulties?
2. Do alternative processes exist, in the interim period and for the long term, which would permit continued inclusion of non-AT&T CIID cards in OCPs?

C. AT&T has stated that the decision to create a new card call processing system, which, *inter alia,* lacks the ability to automatically extend OCP pricing to non-AT&T CIID card usage, was a business decision which was consistent with AT&T's capabilities and which met its marketing objectives. Is any rate discrimination made reasonable, and thus permissible under Section 202(a), if (1) the discrimination is an unavoidable product of decisions made by the carrier in the conduct of its business; and (2) the discrimination could have been avoided by the carrier if the carrier had chosen to modify the business decision which led to the discrimination?

11. AT&T may, of course, present any additional justifications for this rate disparity in its direct case if it chooses to do so.

IV. PROCEDURAL MATTERS

12. This investigation will be conducted as a notice and comment proceeding. AT&T is designated as a party. AT&T shall file its direct case no later than January 30, 1992. The direct case shall present AT&T's position with respect to the issues described in this Order. Pleadings responding to the direct case may be filed no later than February 27, 1992, and must be captioned "Opposition to Direct Case" or "Comments on Direct Case." AT&T may file a "Rebuttal" to oppositions or comments no later than March 12, 1992.

13. An original and seven copies of all pleadings shall be filed with the Secretary of the Commission. In addition, one copy shall be delivered to the Commission's commercial firm for copying, Downtown Copy Center, Room 246, 1919 M Street, N.W., Washington, D.C. 20554. Members of the general public who wish to express their views in an informal manner may do so by submitting one copy of their comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554.

14. *Ex parte* contacts, (*i.e.,* written or oral communications which address either the procedural or substantive merits of the proceeding which are directed to any member, officer, or employee of the Commission who may reasonably be expected to be involved in the decisional process in this proceeding) are permitted in this proceeding until a public notice of scheduled Commission consideration of a final Order is released and after the final Order itself is issued. Written *ex parte* contacts must be filed on the day submitted with the Secretary and Commission employees receiving each presentation. For other requirements, *see generally* Section 1.1200 *et seq.* of the Commission's Rules, 47 C.F.R. § 1.1200 *et seq.*

15. All relevant and timely comments and reply comments will be considered by this Commission. In reaching a decision, the Commission may take into account information and ideas not contained in comments, provided such information is placed in the public file, and provided that the fact of reliance on such information is noted in the Order.

16. The investigation established in this Order has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection, or recordkeeping, labeling, disclosure, or other record retention requirements as contemplated under the statute. *See* 44 U.S.C. § 3502(4)(A).

V. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED that, pursuant to Sections 204(a) and 403 of the Communications Act of 1934, 47 U.S.C. §§ 204(a), 403, an investigation is instituted into the lawfulness of the tariff revisions filed by AT&T Communications, Inc. in Tariff F.C.C. No. 1, Transmittal Nos. 3380, 3537, 3542, and 3543.

18. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the four instant tariff revisions filed by AT&T Communications, Inc. ARE SUSPENDED until May 14, 1992.

19. IT IS FURTHER ORDERED that AT&T Communications, Inc. SHALL FILE a supplement reflecting these suspensions no later than December 18, 1991. Special Permission No. 91-1106 is assigned for this purpose.

20. IT IS FURTHER ORDERED that the petition to reject AT&T Transmittal No. 3380 filed by MCI Telecommunications Corporation IS DENIED.

21. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

MIDWEST COMMUNICATIONS, INC. (Assignor)

File Nos. BALCT-910809KM
BALH-910809KL
BAL-910809KK
BALCT-910809KN
BALCT-910809KO
BALCT-910809KP
BALCT-910809KQ

and

CBS INC.
(Assignee)

For Consent to the Assignment of Licenses of Stations:
WCCO-TV, Minneapolis, Minnesota
WLTE(FM), Minneapolis, Minnesota
WCCO(AM), Minneapolis, Minnesota
KCCO-TV, Alexandria, Minnesota
KCCW-TV, Walker, Minnesota
WFRV-TV, Green Bay, Wisconsin
WJMN-TV, Escanaba, Michigan

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1991; Released: December 20, 1991

By the Commission:

INTRODUCTION

1. The Commission has before it for consideration the above-captioned applications for consent to the assignment of the television and radio broadcast licenses held by Midwest Communications, Inc. (Midwest) to CBS Inc. (CBS).[1] In view of the proposed common ownership of television and radio stations in Minneapolis, Minnesota, which is generally prohibited by the Commission's "one-to-a-market" rule,[2] CBS has requested a waiver of the rule pursuant to the *Second Report and Order* in MM Docket No. 87-7.[3] In addition, as the licensee of twelve FM radio stations, the maximum allowed under our national ownership rule, [4] CBS has requested an 18-month waiver of this rule so that it may acquire WLTE(FM) and retain its other FM radio stations until it can divest itself of one of its existing FM stations. We also consider here the proposal of CBS to continue operating stations KCCO-TV, KCCW-TV, and WJMN-TV as television "satellite" stations pursuant to the Commission's *Report and Order* in MM Docket No. 87-8.[5]

2. KVBM Television, Inc. (KVBM), permittee of television station KVBM-TV, Channel 45, Minneapolis, Minnesota, has filed a Petition to Deny against the assignment only of WCCO-TV, alleging that Section 73.635 of the Commission's Rules precludes grant of the application.[6] CBS and Midwest filed Oppositions against the petition. KVBM submitted a late-filed reply pleading.[7]

ONE-TO-A-MARKET WAIVER

3. In the *Second Report and Order*, we set out standards for reviewing requests for waivers of the one-to-a-market rule. We concluded that we would look favorably upon one-to-a-market waiver requests involving radio and television station combinations located in a top 25 television market where there will be at least 30 separately owned, operated and controlled broadcast licensees or "voices" after the proposed combination. *Second Report and Order*, at 1751. In establishing the "Top 25 Markets/30 Voices" presumption, we stated that "[a]lthough liberalizing the radio-TV cross-ownership rule may affect diversity of ownership to some minimal degree even in markets with many separate licensees, we believe that any such effect must be weighed against the efficiency gains, cost savings, and other benefits of allowing such combinations." *Id.*, at 1752. In support of its waiver request, CBS notes that,

---

[1] The stations are currently held by subsidiary corporations controlled by Midwest. Pursuant to the agreement between the parties, Midwest filed, concurrently with the above applications, short-form applications (FCC Form 316) seeking Commission consent to the merger of the subsidiaries into Midwest. These *pro forma* applications were granted on August 27, 1991. According to the agreement, the mergers will occur immediately preceding the closing of the assignment transactions.

[2] 47 C.F.R. Sec. 73.3555(b).

[3] *Amendment of Section 73.3555*, 4 FCC Rcd 1741, (*"Second Report and Order"*), *recon. granted in part*, 4 FCC Rcd 6489 (1989).

[4] 47 C.F.R. Sec. 73.3555(d)(1)(ii).

[5] *Television Satellite Stations*, 6 FCC Rcd 4212 (1991) (*"Satellite Report and Order"*) (*petitions for partial stay and reconsideration pending).*

[6] Other parties submitted Petitions to Deny which have since been dismissed. The Minneapolis Branch of the NAACP had filed a Petition to Deny against the assignment of the Minneapolis stations, challenging, among other things, the proposed waiver of the twelve-station ownership restriction. In addition, Joe Bornong, Julie Tigges, and Telecommunications Research and Action Center had filed a Petition to Deny against CBS's requests to waive the one-to-a-market rule and the twelve-station ownership provision. Pursuant to settlement agreements with CBS which were approved by the staff on December 11, 1991, these Petitions to Deny were dismissed. *See Abuses of the Commission's Processes*, 5 FCC Rcd 3911, 3915 (1990); 47 C.F.R. Sec. 73.3588. We must nevertheless consider the issues raised in those petitions. *Booth American Co.*, 58 FCC 2d 553 (1976).

[7] Because it does not appear that the parties to these applications were prejudiced by the short delay, the reply will be accepted. Further, the staff sent a letter dated November 18, 1991, to CBS and Midwest requesting additional information regarding KVBM's pleading. Each applicant responded on November 27, 1991, and KVBM replied to their responses on December 5, 1991.

according to the most recent *Arbitron Ratings Television ADI Market Guide,* the Minneapolis-St. Paul market is the fourteenth ranked television market in the United States. Additionally, in accordance with the requirements set out in the *Second Report and Order,* CBS has established that more than 30 separate "voices" will exist in the Minneapolis-St. Paul market after its proposed acquisition. Accordingly, and finding no reason to the contrary, we find that CBS has met its burden under the Top 25 Markets/30 Voices standard to justify grant of its waiver. *See Capital Cities/ABC, Inc.,* 4 FCC Rcd 5498 (1989).

TEMPORARY TWELVE-STATION OWNERSHIP WAIVER

4. As part of its application, CBS requests grant of the assignment of station WLTE(FM), Minneapolis, Minnesota. Since CBS currently owns the maximum number of FM radio stations permitted under our national multiple ownership restrictions,[8] CBS has requested a temporary waiver of Section 73.3555(d)(1)(ii) of the Commission's Rules until 18 months after the closing of the contemplated transaction.[9] In support of its request, CBS argues that the Commission has regularly granted temporary waivers of the multiple- and cross-ownership rules to allow a proposed assignee a reasonable period to come into compliance with the rules by divesting one or more of its media properties. [10] In further support of an 18-month waiver, CBS cites two cases in which the Commission has granted temporary waivers of the national ownership cap.[11] Finally, CBS points to the depressed state of the radio station market where, without a reasonable time period to divest, it will be at a negotiating disadvantage if forced to dispose of an FM station in less than 18 months.

5. While we have established specific criteria for granting one-to-a-market waivers, we have not adopted precise guidelines for waiver of our national ownership limits. Rather, before such a waiver can be granted, an applicant must sustain the burden of showing that any benefits to be achieved by its proposal are in the public interest and that a waiver would not compromise the fundamental policies served by the rule. *WAIT Radio v. F.C.C.,* 42418 F.2d 1153, 1157 (D.C. Cir. 1969). The basic principles of the Commission's multiple-ownership rules are to promote diversity of ownership and to maximize diversification of viewpoints, as well as to prevent any undue concentration of economic power contrary to the public interest. *Multiple Ownership Rules,* 97 FCC 2d 997 (1984), *on recon.,* 58 RR 2d 604, *further recon.,* 1 FCC Rcd 802 (1986).

6. We find that a temporary 18-month waiver will not significantly undermine the principles underlying the multiple ownership rules and will be consistent with similar waivers we have granted in the past.[12] *See RKO General* and *TVX Broadcast Group,* above. Such a limited waiver will have no undue adverse impact on the listening public. CBS has stated its intent to come into compliance with the 12-station standard, and it recently announced its plan to divest itself of station KLOU(FM), St. Louis, Missouri. In addition, local diversity of viewpoints in Minneapolis will not be significantly threatened by grant of the temporary waiver. *See* Para. 3. We believe that an 18-month period will provide CBS with adequate time to come into compliance with the Rule in an orderly manner. Moreover, permitting CBS to seek buyers within 18 months directly relates to the achievement of objectives established in related settlement agreements that we are inclined to favor. We note that, pursuant to its settlement agreement with NAACP, CBS has agreed that, in the course of its effort to identify potential purchasers of an FM station, it will undertake an affirmative action effort designed to maximize the possibility that the station might be purchased by a minority-controlled entity. In addition, we find that a "forced" sale by CBS could unnecessarily restrict the value of the station and could artificially limit the range of potential buyers to those with immediate access to the necessary capital, which may preclude the purchase of the station by local groups or minority-controlled entities. Such a result would work a hardship both on the public and on the licensee, presenting no offsetting public benefit. *See Citadel Communications Company, Ltd.,* 5 FCC Rcd 3842 (1990).

SATELLITE PROPOSALS

7. Pursuant to the satellite exception to the contour overlap provision (duopoly rule) of the Commission's multiple-ownership rules,[13] television station KCCO-TV (formerly KCMT) (Channel 7), Alexandria, Minnesota, operates as a "satellite" of WCCO-TV, Minneapolis, Minnesota, and KCCW-TV (formerly KNMT) (Channel 12), Walker, Minnesota, operates as a "satellite" of KCCO-TV.[14] Since 1969, station WJMN-TV, Escanaba, Michigan, has been operating as a 100-percent satellite station of WFRV-TV, Green Bay, Wisconsin.[15] Pursuant to

---

[8] CBS is licensee of KCBS-FM, Los Angeles, California; KLOU(FM), St. Louis, Missouri; KLTR(FM), Houston, Texas; KRQR(FM) San Francisco, California; KTXQ-FM, Ft. Worth, Texas; WBBM-FM, Chicago, Illinois; WCBS-FM, New York, New York; WJOI(FM), Detroit, Michigan; WLTT(FM), Bethesda, Maryland; WODS(FM), Boston, Massachusetts; WOGL-FM, Philadelphia, Pennsylvania; and WYNF-FM, Tampa, Florida.

[9] CBS had originally requested, in the alternative, a temporary waiver until six months after completion of the Commission's rulemaking proceeding initiated in MM Docket 91-140, the outcome of which may affect the national ownership limit for FM radio stations. On October 11, 1991, CBS withdrew this request.

[10] CBS refers to, as examples, *Capital Cities Communications, Inc.,* 59 RR 2d 451 (1985) (subseq. history omitted) (18 months to divest radio stations from previously grandfathered AM-FM-TV combinations); *Metromedia Radio & Television, Inc.,* 102 FCC 2d 1334 (1985) (subseq. history omitted) (24 months to divest newspaper-television cross-ownership); *Knoxville Channel 8 Limited Partnership,* 4 FCC Rcd 4760 (1989) (18 months to divest FM from FM-TV combination).

[11] *RKO General Inc. (KRTH),* 4 FCC Rcd 4089 (1989) (*"RKO General"*); *TVX Broadcast Group, Inc.,* 2 FCC Rcd 1534 (1987) (*"TVX Broadcast Group"*) (six-month waivers granted).

[12] We note that the multiple ownership rules are included in a pending rulemaking that is examining a number of the Commission's radio regulations. *See Revision of Radio Rules and Policies,* 6 FCC Rcd 3275 (1991). Our decision in this case merely involves the application of existing waiver criteria and in no way suggests the outcome of that proceeding. *See WAIT Radio,* at 1159.

[13] 47 C.F.R. Sec. 73.3555(a)(3), Note 5.

[14] *See Central Minnesota Television, Inc.,* 2 FCC Rcd 6730 (1987).

[15] *See WFRV, Inc.,* 17 FCC 2d 435, 437 (1969).

the above-captioned applications, CBS seeks to acquire these five television stations and intends to maintain the "satellite" status of KCCO-TV, KCCW-TV, and WJMN-TV. Under prior Commission policy, applicants for renewal or assignment were not required to make a specific showing to justify continued satellite operation of the station being renewed or sold.[16] Rather, they needed merely to demonstrate that the economic circumstances in the market that had justified the original grant of satellite status had not significantly changed. We have recently revised our policies regarding new and existing television satellite stations. On July 8, 1991, we released the *Satellite Report and Order,* which announced that, effective August 14, 1991, we would require all applicants seeking to transfer or assign satellite stations to demonstrate that the conditions warranting satellite status under this new policy prevail at the time of transfer or assignment. Absent such a showing, we will consider the satellite to be a full-service station for purposes of acting on the assignment or transfer application.

8. Under our new approach, an applicant for television satellite status will be entitled to a presumption that the proposed satellite operation is in the public interest if the applicant meets the following three criteria: (1) there is no City-Grade signal contour overlap between the parent and the satellite; (2) the proposed satellite will provide service to an underserved area; and (3) no alternative operator is ready and able to construct or to purchase and operate the proposed satellite as a full-service station. *Satellite Report and Order,* 6 FCC Rcd at 4213-14. Applicants that qualify for the presumption, when unrebutted, will be viewed favorably by the Commission. *Id.* at 4214. If an applicant cannot qualify for the presumption, we will evaluate the proposal on an *ad hoc* basis and grant the application if there are other compelling circumstances that warrant approval. *Id.*

9. In order to satisfy the first step of the presumption, the applicants submitted an engineering study showing that none of the satellite stations' City-Grade contours overlap with those of the parent stations. In support of the second criterion, the applicants rely on the "transmission test" to show that each satellite station provides service to an underserved area. Under the transmission test, a proposed satellite's community of license is considered underserved if it has two or fewer full-service stations already licensed to it. *Id.,* at 4215. In this regard, we note that KCCW-TV is the only television station licensed to Walker, Minnesota, and that WJMN-TV is the only television station licensed to Escanaba, Michigan. Alexandria, Minnesota, has two television stations: KCCO-TV and KSAX-TV, both operating as satellites. Accordingly, based on the foregoing, the applicants have satisfied the first two tests for qualifying for the public interest presumption.

10. The third prong of the presumption requires applicants to demonstrate that no alternative operator is ready and able to purchase and operate the proposed satellite as a full-service station. This third factor reflects the Commission's traditional consideration of the proposed satellite's ability to survive as a full-service operation in the market. In the *Satellite Report and Order,* we stated that we would expect the seller to establish its diligence in trying to find a buyer. Without specifying any factors for this showing, we indicated that the seller should provide some specific evidence of its efforts, such as listing the station with a broker, the number of resulting inquiries or lack of them, and the reasons any serious negotiations did not lead to a sale. Regarding this element of the presumption, the applicants state that Midwest made no specific efforts to sell the three existing satellite stations to persons who would operate them as nonsatellite stations. The applicants believe, however, that a strict application of this presumption in this case would be "grossly unfair," since Midwest could not have reasonably foreseen that such efforts would be required prior to the release of the *Satellite Report and Order.* Nevertheless, the applicants argue that even if such efforts were made, no full-service buyer for the satellite stations could have been found. In support of this argument, the applicants submitted the statements of two established media brokerage and appraisal firms, each concluding that it would not be feasible to find a purchaser willing to operate any of the three satellite stations as full-service stations. They based their conclusions on the small size of the markets involved, the expense of upgrading to a full-service station, geographical and population considerations, and the current depressed market for television stations.

11. While the applicant has not presented the specific evidence contemplated by the *Satellite Report and Order* to support the third criterion, we find that it has made a strong enough showing to justify satellite operation under an *ad hoc* analysis. CBS clearly has satisfied the first two criteria of the presumption. As for the third, given the totality of the circumstances discussed below, we believe CBS has made a compelling showing under our *ad hoc* approach.[17]

12. First, the applicant has submitted a letter from Goldman, Sachs, & Co. asserting that, in its attempt to find a buyer for Midwest's properties, no inquiries were received about purchasing the satellites as full-service stations. Also, the applicants provide reports from two brokers, Blackburn & Company and R. C. Crisler & Co., indicating that the Walker, Alexandria, and Escanaba markets could not support full-service operations. Similar economic reports and conclusions by media brokers played an important role in our decision to authorize satellite operations in Walker and Alexandria in 1987, when we authorized the Alexandria station's change from full-service television status and the Walker station's continuation of satellite status. *See Central Minnesota Television, Inc.*, 2 FCC Rcd 6730 (1987). In fact, since that time, the Alexandria market has dwindled to such an extent that Arbitron no longer lists Alexandria as a separate market; instead, Arbitron includes it as part of the Minneapolis/St. Paul market. Likewise the brokers' assessment of Escanaba indicates that the community's declining population, the station's location (between the Green Bay, Wisconsin and Marquette, Michigan markets), and in-

---

[16] *See, e.g., WSTM-TV, Inc.,* 54 RR 2d 1327, 1338, n. 32 (1983).

[17] In the *Satellite Report and Order,* we indicated that the "degree of departure from the presumptive criteria will also influence our decision" under the *ad hoc* approach. 6 FCC Rcd at 4214. Here, the departure is not substantial.

creasing cable penetration would prevent sufficient audience support to justify the entry of another full-service station into the market. Additionally, in taking into account the current depressed market for the purchase of television stations in general, one broker concluded that prospective purchasers who could finance a purchase and a costly conversion of a satellite station are nonexistent at the present time. Finally, we note that CBS and Midwest began negotiating the sale of the group of stations before the Commission altered the satellite policy, at a time when the Commission generally had authorized purchases and renewals of the stations as satellites without a policy that involved establishing a lack of alternative buyers to qualify for a presumption.

13. In summary, we note the conclusions of the media brokers, the applicants' strong showings under the first two elements of the satellite presumption, and Midwest's reasonable inability during negotiations with CBS to foresee the future Commission presumption requirement of demonstrating that no alternative operator would be ready and able to operate the stations as fullservice operations. We therefore find under our *ad hoc* approach that the applicants have demonstrated that continued satellite operation of KCCO-TV, KCCW-TV, and WJMN-TV is in the public interest.

KVBM PETITION TO DENY

14. KVBM Television, Inc. (KVBM), permittee of station KVBM(TV), Channel 45, Minneapolis, Minnesota, has filed a Petition to Deny the assignment of WCCO-TV, Minneapolis, Minnesota. KVBM asserts that Midwest has refused to grant it access to a tower which Midwest controls, in violation of Section 73.635 of the Commission's Rules.[18] Telefarm, Inc. (Telefarm) owns one of two tall towers in a Shoreview, Minnesota antenna farm. Telefarm's tower holds the antennas for the three VHF, network-affiliated stations in the Minneapolis area. Telefarm is a corporation controlled by the licensees of the three VHF stations, including Midwest. Because Telefarm is a unanimous-consent corporation, each licensee has negative control and the ability to reject requests for space. KVBM maintains that Telefarm's refusal to grant access constitutes a violation of the rule by Midwest. If the above-captioned application is granted, CBS will succeed to Midwest's interest in Telefarm.

15. Both CBS and Midwest contend that no relationship exists between KVBM's request for tower access and the proposed assignment. They assert that the anticompetitive effects that flow from the exclusive use of an allegedly unique antenna site do not turn in any way upon the identity of the licensee controlling the site. In addition, while neither applicant concedes the applicability of the rule to the Telefarm site, CBS declares that, upon becoming the licensee, it would promptly evaluate the matter, discuss the pertinent issues with KVBM and the other affected parties, and act with due regard to Section 73.635.

16. Under these circumstances, no action will be taken on KVBM's allegations at this time; the instant assignment application is not the appropriate forum for examining the issues presented by the petition. Due to the structure of Telefarm, comprehensive examination of KVBM's claims requires the involvement of the other two shareholders, neither of which is currently before us. Moreover, we note KVBM's statement in its letter dated December 5, 1991, that its intent is not to thwart the assignment of WCCO TV, but rather to have its claim of access heard at the earliest possible time. Furthermore, we understand CBS's declaration to mean that, upon assuming its interests in WCCO-TV and Telefarm, it will give serious consideration to KVBM's request for collocation. Consequently, grant of the subject application will in no way prejudice any future Commission action deemed appropriate with respect to this matter.[19]

CONCLUSION

17. Therefore, based upon the above, having determined that the applicants are qualified in all respects, we find that grant of the above-captioned applications and authorization of the proposed satellite operations of stations KCCO-TV, Alexandria, Minnesota, KCCW-TV, Walker, Minnesota, and WJMN-TV, Escanaba, Michigan, would serve the public interest.

18. Accordingly, IT IS ORDERED that the Petition to Deny of KVBM Television, Inc. IS DISMISSED.

19. IT IS FURTHER ORDERED that CBS's request for a waiver of Section 73.3555(b), to authorize common ownership of Stations WCCO(AM), WLTE(FM), and WCCO-TV, Minneapolis, Minnesota, IS GRANTED.

20. IT IS FURTHER ORDERED that the applications seeking assignment of the licenses held by Midwest Communications, Inc. to CBS Inc. ARE GRANTED, subject to the condition that CBS come into compliance with Section 73.3555(d)(1)(ii) within 18 months of consummation of the proposed transaction.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

---

[18] The Rule states that "[n]o television license or renewal of a television license will be granted to any person who owns, leases, or controls a particular site which is peculiarly suitable for television broadcasting in a particular area and (a) which is not available for use by other television licensees; and (b) no other comparable site is available in the area; and (c) where the exclusive use of such site by the applicant or licensee would unduly limit the number of television stations that can be authorized in a particular area or would unduly restrict competition among television stations."

[19] In that regard, we direct the staff to initiate as soon as possible an appropriate inquiry to examine KVBM's alleged right of access to the Telefarm site.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-365

In the Matter of

American Network Exchange, Inc.

ORDER

Adopted: December 23, 1991; Released: December 23, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA). 47 U.S.C. § 226(a) *et seq.*, requires, *inter alia,* that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions. and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. American Network Exchange, Inc. (Amnex) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of Amnex's informational tariff and further information that we have directed OSPs to file, we find that at least some of Amnex's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective 45 days from the release of this Order, Amnex must announce that its rates are available on request at the beginning of each call handled by Amnex. Further, as we discuss below, Amnex must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

III. DISCUSSION

6. Our review of Amnex's informational tariff and its price out of sample telephone calls submitted with its September 23 report reveals that Amnex's charges for these calls are as high as $8.74 for one eight-minute call. This charge is among the highest reported by any OSP for

---

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com.Car.Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order. See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

one of the sample calls. On the record before us, this rate does not appear to be just and reasonable. We therefore direct Amnex to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct Amnex to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. Amnex must complete the Statement of Costs and Revenues that is attached to this Order. In addition, Amnex should present any other information that it believes demonstrates that its rates and charges are just and reasonable. Amnex should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities Amnex uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. Amnex should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, Amnex must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. Amnex shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991.[5] Amnex must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, Amnex may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. Amnex must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

IV. FILING REQUIREMENTS

11. Amnex is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. Amnex must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. Amnex's submission shall be captioned "Justification of Operator Service Rates of Amnex." Amnex shall include the docket number of this proceeding on the cover sheet to its Justification. Amnex is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on Amnex's submission not later than 25 days after Amnex's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of Amnex." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on Amnex. Finally, Amnex may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of Amnex" and must in all other respects comply with the filing requirements described in the preceding paragraph. Amnex must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), American Network Exchange, Inc. SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that American Network Exchange, Inc. SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), American Network Exchange, Inc. SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

---

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

ATTACHMENT A

CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete

Name: ______________________

Title: ______________________

Date: ______________________

Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.

Statement of Income and Operations

Company:________________________________

Period: January 1, 1990 through December 31, 1990

Line # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company
Revenues and Income				
1010 Operating Revenues				
1020 Uncollectible Revenues				
1030 Non-Operating Income 3/				
1040 Other 3/				
1050 TOTAL REVENUES AND INCOME 4/				

Expenses

1060 Salaries & Wages, Owners & Officers of Company				
1070 Salaries & Wages, Relatives of Owners & Officers				
1080 Salaries & Wages, Others				
1090 Health and Life Insurance				
1100 General Insurance				
1110 Miscellaneous Operating Expenses 3/				
1120 Taxes				
1130 Access Expense				
1140 Depreciation				
1150 Interest on Short-Term Debt 5/				
1160 Interest on Long-Term Debt 6/				
1170 Other Operating Expenses 3/				
1180 Other Expense 3/				
1190 TOTAL EXPENSES 7/				
1200 NET INCOME 8/				

Operating Statistics

1210 Number of Full-Time Employees				
1220 Number of Part-Time Employees				
1230 Number of Workhours, Full-Time Employees				
1240 Number of Workhours, Part-Time Employees				
1250 Number of Operator Calls Handled				
1260 Number of Months in Operation During 1990				

Statement of Investment

pany:____________________________________

d: On December 31, 1990

# and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
ets:				
rent and Accrued Assets				
Operating Assets				
Other Current and Accrued Assets 3/				
TOTAL CURRENT AND ACCRUED ASSETS 9/				
–Current Assets				
Property, Plant, & Equipment, Shared 10/				
Property, Plant, & Equipment, Dedicated 11/				
Accumulated Depreciation				
Other Non–Current Assets 3/				
TOTAL NON–CURRENT ASSETS 12/				
TOTAL ASSETS 13/				
ilities and Equity:				
rent and Accrued Liabilities				
Accounts Payable				
Notes Payable (current portion)				
Accrued Taxes				
Other Current and Accrued Liabilities 3/				
TOTAL CURRENT AND ACCRUED LIABILITIES 14/				
l Long–Term Debt				
TOTAL LONG–TERM DEBT				
rred Credits				
Accumulated Deferred Income Tax & Credits				
Other 3/				
TOTAL DEFERRED CREDITS 15/				
ity				
Capital Stock				
Additional Paid in Capital				
Other Capital 3/				
TOTAL EQUITY ACCOUNTS 16/				
TOTAL LIABILITIES AND EQUITY 17/				

Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accou
related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consul
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-366

In the Matter of

American Public Communications

ORDER

Adopted: December 23, 1991; Released: December 23, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. American Public Communications (APC) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of APC's informational tariff and further information that we have directed OSPs to file, we find that at least some of APC's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective 45 days from the release of this Order, APC must announce that its rates are available on request at the beginning of each call handled by APC. Further, as we discuss below, APC must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

III. DISCUSSION

6. Our review of APC's informational tariff and its price out of sample telephone calls submitted with its September 23 report reveals that APC's charges for these calls are as high as $7.66 for one eight-minute call. This charge is among the highest reported by any OSP for one of the sample calls. On the record before us, this rate does

---

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com.Car.Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order*. *See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

not appear to be just and reasonable. We therefore direct APC to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct APC to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. APC must complete the Statement of Costs and Revenues that is attached to this Order. In addition, APC should present any other information that it believes demonstrates that its rates and charges are just and reasonable. APC should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities APC uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. APC should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, APC must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. APC shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991.[5] APC must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, APC may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. APC must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

IV. FILING REQUIREMENTS

11. APC is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. APC must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. APC's submission shall be captioned "Justification of Operator Service Rates of APC." APC shall include the docket number of this proceeding on the cover sheet to its Justification. APC is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on APC's submission not later than 25 days after APC's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of APC." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on APC. Finally, APC may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of APC" and must in all other respects comply with the filing requirements described in the preceding paragraph. APC must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), American Public Communications SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that American Public Communications SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), American Public Communications SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

---

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

ATTACHMENT A

CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete

Name: ____________________

Title: ____________________

Date: ____________________

Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.

Statement of Income and Operations

Company: ______________________________

Period: January 1, 1990 through December 31, 1990

Line # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company
Revenues and Income				
1010 Operating Revenues				
1020 Uncollectible Revenues				
1030 Non-Operating Income 3/				
1040 Other 3/				
1050 TOTAL REVENUES AND INCOME 4/				

Expenses

1060 Salaries & Wages, Owners & Officers of Company				
1070 Salaries & Wages, Relatives of Owners & Officers				
1080 Salaries & Wages, Others				
1090 Health and Life Insurance				
1100 General Insurance				
1110 Miscellaneous Operating Expenses 3/				
1120 Taxes				
1130 Access Expense				
1140 Depreciation				
1150 Interest on Short-Term Debt 5/				
1160 Interest on Long-Term Debt 6/				
1170 Other Operating Expenses 3/				
1180 Other Expense 3/				
1190 TOTAL EXPENSES 7/				
1200 NET INCOME 8/				

Operating Statistics

1210 Number of Full-Time Employees				
1220 Number of Part-Time Employees				
1230 Number of Workhours, Full-Time Employees				
1240 Number of Workhours, Part-Time Employees				
1250 Number of Operator Calls Handled				
1260 Number of Months in Operation During 1990				

Statement of Investment

npany: ______________________________

od: On December 31, 1990

e # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
sets:				
rrent and Accrued Assets				
10 Operating Assets				
20 Other Current and Accrued Assets 3/				
30 TOTAL CURRENT AND ACCRUED ASSETS 9/				
n–Current Assets				
40 Property, Plant, & Equipment, Shared 10/				
50 Property, Plant, & Equipment, Dedicated 11/				
60 Accumulated Depreciation				
70 Other Non–Current Assets 3/				
80 TOTAL NON–CURRENT ASSETS 12/				
90 TOTAL ASSETS 13/				
bilities and Equity:				
rrent and Accrued Liabilities				
00 Accounts Payable				
10 Notes Payable (current portion)				
20 Accrued Taxes				
30 Other Current and Accrued Liabilities 3/				
40 TOTAL CURRENT AND ACCRUED LIABILITIES 14/				
tal Long–Term Debt				
50 TOTAL LONG–TERM DEBT				
ferred Credits				
60 Accumulated Deferred Income Tax & Credits				
70 Other 3/				
80 TOTAL DEFERRED CREDITS 15/				
uity				
90 Capital Stock				
00 Additional Paid in Capital				
10 Other Capital 3/				
20 TOTAL EQUITY ACCOUNTS 16/				
30 TOTAL LIABILITIES AND EQUITY 17/				

Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accou
related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consult
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-367

In the Matter of

Ascom Autelca Communications

ORDER

Adopted: December 23, 1991; Released: December 23, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. Ascom Autelca Communications (Ascom) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of Ascom's informational tariff and further information that we have directed OSPs to file, we find that at least some of Ascom's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective 45 days from the release of this Order, Ascom must announce that its rates are available on request at the beginning of each call handled by Ascom. Further, as we discuss below, Ascom must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

III. DISCUSSION

6. Our review of Ascom's informational tariff and its price out of sample telephone calls submitted with its September 23 report reveals that Ascom's charges for these calls are as high as $10.30 for one eight-minute call. This charge is among the highest reported by any OSP for

---

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com.Car.Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order*. *See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

one of the sample calls. On the record before us, this rate does not appear to be just and reasonable. We therefore direct Ascom to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct Ascom to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. Ascom must complete the Statement of Costs and Revenues that is attached to this Order. In addition, Ascom should present any other information that it believes demonstrates that its rates and charges are just and reasonable. Ascom should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities Ascom uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. Ascom should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, Ascom must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. Ascom shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30. 1991.[5] Ascom must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, Ascom may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. Ascom must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

IV. FILING REQUIREMENTS

11. Ascom is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. Ascom must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. Ascom's submission shall be captioned "Justification of Operator Service Rates of Ascom." Ascom shall include the docket number of this proceeding on the cover sheet to its Justification. Ascom is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on Ascom's submission not later than 25 days after Ascom's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of Ascom." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on Ascom. Finally, Ascom may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of Ascom" and must in all other respects comply with the filing requirements described in the preceding paragraph. Ascom must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), Ascom Autelca Communications SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that Ascom Autelca Communications SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), Ascom Autelca Communications SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

---

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

ATTACHMENT A

CERTIFICATION

I am [insert officer title] I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete

Name: ____________________

Title: ____________________

Date: ____________________

Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.

Statement of Income and Operations

Company: ____________________

Period: January 1, 1990 through December 31, 1990

Line # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company
Revenues and Income				
1010 Operating Revenues				
1020 Uncollectible Revenues				
1030 Non-Operating Income 3/				
1040 Other 3/				
1050 TOTAL REVENUES AND INCOME 4/				

Expenses

1060 Salaries & Wages, Owners & Officers of Company				
1070 Salaries & Wages, Relatives of Owners & Officers				
1080 Salaries & Wages, Others				
1090 Health and Life Insurance				
1100 General Insurance				
1110 Miscellaneous Operating Expenses 3/				
1120 Taxes				
1130 Access Expense				
1140 Depreciation				
1150 Interest on Short-Term Debt 5/				
1160 Interest on Long-Term Debt 6/				
1170 Other Operating Expenses 3/				
1180 Other Expense 3/				
1190 TOTAL EXPENSES 7/				
1200 NET INCOME 8/				

Operating Statistics

1210 Number of Full-Time Employees				
1220 Number of Part-Time Employees				
1230 Number of Workhours, Full-Time Employees				
1240 Number of Workhours, Part-Time Employees				
1250 Number of Operator Calls Handled				
1260 Number of Months in Operation During 1990				

Statement of Investment

pany:______________________________

d: On December 31, 1990

# and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
ets:				
rent and Accrued Assets				
) Operating Assets				
) Other Current and Accrued Assets 3/				
) TOTAL CURRENT AND ACCRUED ASSETS 9/				
–Current Assets				
) Property, Plant, & Equipment, Shared 10/				
) Property, Plant, & Equipment, Dedicated 11/				
) Accumulated Depreciation				
) Other Non–Current Assets 3/				
) TOTAL NON–CURRENT ASSETS 12/				
) TOTAL ASSETS 13/				
ilities and Equity:				
rent and Accrued Liabilities				
) Accounts Payable				
) Notes Payable (current portion)				
) Accrued Taxes				
) Other Current and Accrued Liabilities 3/				
) TOTAL CURRENT AND ACCRUED LIABILITIES 14/				
l Long–Term Debt				
) TOTAL LONG–TERM DEBT				
rred Credits				
) Accumulated Deferred Income Tax & Credits				
) Other 3/				
) TOTAL DEFERRED CREDITS 15/				
ty				
) Capital Stock				
) Additional Paid in Capital				
) Other Capital 3/				
) TOTAL EQUITY ACCOUNTS 16/				
) TOTAL LIABILITIES AND EQUITY 17/				

Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accou
related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consul
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-368

In the Matter of

Fone America, Inc.

ORDER

Adopted: December 23, 1991; Released: December 23, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226(a) *et seq.*, requires, *inter alia,* that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. Fone America, Inc. (Fone America) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of Fone America's informational tariff and further information that we have directed OSPs to file, we find that at least some of Fone America's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective 45 days from the release of this Order, Fone America must announce that its rates are available on request at the beginning of each call handled by Fone America. Further, as we discuss below, Fone America must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

III. DISCUSSION

6. Our review of Fone America's informational tariff and its price out of sample telephone calls submitted with its September 23 report reveals that Fone America's charges for these calls are as high as $7.88 for one eight-minute call. This charge is among the highest reported by

---

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com.Car.Bur. 1991) (*OSP Reporting Requirements Order).*

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order. See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

any OSP for one of the sample calls. On the record before us, this rate does not appear to be just and reasonable. We therefore direct Fone America to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct Fone America to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. Fone America must complete the Statement of Costs and Revenues that is attached to this Order. In addition, Fone America should present any other information that it believes demonstrates that its rates and charges are just and reasonable. Fone America should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities Fone America uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. Fone America should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, Fone America must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. Fone America shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991.[5] Fone America must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, Fone America may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. Fone America must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

IV. FILING REQUIREMENTS

11. Fone America is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. Fone America must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. Fone America's submission shall be captioned "Justification of Operator Service Rates of Fone America." Fone America shall include the docket number of this proceeding on the cover sheet to its Justification. Fone America is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on Fone America's submission not later than 25 days after Fone America's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of Fone America." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on Fone America. Finally, Fone America may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of Fone America" and must in all other respects comply with the filing requirements described in the preceding paragraph. Fone America must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), Fone America, Inc. SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that Fone America Inc. SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), Fone America, Inc. SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

---

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

ATTACHMENT A

CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete

Name: ____________________

Title: ____________________

Date: ____________________

Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.

Statement of Income and Operations

pany:______________________________

od: January 1, 1990 through December 31, 1990

e # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
venues and Income				
10 Operating Revenues				
20 Uncollectible Revenues				
30 Non-Operating Income 3/				
40 Other 3/				
50 TOTAL REVENUES AND INCOME 4/				
enses				
60 Salaries & Wages, Owners & Officers of Company				
70 Salaries & Wages, Relatives of Owners & Officers				
80 Salaries & Wages, Others				
90 Health and Life Insurance				
00 General Insurance				
0 Miscellaneous Operating Expenses 3/				
20 Taxes				
30 Access Expense				
40 Depreciation				
50 Interest on Short-Term Debt 5/				
60 Interest on Long-Term Debt 6/				
70 Other Operating Expenses 3/				
80 Other Expense 3/				
90 TOTAL EXPENSES 7/				
00 NET INCOME 8/				
erating Statistics				
0 Number of Full-Time Employees				
20 Number of Part-Time Employees				
30 Number of Workhours, Full-Time Employees				
40 Number of Workhours, Part-Time Employees				
50 Number of Operator Calls Handled				
60 Number of Months in Operation During 1990				

Statement of Investment

Company: ____________________

Period: On December 31, 1990

Line # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company
Assets: **Current and Accrued Assets**				
2010 Operating Assets				
2020 Other Current and Accrued Assets 3/				
2030 TOTAL CURRENT AND ACCRUED ASSETS 9/				

Non-Current Assets

2040 Property, Plant, & Equipment, Shared 10/				
2050 Property, Plant, & Equipment, Dedicated 11/				
2060 Accumulated Depreciation				
2070 Other Non-Current Assets 3/				
2080 TOTAL NON-CURRENT ASSETS 12/				
2090 TOTAL ASSETS 13/				

Liabilities and Equity:

Current and Accrued Liabilities

2100 Accounts Payable				
2110 Notes Payable (current portion)				
2120 Accrued Taxes				
2130 Other Current and Accrued Liabilities 3/				
2140 TOTAL CURRENT AND ACCRUED LIABILITIES 14/				

Total Long-Term Debt

2150 TOTAL LONG-TERM DEBT				

Deferred Credits

2160 Accumulated Deferred Income Tax & Credits				
2170 Other 3/				
2180 TOTAL DEFERRED CREDITS 15/				

Equity

2190 Capital Stock				
2200 Additional Paid in Capital				
2210 Other Capital 3/				
2220 TOTAL EQUITY ACCOUNTS 16/				
2230 TOTAL LIABILITIES AND EQUITY 17/				

Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accounts related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulted.
2/ Total Company equals the sum of Operator Service, Other – Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-369

In the Matter of

Fiberline Network Communications

ORDER

Adopted: December 23, 1991; Released: December 23, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226(a) *et seq.*, requires, *inter alia,* that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. Fiberline Network Communications (FNC) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of FNC's informational tariff and further information that we have directed OSPs to file, we find that at least some of FNC's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective 45 days from the release of this Order, FNC must announce that its rates are available on request at the beginning of each call handled by FNC. Further, as we discuss below, FNC must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

III. DISCUSSION

6. Our review of FNC's informational tariff and its price out of sample telephone calls submitted with its September 23 report reveals that FNC's charges for these calls are as high as $9.81 for one eight-minute call. This charge is among the highest reported by any OSP for one of the sample calls. On the record before us, this rate does

---

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com.Car.Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order. See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

ot appear to be just and reasonable. We therefore direct NC to demonstrate that this rate is, in fact, just and easonable or reduce its rates to a just and reasonable evel.

7. Neither TOCSIA nor the Commission's Rules estab-sh what shall be a just and reasonable rate for an oper-tor-assisted call. The House Committee Report on the ill that eventually became TOCSIA noted that the Com-nission would have the authority to require OSPs to emonstrate that their rates and charges are just and easonable "by providing convincing evidence that they eflect the reasonable costs of providing the service plus a easonable profit." H.R. Rep. No. 213, 101st Cong., 1st ess. 14 (1989). Although the report eschewed "traditional ate-based, rate of return regulation" it noted that OSPs must demonstrate that [their] rates and charges reflect heir reasonable costs of providing service plus a reason-ble profit." *Id.*[4]

8. Consistent with the explicit instructions of the Con-ress, we direct FNC to demonstrate that its rates and harges reflect its reasonable costs of providing service lus a reasonable profit. FNC must complete the State-nent of Costs and Revenues that is attached to this Order. n addition, FNC should present any other information hat it believes demonstrates that its rates and charges are ust and reasonable. FNC should provide detailed infor-nation explaining its costs of providing operator services. uch information should include, but need not be limited o, investment and expenses associated with facilities FNC ses in the provision of operator services, commissions nd surcharges it pays to aggregators, charges it pays for illing and validation services, and expenses for salaries nd other employee benefits. FNC should also detail any ther investment or expense it believes justifies the rates it s charging for operator services.

9. Similarly, FNC must file information concerning its evenues from the provision of operator services and must tate the level of profits generated by these operations. NC shall calculate the annualized rate of return that it as realized on all investment, used and useful, in the rovision of interstate operator services for the period rom January 1, 1991, through June 30, 1991.[5] FNC must xplain the method by which it identifies relevant invest-nent and calculates its rate of return on investment. inally, FNC may include any other information that it elieves demonstrates that its cost of providing operator ervices and the profit that it realizes from these services re just and reasonable.

10. FNC must certify the accuracy of all data submitted n support of its rates by including a signed statement that he support data is true, correct, and complete. Certifica-on is required for all data submitted in support of the ates, including all data that is included in the Statement f Costs and Revenues. The text of the certification is isplayed in Attachment A.

IV. FILING REQUIREMENTS

11. FNC is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. FNC must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. FNC's submission shall be captioned "Justification of Operator Service Rates of FNC." FNC shall include the docket number of this proceeding on the cover sheet to its Justification. FNC is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on FNC's submission not later than 25 days after FNC's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of FNC." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on FNC. Finally, FNC may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of FNC" and must in all other respects comply with the filing requirements described in the preceding paragraph. FNC must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), Fiberline Network Communications SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that Fiberline Network Communications SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), Fiberline Network Communications SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

The bill reported by the Senate Committee on Commerce, cience, and Transportation differed from the House bill in a umber of respects. In particular, the Senate bill would have mitted the provision authorizing the Commission to require SPs to demonstrate that their rates are just and reasonable. he language ultimately adopted, however, is consistent with he provision reported by the House Committee on Energy and ommerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

ATTACHMENT A

CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete

Name: ______________________

Title: ______________________

Date: ______________________

Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.

Statement of Income and Operations

npany: ____________________

od: January 1, 1990 through December 31, 1990

e # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
venues and Income				
10 Operating Revenues				
20 Uncollectible Revenues				
30 Non-Operating Income 3/				
40 Other 3/				
50 TOTAL REVENUES AND INCOME 4/				
oenses				
60 Salaries & Wages, Owners & Officers of Company				
70 Salaries & Wages, Relatives of Owners & Officers				
80 Salaries & Wages, Others				
90 Health and Life Insurance				
00 General Insurance				
10 Miscellaneous Operating Expenses 3/				
20 Taxes				
30 Access Expense				
40 Depreciation				
50 Interest on Short-Term Debt 5/				
60 Interest on Long-Term Debt 6/				
70 Other Operating Expenses 3/				
80 Other Expense 3/				
90 TOTAL EXPENSES 7/				
00 NET INCOME 8/				
erating Statistics				
10 Number of Full-Time Employees				
20 Number of Part-Time Employees				
30 Number of Workhours, Full-Time Employees				
40 Number of Workhours, Part-Time Employees				
50 Number of Operator Calls Handled				
60 Number of Months in Operation During 1990				

Statement of Investment

Company: ____________________

Period: On December 31, 1990

Line # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2
Assets: **Current and Accrued Assets**				
2010 Operating Assets				
2020 Other Current and Accrued Assets 3/				
2030 TOTAL CURRENT AND ACCRUED ASSETS 9/				

Non-Current Assets

2040 Property, Plant, & Equipment, Shared 10/				
2050 Property, Plant, & Equipment, Dedicated 11/				
2060 Accumulated Depreciation				
2070 Other Non-Current Assets 3/				
2080 TOTAL NON-CURRENT ASSETS 12/				
2090 TOTAL ASSETS 13/				

Liabilities and Equity:

Current and Accrued Liabilities

2100 Accounts Payable				
2110 Notes Payable (current portion)				
2120 Accrued Taxes				
2130 Other Current and Accrued Liabilities 3/				
2140 TOTAL CURRENT AND ACCRUED LIABILITIES 14/				

Total Long-Term Debt

2150 TOTAL LONG-TERM DEBT				

Deferred Credits

2160 Accumulated Deferred Income Tax & Credits				
2170 Other 3/				
2180 TOTAL DEFERRED CREDITS 15/				

Equity

2190 Capital Stock				
2200 Additional Paid in Capital				
2210 Other Capital 3/				
2220 TOTAL EQUITY ACCOUNTS 16/				
2230 TOTAL LIABILITIES AND EQUITY 17/				

Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accounts related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulted.
2/ Total Company equals the sum of Operator Service, Other – Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-370

In the Matter of

Ju-Le Corporation

ORDER

Adopted: December 23, 1991; Released: December 23, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226(a) *et seq.*, requires, *inter alia,* that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission. the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. Ju-Le Corporation (Ju-Le) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of Ju-Le's informational tariff and further information that we have directed OSPs to file, we find that at least some of Ju-Le's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective 45 days from the release of this Order, Ju-Le must announce that its rates are available on request at the beginning of each call handled by Ju-Le. Further, as we discuss below, Ju-Le must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

III. DISCUSSION

6. Our review of Ju-Le's informational tariff and its price out of sample telephone calls submitted with its September 23 report reveals that Ju-Le's charges for these calls are as high as $8.82 for one eight-minute call. This charge is among the highest reported by any OSP for one of the sample calls. On the record before us. this rate does

---

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com.Car.Bur. 1991) (*OSP Reporting Requirements Order).*

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order. See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

not appear to be just and reasonable. We therefore direct Ju-Le to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct Ju-Le to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. Ju-Le must complete the Statement of Costs and Revenues that is attached to this Order. In addition, Ju-Le should present any other information that it believes demonstrates that its rates and charges are just and reasonable. Ju-Le should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities Ju-Le uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. Ju-Le should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, Ju-Le must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. Ju-Le shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991.[5] Ju-Le must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, Ju-Le may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. Ju-Le must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

IV. FILING REQUIREMENTS

11. Ju-Le is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. Ju-Le must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. Ju-Le's submission shall be captioned "Justification of Operator Service Rates of Ju-Le." Ju-Le shall include the docket number of this proceeding on the cover sheet to its Justification. Ju-Le is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on Ju-Le's submission not later than 25 days after Ju-Le's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of Ju-Le." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on Ju-Le. Finally, Ju-Le may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of Ju-Le" and must in all other respects comply with the filing requirements described in the preceding paragraph. Ju-Le must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), Ju-Le Corporation SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that Ju-Le Corporation SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), Ju-Le Corporation SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

---

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

ATTACHMENT A

CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete

Name: ____________________

Title: ____________________

Date: ____________________

Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.

Statement of Income and Operations

npany: ______________________________

od: January 1, 1990 through December 31, 1990

e # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
venues and Income				
10 Operating Revenues				
20 Uncollectible Revenues				
30 Non-Operating Income 3/				
40 Other 3/				
50 TOTAL REVENUES AND INCOME 4/				
penses				
60 Salaries & Wages, Owners & Officers of Company				
70 Salaries & Wages, Relatives of Owners & Officers				
80 Salaries & Wages, Others				
90 Health and Life Insurance				
00 General Insurance				
10 Miscellaneous Operating Expenses 3/				
20 Taxes				
30 Access Expense				
40 Depreciation				
50 Interest on Short-Term Debt 5/				
60 Interest on Long-Term Debt 6/				
70 Other Operating Expenses 3/				
80 Other Expense 3/				
90 TOTAL EXPENSES 7/				
00 NET INCOME 8/				
erating Statistics				
10 Number of Full-Time Employees				
20 Number of Part-Time Employees				
30 Number of Workhours, Full-Time Employees				
40 Number of Workhours, Part-Time Employees				
50 Number of Operator Calls Handled				
60 Number of Months in Operation During 1990				

Statement of Investment

Company:______________________________

Period: On December 31, 1990

Line # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company
Assets: **Current and Accrued Assets**				
2010 Operating Assets				
2020 Other Current and Accrued Assets 3/				
2030 TOTAL CURRENT AND ACCRUED ASSETS 9/				

Non-Current Assets

2040 Property, Plant, & Equipment, Shared 10/				
2050 Property, Plant, & Equipment, Dedicated 11/				
2060 Accumulated Depreciation				
2070 Other Non-Current Assets 3/				
2080 TOTAL NON-CURRENT ASSETS 12/				
2090 TOTAL ASSETS 13/				

Liabilities and Equity:

Current and Accrued Liabilities

2100 Accounts Payable				
2110 Notes Payable (current portion)				
2120 Accrued Taxes				
2130 Other Current and Accrued Liabilities 3/				
2140 TOTAL CURRENT AND ACCRUED LIABILITIES 14/				

Total Long-Term Debt

2150 TOTAL LONG-TERM DEBT				

Deferred Credits

2160 Accumulated Deferred Income Tax & Credits				
2170 Other 3/				
2180 TOTAL DEFERRED CREDITS 15/				

Equity

2190 Capital Stock				
2200 Additional Paid in Capital				
2210 Other Capital 3/				
2220 TOTAL EQUITY ACCOUNTS 16/				
2230 TOTAL LIABILITIES AND EQUITY 17/				

Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accounts related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulted
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-371

In the Matter of

One Call Communications, Inc.

ORDER

Adopted: December 23, 1991; Released: December 23, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226(a) *et seq.*, requires, *inter alia,* that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. One Call Communications, Inc. (One Call) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of One Call's informational tariff and further information that we have directed OSPs to file, we find that at least some of One Call's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective 45 days from the release of this Order, One Call must announce that its rates are available on request at the beginning of each call handled by One Call. Further, as we discuss below, One Call must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

III. DISCUSSION

6. Our review of One Call's informational tariff and its price out of sample telephone calls submitted with its September 23 report reveals that One Call's charges for these calls are as high as $7.87 for one eight-minute call. This charge is among the highest reported by any OSP for

---

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com.Car.Bur. 1991) (*OSP Reporting Requirements Order).*

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order. See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

one of the sample calls. On the record before us, this rate does not appear to be just and reasonable. We therefore direct One Call to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct One Call to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. One Call must complete the Statement of Costs and Revenues that is attached to this Order. In addition, One Call should present any other information that it believes demonstrates that its rates and charges are just and reasonable. One Call should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities One Call uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. One Call should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, One Call must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. One Call shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991.[5] One Call must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, One Call may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. One Call must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

IV. FILING REQUIREMENTS

11. One Call is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. One Call must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. One Call's submission shall be captioned "Justification of Operator Service Rates of One Call." One Call shall include the docket number of this proceeding on the cover sheet to its Justification. One Call is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on One Call's submission not later than 25 days after One Call's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of One Call." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on One Call. Finally, One Call may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of One Call" and must in all other respects comply with the filing requirements described in the preceding paragraph. One Call must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), One Call Communications, Inc. SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that One Call Communications, Inc. SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), One Call Communications, Inc. SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION
Carl D. Lawson

---

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

Deputy Chief (Policy)
Common Carrier Bureau

ATTACHMENT A

CERTIFICATION

I am [insert officer title] I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete

Name: ____________________

Title: ____________________

Date: ____________________

Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.

Statement of Income and Operations

Company: ____________________________________

Period: January 1, 1990 through December 31, 1990

Line # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company
Revenues and Income				
1010 Operating Revenues				
1020 Uncollectible Revenues				
1030 Non-Operating Income 3/				
1040 Other 3/				
1050 TOTAL REVENUES AND INCOME 4/				

Expenses

1060 Salaries & Wages, Owners & Officers of Company				
1070 Salaries & Wages, Relatives of Owners & Officers				
1080 Salaries & Wages, Others				
1090 Health and Life Insurance				
1100 General Insurance				
1110 Miscellaneous Operating Expenses 3/				
1120 Taxes				
1130 Access Expense				
1140 Depreciation				
1150 Interest on Short-Term Debt 5/				
1160 Interest on Long-Term Debt 6/				
1170 Other Operating Expenses 3/				
1180 Other Expense 3/				
1190 TOTAL EXPENSES 7/				
1200 NET INCOME 8/				

Operating Statistics

1210 Number of Full-Time Employees				
1220 Number of Part-Time Employees				
1230 Number of Workhours, Full-Time Employees				
1240 Number of Workhours, Part-Time Employees				
1250 Number of Operator Calls Handled				
1260 Number of Months in Operation During 1990				

Statement of Investment

pany: ______________________________

od: On December 31, 1990

e # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
sets:				
rrent and Accrued Assets				
0 Operating Assets				
0 Other Current and Accrued Assets 3/				
0 TOTAL CURRENT AND ACCRUED ASSETS 9/				
n–Current Assets				
0 Property, Plant, & Equipment, Shared 10/				
0 Property, Plant, & Equipment, Dedicated 11/				
0 Accumulated Depreciation				
0 Other Non–Current Assets 3/				
0 TOTAL NON–CURRENT ASSETS 12/				
0 TOTAL ASSETS 13/				

ilitiesand Equity:

rent and Accrued Liabilities				
0 Accounts Payable				
0 Notes Payable (current portion)				
0 Accrued Taxes				
0 Other Current and Accrued Liabilities 3/				
0 TOTAL CURRENT AND ACCRUED LIABILITIES 14/				
al Long–Term Debt				
0 TOTAL LONG–TERM DEBT				
erred Credits				
0 Accumulated Deferred Income Tax & Credits				
0 Other 3/				
0 TOTAL DEFERRED CREDITS 15/				
ity				
0 Capital Stock				
0 Additional Paid in Capital				
0 Other Capital 3/				
0 TOTAL EQUITY ACCOUNTS 16/				
0 TOTAL LIABILITIESAND EQUITY 17/				

Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accoun
related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulte
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-372

In the Matter of

Pay Com, Inc.

ORDER

dopted: December 23, 1991; Released: December 23, 1991

By the Deputy Chief (Policy), Common Carrier Bu-
eau:

I. INTRODUCTION

1. The Telephone Operator Consumer Services
mprovement Act of 1990 (TOCSIA), 47 U.S.C. § 226(a)
t seq., requires, *inter alia*, that interstate providers of
perator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

7 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if,
pon review by the Commission, the rates and charges
iled by any OSP appear to be unjust and unreasonable,
he Commission may require such OSP to do either or
oth of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

7 U.S.C. § 226(h)(2).

2. Pay Com, Inc. (Pay Com) is one of 396 OSPs that
ave filed informational tariffs with the Commission since
he informational tariff filing requirement became effec-
ive on January 15, 1991. Based on our review of Pay
Com's informational tariff and further information that we have directed OSPs to file, we find that at least some of Pay Com's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective 45 days from the release of this Order, Pay Com must announce that its rates are available on request at the beginning of each call handled by Pay Com. Further, as we discuss below, Pay Com must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

III. DISCUSSION

6. Our review of Pay Com's informational tariff and its price out of sample telephone calls submitted with its September 23 report reveals that Pay Com's charges for these calls are as high as $8.20 for one eight-minute call. This charge is among the highest reported by any OSP for one of the sample calls. On the record before us, this rate

---

The call data that AT&T originally submitted includes four
alls placed from hotels and six calls placed from public pay
elephones. The duration of each call is eight minutes and the
alls vary by time of day and call type (*i.e.*, whether placed
ollect or using a calling card). Each of the ten calls is priced at
6 miles and at 1910 miles. Each OSP's price out of these calls
hus produces 20 sample call charges.

Policies and Rules Concerning Operator Service Providers,
C Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com.Car.Bur.
991) (*OSP Reporting Requirements Order).*

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order. See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

does not appear to be just and reasonable. We therefore direct Pay Com to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct Pay Com to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. Pay Com must complete the Statement of Costs and Revenues that is attached to this Order. In addition, Pay Com should present any other information that it believes demonstrates that its rates and charges are just and reasonable. Pay Com should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities Pay Com uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. Pay Com should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, Pay Com must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. Pay Com shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991.[5] Pay Com must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, Pay Com may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. Pay Com must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

IV. FILING REQUIREMENTS

11. Pay Com is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. Pay Com must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. Pay Com's submission shall be captioned "Justification of Operator Service Rates of Pay Com." Pay Com shall include the docket number of this proceeding on the cover sheet to its Justification. Pay Com is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on Pay Com's submission not later than 25 days after Pay Com's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of Pay Com." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on Pay Com. Finally, Pay Com may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of Pay Com" and must in all other respects comply with the filing requirements described in the preceding paragraph. Pay Com must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), Pay Com Inc. SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that Pay Com, Inc. SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), Pay Com Inc. SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

---

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

ATTACHMENT A

CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete

Name: ____________________

Title: ____________________

Date: ____________________

Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.

Statement of Income and Operations

Company: ______________________________

Period: January 1, 1990 through December 31, 1990

Line # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company
Revenues and Income				
1010 Operating Revenues				
1020 Uncollectible Revenues				
1030 Non-Operating Income 3/				
1040 Other 3/				
1050 TOTAL REVENUES AND INCOME 4/				

Expenses

1060 Salaries & Wages, Owners & Officers of Company				
1070 Salaries & Wages, Relatives of Owners & Officers				
1080 Salaries & Wages, Others				
1090 Health and Life Insurance				
1100 General Insurance				
1110 Miscellaneous Operating Expenses 3/				
1120 Taxes				
1130 Access Expense				
1140 Depreciation				
1150 Interest on Short-Term Debt 5/				
1160 Interest on Long-Term Debt 6/				
1170 Other Operating Expenses 3/				
1180 Other Expense 3/				
1190 TOTAL EXPENSES 7/				
1200 NET INCOME 8/				

Operating Statistics

1210 Number of Full-Time Employees				
1220 Number of Part-Time Employees				
1230 Number of Workhours, Full-Time Employees				
1240 Number of Workhours, Part-Time Employees				
1250 Number of Operator Calls Handled				
1260 Number of Months in Operation During 1990				

Statement of Investment

pany: ______________________________

d: On December 31, 1990

# and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
ets:				
rent and Accrued Assets				
Operating Assets				
Other Current and Accrued Assets 3/				
TOTAL CURRENT AND ACCRUED ASSETS 9/				
–Current Assets				
Property, Plant, & Equipment, Shared 10/				
Property, Plant, & Equipment, Dedicated 11/				
Accumulated Depreciation				
Other Non–Current Assets 3/				
TOTAL NON–CURRENT ASSETS 12/				
TOTAL ASSETS 13/				
ilities and Equity:				
rent and Accrued Liabilities				
Accounts Payable				
Notes Payable (current portion)				
Accrued Taxes				
Other Current and Accrued Liabilities 3/				
TOTAL CURRENT AND ACCRUED LIABILITIES 14/				
l Long–Term Debt				
TOTAL LONG–TERM DEBT				
rred Credits				
Accumulated Deferred Income Tax & Credits				
Other 3/				
TOTAL DEFERRED CREDITS 15/				
ity				
Capital Stock				
Additional Paid in Capital				
Other Capital 3/				
TOTAL EQUITY ACCOUNTS 16/				
TOTAL LIABILITIES AND EQUITY 17/				

Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accou
related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consult
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-373

In the Matter of

Pilgrim Telephone, Inc.

ORDER

Adopted: December 23, 1991; Released: December 23, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. Pilgrim Telephone, Inc. (Pilgrim) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of Pilgrim's informational tariff and further information that we have directed OSPs to file, we find that at least some of Pilgrim's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective 45 days from the release of this Order, Pilgrim must announce that its rates are available on request at the beginning of each call handled by Pilgrim. Further, as we discuss below, Pilgrim must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

III. DISCUSSION

6. Our review of Pilgrim's informational tariff and its price out of sample telephone calls submitted with its September 23 report reveals that Pilgrim's charges for these calls are as high as $8.00 for one eight-minute call. This charge is among the highest reported by any OSP for one of the sample calls. On the record before us, this rate

---

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com.Car.Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order*. *See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

does not appear to be just and reasonable. We therefore direct Pilgrim to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct Pilgrim to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. Pilgrim must complete the Statement of Costs and Revenues that is attached to this Order. In addition, Pilgrim should present any other information that it believes demonstrates that its rates and charges are just and reasonable. Pilgrim should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities Pilgrim uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. Pilgrim should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, Pilgrim must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. Pilgrim shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991.[5] Pilgrim must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, Pilgrim may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. Pilgrim must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

IV. FILING REQUIREMENTS

11. Pilgrim is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. Pilgrim must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. Pilgrim's submission shall be captioned "Justification of Operator Service Rates of Pilgrim." Pilgrim shall include the docket number of this proceeding on the cover sheet to its Justification. Pilgrim is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on Pilgrim's submission not later than 25 days after Pilgrim's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of Pilgrim." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on Pilgrim. Finally, Pilgrim may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of Pilgrim" and must in all other respects comply with the filing requirements described in the preceding paragraph. Pilgrim must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), Pilgrim Telephone, Inc. SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that Pilgrim Telephone, Inc. SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), Pilgrim Telephone, Inc. SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

---

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

ATTACHMENT A

CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete

Name: ______________________

Title: ______________________

Date: ______________________

Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.

Statement of Income and Operations

Company:______________________________________

Period: January 1, 1990 through December 31, 1990

Line # and Account 1/		Operator Service	Other Telephone Related	Other	Total Company
Revenues and Income					
1010	Operating Revenues				
1020	Uncollectible Revenues				
1030	Non-Operating Income 3/				
1040	Other 3/				
1050	TOTAL REVENUES AND INCOME 4/				

Expenses

1060	Salaries & Wages, Owners & Officers of Company				
1070	Salaries & Wages, Relatives of Owners & Officers				
1080	Salaries & Wages, Others				
1090	Health and Life Insurance				
1100	General Insurance				
1110	Miscellaneous Operating Expenses 3/				
1120	Taxes				
1130	Access Expense				
1140	Depreciation				
1150	Interest on Short-Term Debt 5/				
1160	Interest on Long-Term Debt 6/				
1170	Other Operating Expenses 3/				
1180	Other Expense 3/				
1190	TOTAL EXPENSES 7/				
1200	NET INCOME 8/				

Operating Statistics

1210	Number of Full-Time Employees				
1220	Number of Part-Time Employees				
1230	Number of Workhours, Full-Time Employees				
1240	Number of Workhours, Part-Time Employees				
1250	Number of Operator Calls Handled				
1260	Number of Months in Operation During 1990				

Statement of Investment

pany:______________________________

d: On December 31, 1990

# and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
sets:				
rrent and Accrued Assets				
0 Operating Assets				
0 Other Current and Accrued Assets 3/				
0 TOTAL CURRENT AND ACCRUED ASSETS 9/				
–Current Assets				
0 Property, Plant, & Equipment, Shared 10/				
0 Property, Plant, & Equipment, Dedicated 11/				
0 Accumulated Depreciation				
0 Other Non–Current Assets 3/				
0 TOTAL NON–CURRENT ASSETS 12/				
0 TOTAL ASSETS 13/				
ilities and Equity:				
rent and Accrued Liabilities				
0 Accounts Payable				
0 Notes Payable (current portion)				
0 Accrued Taxes				
0 Other Current and Accrued Liabilities 3/				
0 TOTAL CURRENT AND ACCRUED LIABILITIES 14/				
al Long–Term Debt				
0 TOTAL LONG–TERM DEBT				
erred Credits				
0 Accumulated Deferred Income Tax & Credits				
0 Other 3/				
0 TOTAL DEFERRED CREDITS 15/				
ity				
0 Capital Stock				
0 Additional Paid in Capital				
0 Other Capital 3/				
0 TOTAL EQUITY ACCOUNTS 16/				
0 TOTAL LIABILITIES AND EQUITY 17/				

Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accoun related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulte
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-374

In the Matter of

Southeast Pay Telephone, Inc.

ORDER

Adopted: December 23, 1991; Released: December 23, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226(a) *et seq.*, requires, *inter alia,* that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. Southeast Pay Telephone, Inc. (SPT) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of SPT's informational tariff and further information that we have directed OSPs to file, we find that at least some of SPT's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective 45 days from the release of this Order, SPT must announce that its rates are available on request at the beginning of each call handled by SPT. Further, as we discuss below, SPT must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

III. DISCUSSION

6. Our review of SPT's informational tariff and its price out of sample telephone calls submitted with its September 23 report reveals that SPT's charges for these calls are as high as $7.56 for one eight-minute call. This charge is among the highest reported by any OSP for one of the sample calls. On the record before us, this rate does not

---

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com.Car.Bur. 1991) (*OSP Reporting Requirements Order).*

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order. See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

appear to be just and reasonable. We therefore direct SPT to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct SPT to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. SPT must complete the Statement of Costs and Revenues that is attached to this Order. In addition, SPT should present any other information that it believes demonstrates that its rates and charges are just and reasonable. SPT should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities SPT uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. SPT should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, SPT must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. SPT shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991.[5] SPT must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, SPT may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. SPT must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

IV. FILING REQUIREMENTS

11. SPT is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. SPT must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. SPT's submission shall be captioned "Justification of Operator Service Rates of SPT." SPT shall include the docket number of this proceeding on the cover sheet to its Justification. SPT is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on SPT's submission not later than 25 days after SPT's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of SPT." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on SPT. Finally, SPT may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of SPT" and must in all other respects comply with the filing requirements described in the preceding paragraph. SPT must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), Southeast Pay Telephone, Inc. SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that Southeast Pay Telephone, Inc. SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), Southeast Pay Telephone, Inc. SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

---

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

ATTACHMENT A

CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete

Name: ______________________

Title: ______________________

Date: ______________________

Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.

Statement of Income and Operations

Company: ______________________________

Period: January 1, 1990 through December 31, 1990

Line # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company
Revenues and Income				
1010 Operating Revenues				
1020 Uncollectible Revenues				
1030 Non-Operating Income 3/				
1040 Other 3/				
1050 TOTAL REVENUES AND INCOME 4/				

Expenses

1060 Salaries & Wages, Owners & Officers of Company				
1070 Salaries & Wages, Relatives of Owners & Officers				
1080 Salaries & Wages, Others				
1090 Health and Life Insurance				
1100 General Insurance				
1110 Miscellaneous Operating Expenses 3/				
1120 Taxes				
1130 Access Expense				
1140 Depreciation				
1150 Interest on Short-Term Debt 5/				
1160 Interest on Long-Term Debt 6/				
1170 Other Operating Expenses 3/				
1180 Other Expense 3/				
1190 TOTAL EXPENSES 7/				
1200 NET INCOME 8/				

Operating Statistics

1210 Number of Full-Time Employees				
1220 Number of Part-Time Employees				
1230 Number of Workhours, Full-Time Employees				
1240 Number of Workhours, Part-Time Employees				
1250 Number of Operator Calls Handled				
1260 Number of Months in Operation During 1990				

Statement of Investment

pany: ______________________________

d: On December 31, 1990

# and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
ets:				
rent and Accrued Assets				
Operating Assets				
Other Current and Accrued Assets 3/				
TOTAL CURRENT AND ACCRUED ASSETS 9/				
–Current Assets				
Property, Plant, & Equipment, Shared 10/				
Property, Plant, & Equipment, Dedicated 11/				
Accumulated Depreciation				
Other Non–Current Assets 3/				
TOTAL NON–CURRENT ASSETS 12/				
TOTAL ASSETS 13/				
ilities and Equity:				
rent and Accrued Liabilities				
Accounts Payable				
Notes Payable (current portion)				
Accrued Taxes				
Other Current and Accrued Liabilities 3/				
TOTAL CURRENT AND ACCRUED LIABILITIES 14/				
l Long–Term Debt				
TOTAL LONG–TERM DEBT				
rred Credits				
Accumulated Deferred Income Tax & Credits				
Other 3/				
TOTAL DEFERRED CREDITS 15/				
ity				
Capital Stock				
Additional Paid in Capital				
Other Capital 3/				
TOTAL EQUITY ACCOUNTS 16/				
TOTAL LIABILITIES AND EQUITY 17/				

Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accoun related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulte
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-375

In the Matter of

Telephone Operating Systems

ORDER

Adopted: December 23, 1991; Released: December 23, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. Telephone Operating Systems (TOS) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of TOS's informational tariff and further information that we have directed OSPs to file, we find that at least some of TOS's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective 45 days from the release of this Order, TOS must announce that its rates are available on request at the beginning of each call handled by TOS. Further, as we discuss below, TOS must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

III. DISCUSSION

6. Our review of TOS's informational tariff and its price out of sample telephone calls submitted with its September 23 report reveals that TOS's charges for these calls are as high as $7.80 for one eight-minute call. This charge is among the highest reported by any OSP for one of the sample calls. On the record before us, this rate does

---

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com.Car.Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order*. *See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

not appear to be just and reasonable. We therefore direct TOS to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct TOS to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. TOS must complete the Statement of Costs and Revenues that is attached to this Order. In addition, TOS should present any other information that it believes demonstrates that its rates and charges are just and reasonable. TOS should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities TOS uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. TOS should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, TOS must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. TOS shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991.[5] TOS must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, TOS may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. TOS must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

IV. FILING REQUIREMENTS

11. TOS is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. TOS must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. TOS's submission shall be captioned "Justification of Operator Service Rates of TOS." TOS shall include the docket number of this proceeding on the cover sheet to its Justification. TOS is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on TOS's submission not later than 25 days after TOS's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of TOS." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on TOS. Finally, TOS may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of TOS" and must in all other respects comply with the filing requirements described in the preceding paragraph. TOS must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), Telephone Operating Systems SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that Telephone Operating Systems SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), Telephone Operating Systems SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

---

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

ATTACHMENT A

CERTIFICATION

I am [insert officer title] I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete

Name: ______________________

Title: ______________________

Date: ______________________

Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.

Statement of Income and Operations

Company: ______________________________

Period: January 1, 1990 through December 31, 1990

Line # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2
Revenues and Income				
1010 Operating Revenues				
1020 Uncollectible Revenues				
1030 Non-Operating Income 3/				
1040 Other 3/				
1050 TOTAL REVENUES AND INCOME 4/				

Expenses

1060 Salaries & Wages, Owners & Officers of Company				
1070 Salaries & Wages, Relatives of Owners & Officers				
1080 Salaries & Wages, Others				
1090 Health and Life Insurance				
1100 General Insurance				
1110 Miscellaneous Operating Expenses 3/				
1120 Taxes				
1130 Access Expense				
1140 Depreciation				
1150 Interest on Short-Term Debt 5/				
1160 Interest on Long-Term Debt 6/				
1170 Other Operating Expenses 3/				
1180 Other Expense 3/				
1190 TOTAL EXPENSES 7/				
1200 NET INCOME 8/				

Operating Statistics

1210 Number of Full-Time Employees				
1220 Number of Part-Time Employees				
1230 Number of Workhours, Full-Time Employees				
1240 Number of Workhours, Part-Time Employees				
1250 Number of Operator Calls Handled				
1260 Number of Months in Operation During 1990				

Statement of Investment

pany: ____________________

od: On December 31, 1990

# and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
sets:				
rrent and Accrued Assets				
0 Operating Assets				
0 Other Current and Accrued Assets 3/				
0 TOTAL CURRENT AND ACCRUED ASSETS 9/				
-Current Assets				
0 Property, Plant, & Equipment, Shared 10/				
0 Property, Plant, & Equipment, Dedicated 11/				
0 Accumulated Depreciation				
0 Other Non-Current Assets 3/				
0 TOTAL NON-CURRENT ASSETS 12/				
0 **TOTAL ASSETS 13/**				
bilities and Equity:				
rrent and Accrued Liabilities				
0 Accounts Payable				
10 Notes Payable (current portion)				
20 Accrued Taxes				
0 Other Current and Accrued Liabilities 3/				
0 TOTAL CURRENT AND ACCRUED LIABILITIES 14/				
al Long-Term Debt				
50 TOTAL LONG-TERM DEBT				
ferred Credits				
0 Accumulated Deferred Income Tax & Credits				
70 Other 3/				
0 TOTAL DEFERRED CREDITS 15/				
uity				
0 Capital Stock				
0 Additional Paid in Capital				
10 Other Capital 3/				
20 TOTAL EQUITY ACCOUNTS 16/				
0 **TOTAL LIABILITIES AND EQUITY 17/**				

Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accour related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulte
2/ Total Company equals the sum of Operator Service, Other – Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-376

In the Matter of

USA Payphone Systems

ORDER

Adopted: December 23, 1991; Released: December 23, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. USA Payphone Systems (USAPS) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of USAPS's informational tariff and further information that we have directed OSPs to file, we find that at least some of USAPS's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective 45 days from the release of this Order, USAPS must announce that its rates are available on request at the beginning of each call handled by USAPS. Further, as we discuss below, USAPS must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

III. DISCUSSION

6. Our review of USAPS's informational tariff and its price out of sample telephone calls submitted with its September 23 report reveals that USAPS's charges for these calls are as high as $9.00 for one eight-minute call. This charge is among the highest reported by any OSP for one of the sample calls. On the record before us, this rate

---

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com.Car.Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order*. *See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

does not appear to be just and reasonable. We therefore direct USAPS to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct USAPS to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. USAPS must complete the Statement of Costs and Revenues that is attached to this Order. In addition, USAPS should present any other information that it believes demonstrates that its rates and charges are just and reasonable. USAPS should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities USAPS uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. USAPS should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, USAPS must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. USAPS shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991.[5] USAPS must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, USAPS may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. USAPS must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

IV. FILING REQUIREMENTS

11. USAPS is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. USAPS must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. USAPS's submission shall be captioned "Justification of Operator Service Rates of USAPS." USAPS shall include the docket number of this proceeding on the cover sheet to its Justification. USAPS is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on USAPS's submission not later than 25 days after USAPS's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of USAPS." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on USAPS. Finally, USAPS may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of USAPS" and must in all other respects comply with the filing requirements described in the preceding paragraph. USAPS must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), USA Payphone Systems SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that USA Payphone Systems SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), USA Payphone Systems SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

---

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

ATTACHMENT A

CERTIFICATION

I am [insert officer title] I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete

Name: ____________________

Title: ____________________

Date: ____________________

Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.

Statement of Income and Operations

Company: ____________________

Period: January 1, 1990 through December 31, 1990

Line # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company
Revenues and Income				
1010 Operating Revenues				
1020 Uncollectible Revenues				
1030 Non-Operating Income 3/				
1040 Other 3/				
1050 TOTAL REVENUES AND INCOME 4/				

Expenses

1060 Salaries & Wages, Owners & Officers of Company				
1070 Salaries & Wages, Relatives of Owners & Officers				
1080 Salaries & Wages, Others				
1090 Health and Life Insurance				
1100 General Insurance				
1110 Miscellaneous Operating Expenses 3/				
1120 Taxes				
1130 Access Expense				
1140 Depreciation				
1150 Interest on Short-Term Debt 5/				
1160 Interest on Long-Term Debt 6/				
1170 Other Operating Expenses 3/				
1180 Other Expense 3/				
1190 TOTAL EXPENSES 7/				
1200 NET INCOME 8/				

Operating Statistics

1210 Number of Full-Time Employees				
1220 Number of Part-Time Employees				
1230 Number of Workhours, Full-Time Employees				
1240 Number of Workhours, Part-Time Employees				
1250 Number of Operator Calls Handled				
1260 Number of Months in Operation During 1990				

Statement of Investment

pany: ____________________

d: On December 31, 1990

# and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
sets:				
rrent and Accrued Assets				
0 Operating Assets				
0 Other Current and Accrued Assets 3/				
0 TOTAL CURRENT AND ACCRUED ASSETS 9/				
n–Current Assets				
0 Property, Plant, & Equipment, Shared 10/				
0 Property, Plant, & Equipment, Dedicated 11/				
0 Accumulated Depreciation				
0 Other Non–Current Assets 3/				
0 TOTAL NON–CURRENT ASSETS 12/				
0 **TOTAL ASSETS 13/**				
bilities and Equity:				
rrent and Accrued Liabilities				
0 Accounts Payable				
10 Notes Payable (current portion)				
20 Accrued Taxes				
30 Other Current and Accrued Liabilities 3/				
40 TOTAL CURRENT AND ACCRUED LIABILITIES 14/				
al Long–Term Debt				
50 TOTAL LONG–TERM DEBT				
ferred Credits				
60 Accumulated Deferred Income Tax & Credits				
70 Other 3/				
80 TOTAL DEFERRED CREDITS 15/				
uity				
90 Capital Stock				
0 Additional Paid in Capital				
10 Other Capital 3/				
20 TOTAL EQUITY ACCOUNTS 16/				
30 **TOTAL LIABILITIES AND EQUITY 17/**				

Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accoun related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulte
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-377

In the Matter of

U.S. Communications
of Westchester

ORDER

Adopted: December 23, 1991; Released: December 23, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226(a) *et seq.*, requires, *inter alia,* that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. U.S. Communications of Westchester (USCW) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of USCW's informational tariff and further information that we have directed OSPs to file, we find that at least some of USCW's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective 45 days from the release of this Order, USCW must announce that its rates are available on request at the beginning of each call handled by USCW. Further, as we discuss below, USCW must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

III. DISCUSSION

6. Our review of USCW's informational tariff and its price out of sample telephone calls submitted with its September 23 report reveals that USCW's charges for these calls are as high as $11.24 for one eight-minute call.

---

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com.Car.Bur. 1991) (*OSP Reporting Requirements Order).*

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order. See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

This charge is among the highest reported by any OSP for one of the sample calls. On the record before us, this rate does not appear to be just and reasonable. We therefore direct USCW to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct USCW to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. USCW must complete the Statement of Costs and Revenues that is attached to this Order. In addition, USCW should present any other information that it believes demonstrates that its rates and charges are just and reasonable. USCW should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities USCW uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. USCW should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, USCW must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. USCW shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991.[5] USCW must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, USCW may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. USCW must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

IV. FILING REQUIREMENTS

11. USCW is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. USCW must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. USCW's submission shall be captioned "Justification of Operator Service Rates of USCW." USCW shall include the docket number of this proceeding on the cover sheet to its Justification. USCW is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on USCW's submission not later than 25 days after USCW's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of USCW." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on USCW. Finally, USCW may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of USCW" and must in all other respects comply with the filing requirements described in the preceding paragraph. USCW must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), U.S. Communications of Westchester SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that U. S. Communications of Westchester SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), U.S. Communications of Westchester SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

---

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

ATTACHMENT A

CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete

Name: ____________________

Title: ____________________

Date: ____________________

Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.

Statement of Income and Operations

pany: ____________________

d: January 1, 1990 through December 31, 1990

# and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
venues and Income				
0 Operating Revenues				
0 Uncollectible Revenues				
0 Non-Operating Income 3/				
0 Other 3/				
0 TOTAL REVENUES AND INCOME 4/				
enses				
0 Salaries & Wages, Owners & Officers of Company				
0 Salaries & Wages, Relatives of Owners & Officers				
0 Salaries & Wages, Others				
0 Health and Life Insurance				
0 General insurance				
0 Miscellaneous Operating Expenses 3/				
0 Taxes				
0 Access Expense				
0 Depreciation				
0 Interest on Short-Term Debt 5/				
0 Interest on Long-Term Debt 6/				
0 Other Operating Expenses 3/				
0 Other Expense 3/				
0 TOTAL EXPENSES 7/				
0 NET INCOME 8/				
rating Statistics				
0 Number of Full-Time Employees				
0 Number of Part-Time Employees				
0 Number of Workhours, Full-Time Employees				
0 Number of Workhours, Part-Time Employees				
0 Number of Operator Calls Handled				
0 Number of Months in Operation During 1990				

Statement of Investment

Company: ______________________________

Period: On December 31, 1990

Line # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2
Assets:				
Current and Accrued Assets				
2010 Operating Assets				
2020 Other Current and Accrued Assets 3/				
2030 TOTAL CURRENT AND ACCRUED ASSETS 9/				

Non-Current Assets

2040 Property, Plant, & Equipment, Shared 10/				
2050 Property, Plant, & Equipment, Dedicated 11/				
2060 Accumulated Depreciation				
2070 Other Non-Current Assets 3/				
2080 TOTAL NON-CURRENT ASSETS 12/				
2090 TOTAL ASSETS 13/				

Liabilities and Equity:

Current and Accrued Liabilities

2100 Accounts Payable				
2110 Notes Payable (current portion)				
2120 Accrued Taxes				
2130 Other Current and Accrued Liabilities 3/				
2140 TOTAL CURRENT AND ACCRUED LIABILITIES 14/				

Total Long-Term Debt

2150 TOTAL LONG-TERM DEBT				

Deferred Credits

2160 Accumulated Deferred Income Tax & Credits				
2170 Other 3/				
2180 TOTAL DEFERRED CREDITS 15/				

Equity

2190 Capital Stock				
2200 Additional Paid in Capital				
2210 Other Capital 3/				
2220 TOTAL EQUITY ACCOUNTS 16/				
2230 TOTAL LIABILITIES AND EQUITY 17/				

Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accounts related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulted.
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-378

In the Matter of

United Tele-Systems
of Virginia

ORDER

Adopted: December 23, 1991; Released: December 23, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. United Tele-Systems of Virginia (UTV) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of UTV's informational tariff and further information that we have directed OSPs to file, we find that at least some of UTV's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective 45 days from the release of this Order, UTV must announce that its rates are available on request at the beginning of each call handled by UTV. Further, as we discuss below, UTV must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

III. DISCUSSION

6. Our review of UTV's informational tariff and its price out of sample telephone calls submitted with its September 23 report reveals that UTV's charges for these calls are as high as $8.22 for one eight-minute call. This

---

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com.Car.Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order. See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

charge is among the highest reported by any OSP for one of the sample calls. On the record before us, this rate does not appear to be just and reasonable. We therefore direct UTV to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct UTV to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. UTV must complete the Statement of Costs and Revenues that is attached to this Order. In addition, UTV should present any other information that it believes demonstrates that its rates and charges are just and reasonable. UTV should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities UTV uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. UTV should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, UTV must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. UTV shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991.[5] UTV must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, UTV may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. UTV must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

IV. FILING REQUIREMENTS

11. UTV is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. UTV must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. UTV's submission shall be captioned "Justification of Operator Service Rates of UTV." UTV shall include the docket number of this proceeding on the cover sheet to its Justification. UTV is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12.Interested parties may file comments on UTV's submission not later than 25 days after UTV's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of UTV." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on UTV. Finally, UTV may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of UTV" and must in all other respects comply with the filing requirements described in the preceding paragraph. UTV must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), United TeleSystems of Virginia SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that United Tele-Systems of Virginia SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), United Tele-Systems of Virginia SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

---

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Burea

ATTACHMENT A

CERTIFICATION

I am [insert officer title] I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete

Name: ______________________

Title: ______________________

Date: ______________________

Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.

Statement of Income and Operations

Company: ______________________________

Period: January 1, 1990 through December 31, 1990

Line # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company
Revenues and Income				
1010 Operating Revenues				
1020 Uncollectible Revenues				
1030 Non-Operating Income 3/				
1040 Other 3/				
1050 TOTAL REVENUES AND INCOME 4/				

Expenses

1060 Salaries & Wages, Owners & Officers of Company				
1070 Salaries & Wages, Relatives of Owners & Officers				
1080 Salaries & Wages, Others				
1090 Health and Life Insurance				
1100 General Insurance				
1110 Miscellaneous Operating Expenses 3/				
1120 Taxes				
1130 Access Expense				
1140 Depreciation				
1150 Interest on Short-Term Debt 5/				
1160 Interest on Long-Term Debt 6/				
1170 Other Operating Expenses 3/				
1180 Other Expense 3/				
1190 TOTAL EXPENSES 7/				
1200 NET INCOME 8/				

Operating Statistics

1210 Number of Full-Time Employees				
1220 Number of Part-Time Employees				
1230 Number of Workhours, Full-Time Employees				
1240 Number of Workhours, Part-Time Employees				
1250 Number of Operator Calls Handled				
1260 Number of Months in Operation During 1990				

Statement of Investment

ompany: ____________________

eriod: On December 31, 1990

ine # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
ssets:				
urrent and Accrued Assets				
2010 Operating Assets				
2020 Other Current and Accrued Assets 3/				
2030 TOTAL CURRENT AND ACCRUED ASSETS 9/				
on–Current Assets				
2040 Property, Plant, & Equipment, Shared 10/				
2050 Property, Plant, & Equipment, Dedicated 11/				
2060 Accumulated Depreciation				
2070 Other Non–Current Assets 3/				
2080 TOTAL NON–CURRENT ASSETS 12/				
2090 TOTAL ASSETS 13/				
iabilitiesand Equity:				
urrent and Accrued Liabilities				
2100 Accounts Payable				
2110 Notes Payable (current portion)				
2120 Accrued Taxes				
2130 Other Current and Accrued Liabilities 3/				
2140 TOTAL CURRENT AND ACCRUED LIABILITIES 14/				
otal Long–Term Debt				
2150 TOTAL LONG–TERM DEBT				
eferred Credits				
2160 Accumulated Deferred Income Tax & Credits				
2170 Other 3/				
2180 TOTAL DEFERRED CREDITS 15/				
quity				
2190 Capital Stock				
2200 Additional Paid in Capital				
2210 Other Capital 3/				
2220 TOTAL EQUITY ACCOUNTS 16/				
2230 TOTAL LIABILITIES AND EQUITY 17/				

Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to account related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulte
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-6

In the matter of

Amendment of Part 22 of the Commission's
rules to provide for filing and processing
of applications for unserved areas in the
cellular service and to modify other
cellular rules

ORDER

Adopted: December 24, 1991; Released: December 26, 1991

By the Deputy Chief (Operations), Common Carrier Bureau:

I. INTRODUCTION

1. On October 18, 1991, the Commission issued rules for the acceptance, processing and selection of applications for unserved areas in the cellular service, and deadlines for the submission of updated cellular system information.[1] Concurrently, the Commission issued a Further Notice of Proposed Rule Making requesting comments on its proposal that the Cellular Geographic Service Areas (CGSAs) of all cellular systems be altered to more closely reflect the area where service is actually provided by licensees.[2] Cellular Telecommunications Industry Association (CTIA) filed a motion for temporary suspension of the dates for filing updated cellular system information and the filing of unserved area applications as announced in the *Report and Order*. For the reasons set forth below, we will waive the deadlines for filing updated cellular system information as announced in the *Report and Order* and postpone the acceptance of applications for unserved areas.

II. DISCUSSION

2. In its *Report and Order*, the Commission established deadlines for cellular licensees to submit updated (1) maps of their systems showing their existing 39 dBu contours and CGSAs and (2) frequency utilization charts or frequency plans (updated system information).[3] An unserved area is defined as "[a]ny area . . . which is outside of an existing cellular geographic service area in a specific frequency block." *See* 47 C.F.R. §22.2. Therefore, a cellular system's CGSA determines which parts of a given Metropolitan Statistical Area or Rural Service Area constitute unserved areas. Under the Commission's current rules, a licensee must cover seventy-five percent of its proposed CGSA using 39 dBu contours. *See* 47 C.F.R. § 22.903. In its *FNPRM*, however, the Commission proposes to redefine the existing CGSAs of current licensees using a formula that approximates the Carey predicted 32 dBu contour.

3. CTIA contends that "the Commission's present plan [as announced in its *FNPRM*] to redefine CGSAs around a more realistic standard only *after* the unserved application and licensing process has begun will result in years of interference litigation, and marketing uncertainty." *See* CTIA Motion at 3. Because the boundaries for unserved areas are measured by existing cellular licensees' CGSAs, the Commission's proposal would result in a redefinition of the boundaries for unserved areas. We are persuaded that we should temporarily suspend the dates for filing updated system information and postpone acceptance of applications until the Commission has the opportunity to consider CTIA's motion. This action will avoid potentially unnecessary expenditure of staff and licensee resources.

III. ORDERING PARAGRAPH

4. Accordingly, we are waiving the deadlines for the submission of updated cellular system information as announced in the *Report and Order* and postponing acceptance of applications for unserved areas pending Commission action on CTIA's motion. This action is taken pursuant to Sections 1.3 and 0.291 of the Commission's rules, 47 C.F.R. §§ 1.3 and 0.291.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief (Operations)
Common Carrier Bureau

FOOTNOTES

[1] *See* Amendment of Part 22 of the Commission's rules to provide for filing and processing applications for unserved areas in the Cellular Service and to modify other cellular rules, First Report and Order and Memorandum Opinion and Order on Reconsideration, CC Docket Numbers 90-6 and 85-388, FCC 91-306, 6 FCC Rcd 6185 (1991) (Report and Order).

[2] *See* Amendment of Part 22 of the Commission's rules to provide for filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules, Further Notice of Proposed Rule Making, CC Docket Number 90-6, FCC 91-311, 6 FCC Rcd 6158 (1991) (FNPRM).

[3] Specifically, the Report and Order sets January 21, 1992 as the deadline for filing updated system information for markets where the five-year fill-in period expires on or before March 20, 1992. *See* Report and Order at 6206 and 6207; *see also* 47 C.F.R. §22.925(c); *see also* 56 Fed. Reg. 58.503 (November 20, 1991); *see also* Public Notice, Report No. CL-92-30 (released December 11, 1991) (in clarifying the dates for filing updated system information, the Common Carrier Bureau announces that "licensees in markets whose five-year fill-in period expires between February 19, 1992 and March 20, 1992, need not file the information required by Section 22.925 until January 21, 1991"). For all other markets, the deadline for filing updated system information is "60 days prior to the expiration of the five-year fill-in period." *See* Report and Order at 6206 and 6207; *see also* 47 C.F.R. §22.925(a). Sections 22.31(a)(1) and (f) of the rules provided initial licensees with a five-year fill-in period during which they could expand their systems within the markets without challenge from competing applications.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRT/FTC COMMUNICATIONS, INC. File No. I-T-C-92-018

Application for authorization under Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the PTAT-1 Cable System for the provision of authorized common carrier service between the United States and Bermuda.

ORDER AND AUTHORIZATION

Adopted: December 31, 1991; Released: January 9, 1992

By the Chief, International Facilities Division:

1. The above-captioned application, filed on October 22, 1991, by TRT/FTC Communications, Inc. (TRT/FTC), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the Private Transatlantic Telecommunications Cable System (PTAT-1) and interconnecting facilities for the provision of authorized common carrier services between the U.S. and Bermuda and beyond. The application was placed on public notice on November 6, 1991. No comments were received.

2. TRT/FTC is an international carrier currently providing international services between the U.S. and international points using a mix of cable and satellite facilities, including the PTAT-1 cable system. TRT/FTC is authorized to acquire and operate circuits in the PTAT-1 cable system for service between the U.S. and the United Kingdom, Germany and France and points beyond. It now proposes to acquire and operate an additional one-half interest in one DS-1 circuit (1.544 Mbps) in the PTAT-1 cable. TRT/FTC states that the requested facilities will be used to supplement existing facilities between the U.S. and Bermuda and will not be used to direct any existing traffic to the PTAT-1 cable.

3. The Commission stated in its *Private Submarine Cable Decision*[1] that it would require common carriers wishing to acquire capacity in the PTAT-1 cable system to file applications pursuant to Section 214 of the Communications Act.[2] In this context, we find that TRT/FTC's application contains all of the information necessary under Section 63.01 of the Commission's Rules. [3] Furthermore, we find that TRT/FTC's application does not raise any economic impact issues.[4]

4. Upon consideration of the application and in view of the foregoing, we find that authorization of the requested facilities is required by the public convenience and necessity.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-92-018 IS GRANTED, and TRT/FTC is authorized to:

a. acquire, on an Indefeasible Right of User (IRU) basis, and operate the western half-interest in one DS-1 circuit in the PTAT-1 cable between the cablehead at Manasquan, New Jersey and the cablehead in Bermuda;[5] and

b. use said facilities to provide TRT/FTC's regularly authorized services between the U.S. and Bermuda and beyond.

6. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license issued to Private Transatlantic Telecommunications Systems, Inc. under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§34-39).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Private Submarine Cable Decision, 100 FCC 2d 1033 (1985).

[2] This requirement was restated in the *International Competitive Carrier* decision in which the Commission determined that it would require non-dominant carriers to file applications to acquire capacity from any future private cable sources. *International Competitive Carrier Policies*, 102 FCC 2d 812, 845 (1985). Information requirements for Section 214 applications are found in Section 63.01 of the Commission's Rules 47 C.F.R. §63.01.

[3] The Commission places no special burdens on any carrier making an application for private cable capacity. *See Pacific Telecom, Inc., Request for Clarification of Policies Concerning Use of Independent Cables*, File No. ISP-89-002, 4 FCC Rcd 4454 (1989).

[4] The Commission stated that it has authority under the public interest mandate of Section 214 to consider *sua sponte* any economic impact issues, including traffic diversion issues, that may be raised in an application by a common carrier to acquire private cable capacity or to consider such issues when raised by third parties filing comments in response to an application. However, the Commission has stated that it does not anticipate that common carrier acquisition of private cable capacity will normally give rise to such issues. Even if an applicant seeks to acquire a substantial amount of private cable capacity and to offload capacity on a common carrier cable or change a prior commitment for use of capacity in planned common carrier facilities, the Commission stated that the presence of these factors would not be conclusive evidence of eco-

nomic harm. The Commission further stated that the "[r]esolution of any economic impact issues that may arise, and a determination of whether grant of the application would serve the public interest, would be dictated by the circumstances of the particular case before us." *Id.* at 4456.

[5] TRT/FTC notes that it will pay the western owners of the PTAT-1 cable system approximately $235,000 and in addition will incur quarterly maintenance charges.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bay Communications
Complainant,

v. File No. IC-90-03350

New England Telephone Co.
Defendant.

ORDER

Adopted: January 3, 1992; Released: January 9, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On December 11, 1989, Bay Communications filed with the Commission the above-captioned informal complaint against New England Telephone Co. (hereinafter "defendant") requesting a refund of alleged excessive access charges collected from Bay Communications by the defendant. Defendant has filed a report in accordance with Section 1.717 of the Commission's Rules, 47 C.F.R. § 1.717, in which it generally denies any violation of the Communications Act or the Commission's rules.

2. On February 28, 1991, complainant filed a request for waiver of Section 1.718 of the Commission's rules, 47 C.F.R. § 1.718, which provides *inter alia*, that a complainant will be deemed to have abandoned its informal complaint if a formal complaint is not filed within six months of the date of the carrier's report. Because the last report in this complaint proceeding was filed on August 31, 1990, complainant could be considered to have abandoned the above-captioned complaint as of March 3, 1991. In support of its waiver request, complainant states that issues central to its complaint are currently pending in two related formal complaint proceedings. *See American Sharecom v. Mountain States Tel.* (File No. E-88-36) and *American Sharecom v. Pac. Northwest Bell* (File No. E-88-37). Complainant argues that it would be redundant and time consuming to require it to institute a formal complaint proceeding at this time since the outcome of the *American Sharecom* proceedings may serve as precedent for resolving the issues in its complaint. The waiver request is unopposed.

3. The "six months" provision of Section 1.718 provides a complainant whose informal complaint has not been satisfied by the carrier's report, the opportunity to pursue further its claims by filing a formal complaint which might otherwise be barred by the two year statute of limitations contained in Section 415 of the Communications Act.[1] The rule is also intended to ensure finality to a controversy within a time certain if no formal complaint is filed. In the instant case, since the carrier's report does not appear to have satisfied the complainant, Section 1.718 would have required the complainant to file a formal complaint by March 3, 1991, to continue to pursue its damage claims.

4. Section 1.3 of the Communication's rules, 47 C.F.R. § 1.3, provides that the rules may be waived for good cause. We conclude that in the instant case, since the outcome of the *American Sharecom* proceedings may impact the resolution of the instant case, and since there has been no disposition of the informal complaint by the Commission, no public purpose would be served by requiring the complainant to file a formal complaint in order to continue to pursue its claim. Therefore, we will grant the requested waiver.

5. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the request for waiver of Section 1.718 of the Rules, 47 C.F.R. § 1.718, filed by Bay Communications IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

---

[1] 47 U.S.C. § 415.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

American Telephone and Telegraph Company	Transmittal Nos. 3333, 3338, 3339, 3340, 3342, 3345, 3348, 3351, 3352, 3354, 3355

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: November 29, 1991; Released: November 29, 1991

By the Deputy Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) filed Virtual Telecommunications Network Service (VTNS) Options 93-96 on August 2, 1991 (Transmittal Nos. 3333, 3338, 3339, and 3340), Option 97 on August 5, 1991 (Transmittal No. 3342), Options 98 and 99 on August 6, 1991 (Transmittal Nos. 3343 and 3345), and Options 100-107 on August 8, 1991 (Transmittal Nos. 3348 and 3351-3357). Under these options, AT&T provides voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. [1]

2. MCI Telecommunications Corporation (MCI) filed one petition to reject all of the above transmittals on August 19, 1991. US Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject or suspend and investigate Transmittal Nos. 3333, 3338, 3339, 3340, 3342 and 3345 on August 19, 1991. Williams Telecommunications Group, Inc. (Williams) and Competitive Telecommunications Association (CompTel) filed petitions to reject or suspend and investigate Transmittal Nos. 3333, 3338, 3339 and 3340 on August 19, 1991. Sprint filed a petition to reject or suspend and investigate Transmittal Nos. 3348, 3351, 3352, 3354 and 3355 on August 23, 1991. Williams and CompTel each filed petitions to reject or suspend and investigate the following: Transmittal No. 3342 on August 20, 1991; Transmittal No. 3345 on August 21, 1991; and Transmittal Nos. 3348, 3351, 3352, 3354, and 3355 on August 23, 1991. AT&T filed one reply to all of the above petitions on August 30, 1991.

3. Petitioners make essentially the same arguments against each of the above transmittals. The petitioners focus on the issue of bundling of inbound services in Tariff 12 options in the wake of the Commission's decision in CC Docket No. 90-132. [2] MCI, Sprint, Williams, and CompTel argue that the Commission decided that because the lack of number portability remains a barrier to full competition in 800 and inbound services, AT&T should be precluded from bundling inbound services with other AT&T business services in Tariff 12 options. These petitioners assert that because Options 93-97, 99-102, and 104-105 contain an inbound component and were filed after August 1, 1991, they must be rejected. [3]

4. Williams argues that AT&T has failed to demonstrate that these options are integrated service packages that are "unlike" their component services and thus has failed to justify the discrimination between these options and AT&T's other services. Williams further alleges that even if these options could qualify as integrated service packages, their rates vary without justification from other options under Tariff 12 and thus are discriminatory.

5. CompTel alleges that, with the exception of Option 96, these options are not generally available because they incorporate geographically deaveraged rates. CompTel further charges that each of these options embodies the unlawful leveraging of AT&T's market power over international services into other sectors. CompTel also asserts that Option 98 is not integrated, claiming that inbound services account for over 90 percent of the revenues from measured charges.

6. AT&T filed one reply in response to the petitions submitted against Options 93-107 arguing that the Commission should permit these options to become effective despite the August 1 action in CC Docket 90-132. AT&T insists that the Commission has used the gradual implementation of new rates and policies as a standard tool to avoid excessively burdening carriers and customers. In response to charges of discrimination, geographic deaveraging, and lack of general availability, AT&T replies that these claims have been raised previously without success and are patently without merit. AT&T argues that CompTel's claim that Option 98 is not integrated is misleading at best because CompTel has considered only measured (switched) usage in its comparison and ignored all the dedicated service elements in the option. AT&T asserts that when Option 98 is considered in its entirety, inbound measured charges account for less than 39 percent of 1991 projected revenues.

7. The Common Carrier Bureau has reviewed AT&T Transmittal Nos. 3333, 3338, 3339, 3340, 3342, 3345, 3348, 3351, 3352, 3354, and 3355, the petitions filed by MCI, Sprint, Williams, and CompTel, and AT&T's reply. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to warrant rejection.

8. Accordingly, IT IS ORDERED that the petition to reject American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal Nos. 3333, 3338, 3339, 3340, 3342, 3345, 3348, 3351, 3352, 3354 and 3355, filed

---

[1] See generally Descriptions and Justifications accompanying each transmittal. AT&T subsequently filed Transmittal No. 3508 on October 1, 1991, to withdraw Option 98 (Transmittal No. 3343), and Transmittal No. 3588 on October 30, 1991, to withdraw Options 103, 106, and 107 (Transmittal Nos. 3352, 3356, and 3357).

[2] Competition in the Interstate Interexchange Marketplace, Report and Order, 56 Fed. Reg. 55235 (Oct. 25, 1991), 6 FCC Rcd 5880 (1991) (hereinafter "Interexchange Order"). Because the petitions against Options 93-107 were due prior to the release of the *Interexchange Order*, petitioners cite to statements made at the August 1 meeting, comments in the press, and the FCC News Release.

[3] *But see* Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Memorandum Opinion and Order, FCC No. 91-390, Mimeo 38289, (released Nov. 25, 1991).

by MCI Telecommunications Corporation, and the petitions to reject or suspend and investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal Nos. 3333, 3338, 3339, 3340, 3342, 3345, 3348, 3351, 3352, 3354 and 3355, filed by US Sprint Communications Company Limited Partnership, Williams Telecommunications Group, Inc., and Competitive Telecommunications Association, ARE DENIED.

9. IT IS FURTHER ORDERED that, for the purpose of advancing the effective date of the transmittals at issue here for American Telephone and Telegraph Company Tariff F.C.C. No. 12, Special Permission No. 91-1045 is assigned and Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59, ARE WAIVED. These revisions should be filed to be effective on not less than one day's notice.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Bureau Chief (Policy)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies
Transmittal Nos. 499, 500, 501, 509, 526, 535, 557, and 573

Revisions to Tariff F.C.C. No. 2

Open Network Architecture

MEMORANDUM OPINION AND ORDER

Adopted: December 26, 1991; Released: December 27, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. In the *Computer III* proceeding,[1] the Commission initiated a process for replacing the structural separation requirements for Bell Operating Companies (BOCs) enhanced service operations with nonstructural safeguards, including Open Network Architecture (ONA).[2] ONA was designed to unbundle services provided by BOCs to promote efficient and innovative use of the network by independent enhanced service providers (ESPs), while preventing discrimination against ESPs. The Ameritech Operating Companies (Ameritech) filed tariff revisions to make ONA offerings in interstate tariffs.

2. In July 1991, the Commission adopted revisions to Part 69 of the Commission's Rules, specifying rate structure and other tariffing requirements to be used by BOCs[3] when implementing their ONA plans.[4] Ameritech sought to implement its ONA plan conditionally, by filing several transmittals prior to the resolution of outstanding issues in the Part 69 ONA docket. Taken together, these filings would unbundle seven basic service elements (BSEs) from existing services, offer fourteen new BSEs,[5] and establish lineside and trunkside basic serving arrangements (BSAs).

3. Ameritech submitted its first ONA filings in December 1990, and the ONA services offered in those filings, as modified by later transmittals, have been examined in depth for the past 12 months. Furthermore, interested parties have had several opportunities to comment on Ameritech's ONA offerings.[6] We have also performed a preliminary *in camera* review of Ameritech's Switching Cost Information System (SCIS) costing model. Implementation of ONA presents difficult and complex issues including the levels of unbundled rates. For reasons discussed more fully below, we initiate an investigation of the Ameritech ONA transmittals. Those transmittals will, however, become effective on December 31, 1991, following a one-day suspension, subject to an accounting order, in the event that refunds later prove necessary.[7] We will designate issues in this investigation in a later Order.

II. COST SUPPORT AND RATE LEVELS

A. Cost Issues

1. SCIS Model

4. *Background*. The *Part 69 ONA Order* adopted a flexible, cost-based approach to ONA pricing that requires BOCs to support rates for BSEs by direct costs plus overheads, including the ratio of direct unit costs to unit investment and direct unit cost to unit price. BSAs are priced residually.[8] To develop its rates, Ameritech employs the Switching Cost Information System (SCIS), a

---

[1] Amendments of Section 64.702 of the Commission's Rules and Regulations, Report and Order, CC Docket No. 85-229, 104 FCC 2d 958 (1986); *recon.*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*), *further recon.*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration*), Amendments of Sections 64.702 of the Commission's Rules and Regulations, Report and Order, CC Docket No. 85-229, 2 FCC Rcd 3072 (1988) (*Phase II Order*), *recon.*, 3 FCC Rcd 1150 (*Phase II Reconsideration*), *vacated sub nom.* California v. FCC, 905 F2d 1217 (9th Cir. 1990), *appeal pending sub nom.* Illinois Bell Tel. v. FCC, No. 881364 (D.C. Cir. pet. for rev. filed May 16, 1988).

[2] The Commission recently adopted revised safeguards in this area. *See Computer III* Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, CC Docket No. 90-623, FCC 91-381, adopted November 21, 1991.

[3] The Bell Operating Companies are Ameritech Operating Companies (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Telephone Companies (BellSouth), New York Telephone Company and New England Telephone and Telegraph Company (NYNEX), Pacific Bell and Nevada Bell (Pacific), Southwestern Bell Telephone Company (Southwestern), and US West Communications, Inc. (US West).

[4] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, Report and Order, Order on Reconsideration, and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991) (*Part 69 ONA Order*). The BOCs' ONA plans had been previously approved. *See* Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 5 FCC Rcd 3103 (1990) (*ONA Amended Plans Order*).

[5] *See* Ameritech Transmittal 557, Description and Justification (D&J), at Exh. 1.

[6] Ameritech's filings, the parties filing pleadings in these proceedings, and the abbreviations by which these pleadings are referenced, are listed in Appendix A of this Order. In this Order, we refer to petitions filed against particular transmittals by transmittal numbers; *i.e.*, Ad Hoc Petition (499/500) at ________; Ad Hoc Petition (557) at ________. Ameritech filed three replies. The first was filed on January 14, 1991, in response to petitions to suspend or reject Transmittals 499, 500, and 501. The second was filed on April 29, 1991, in response to petitions against Transmittal 526, and the third was filed on September 19, 1991, in response to petitions against Transmittal 557. We refer to Ameritech's January reply as Ameritech Reply (January), its April reply as Ameritech Reply (April), and its September reply as Ameritech Reply (September).

[7] This accounting order will apply to all BSA and BSE rates, and thus will facilitate any refunds that might be warranted.

[8] *See Part 69 ONA Order*, 6 FCC Rcd at 4531-32, paras. 38-48.

computer model that simulates a central office switch and apportions its capacity and cost between the functions the switch provides, to develop rates for BSEs. The Bureau's *ONA TRP Order* required the BOCs to provide the SCIS model and associated documentation when filing their ONA tariffs.[9] The affected carriers each sought waiver of this requirement, claiming that carrier and switch vendor data used as inputs to SCIS, and the Bellcore-maintained software that constitutes the model itself, are proprietary information. To review these contentions, the Bureau required one BOC, Ameritech, to submit its SCIS model, and the Bureau staff initiated a detailed *in camera* review of SCIS.[10]

5. *Pleadings.* Various parties argue that their inability to evaluate SCIS prior to the effective date of Ameritech's tariffs has prevented them from evaluating the model as a reasonable basis for rates.[11]

6. *Discussion.* In view of our decision to initiate an investigation, petitioners have not been prejudiced by their inability to use this information in petitions for investigation. We recognize that petitioners who choose to participate in the investigation will need some access to at least some of the data. We will address this subject in a subsequent order.

2. Compliance with *Part 69 ONA Order* Cost Support Requirements

7. *Pleadings.* Ad Hoc, MCI, and Allnet argue that Ameritech fails to comply with the cost support requirements set forth in the *Part 69 ONA Order* regarding direct costs. Specifically, Ad Hoc and Allnet argue that Ameritech fails to provide studies, disaggregated costs, and detailed descriptions of its costing methods.[12] Also, MCI argues that Ameritech fails to provide the direct cost studies from which direct costs were derived.[13] Ameritech replies that it provided fully supported cost information in its D&Js for Transmittals 499 and 500. Ameritech further explains that it derives direct costs by applying a direct cost factor to investment.[14]

8. MCI also notes there is no explanation regarding why the ratio of direct cost to unit investment is the same for all Ameritech's BSEs.[15] Ameritech states that, given the shared nature of switching investment, it is impossible to determine any relationships of direct costs to investment for individual BSEs, and Ameritech assumed that each service contributes equally to expenses.[16]

9. Allnet and Sprint assert that Ameritech has set the recurring charge for Call Detail Recording (CDR) at over six times unit recurring costs.[17] Allnet also claims that there appear to be inconsistencies with respect to the pricing of CDR and Flex ANI, and that Ameritech is not applying cost principles consistently to these options in violation of the *Part 69 ONA Order.*[18] Ameritech replies that its cost methodology is consistent for all BSEs and that Allnet may be confused because of Ameritech's treatment of nonrecurring costs for CDR and Flex ANI. Ameritech states that nonrecurring costs for CDR are too great to recover exclusively through nonrecurring charges and that, therefore, some of these nonrecurring costs are recovered through the recurring charges for CDR. Ameritech also states that Flex ANI costs are exclusively nonrecurring and that these costs are recovered exclusively through nonrecurring charges.[19]

10. *Discussion.* In Transmittals 499 and 500, Ameritech developed a direct cost factor on which it based its direct costs, and in Transmittal 557, Ameritech provided those direct costs and displayed them as part of the TRP. Ameritech has achieved substantial compliance with applicable cost support requirements and petitioners have not stated a basis for rejection.

3. Cost of Money

11. *Pleadings.* Allnet claims that Ameritech's rates are developed from Cost of Money factor unexplained its cost of money rather than from the Commission prescribed rate of return, and that Ameritech fails to specify the cost of money factor itself.[20] Ameritech explains that the rate paid to debt and equity providers is forward looking, and reflects both the market-determined rate on debt capital, and the market-determined return on equity capital. Ameritech maintains that the rate of return reflects profitability after common overheads have been paid, while the cost of money does not.[21]

12. *Discussion.* At the Bureau staff's request, Ameritech informally submitted additional explanations and documentation in support of its alleged cost of money. In this submission, Ameritech showed its cost of money is 13.5 percent, based on a debt cost of 9.5 percent and an equity cost of 16 percent, and a capital structure of 39.2 percent debt and 60.8 percent equity. In the proceeding leading to the recent *Represcription Order*,[22] Ameritech provided data that showed its cost of debt to be in a range of 7.8 percent

---

[9] Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, 6 FCC Rcd 5682, para. 3 n. 3 (Com.Car.Bur. 1991) (*ONA TRP Order*), petitions for reconsideration pending. US West uses a similar model that it calls Switching Cost Model (SCM). All general references to SCIS include SCM and all models used to allocate switch investment for BSEs.

[10] Ameritech submitted data for SCIS model offices and documentation for Illinois. On December 9, 1991, Ameritech also filed data for its SCIS model in its other study areas. *See* Letter from Chief, Tariff Division, to M. Suthers, Director of Tariffs, Ameritech, Nov. 26, 1991.

[11] Allnet Petition (499/500) at 7 (arguing that costs appear to be arbitrarily assigned to automatic number identification (ANI) and calling number delivery (CND) features); MCI Petition (557) at 4-5 (SCIS can be manipulated to produce predetermined outcomes); MCI Petition (499/500) at 8-9 (no way to evaluate Ameritech's claim that unit costs remain stable as demand increases).

[12] Ad Hoc Petition (557) at 7; Allnet Petition (557) at 4-5.

[13] MCI Petition (557) at 8-9.

[14] Ameritech Reply (September) at 16-17.

[15] MCI Petition (557) at 8-9.

[16] Ameritech Reply (September) at 16-17.

[17] Allnet Petition (499/500) at 5-6; Sprint Petition (499/500) at 3-4.

[18] Allnet Petition (557) at 8.

[19] Ameritech Reply (January) at 24-25; Ameritech Reply (September) at 1819.

[20] Allnet Petition (557) at 7; *see also* Ad Hoc Petition (557) at 7.

[21] Ameritech Reply (September) at 15-16.

[22] Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507 (1990), at App. 1 (*Represcription Order).*

to 8.4 percent, its cost of equity to be 15.5 percent, and its capital structure to be 41.5 percent debt and 58.5 percent equity.[23] In the same Order, the Commission based the authorized rate of return on 8.8 percent cost of debt, a range of 12.5 percent to 13.5 percent for cost of equity, and a capital structure of 44.2 percent debt and 55.8 percent equity. If Ameritech overstates its cost of money, the BSE costs derived from the SCIS model will be likewise overstated, resulting in excessive BSE rates. Accordingly, issues regarding Ameritech's use and calculation of cost of money may be set for investigation in a subsequent Order.

4. Element-Specific Cost Issues

13. *Pleadings*. Allnet asserts that Ameritech fails to establish any discrete switching costs associated with providing automatic number identification (ANI) and called number delivery (CND).[24] Allnet claims that Ameritech does not incur discrete, identifiable costs for similar services, such as calling party number (CPN) offered with common channel signalling (CCS)-related out of band signalling,[25] and assumes ANI and CND also have no costs. MCI asserts that Ameritech plans to earn much more revenue from ANI and CND than from the rest of its planned BSEs combined, and believes that the prices for these services are substantially above costs.[26] Ameritech replies that it has previously "established" in defending Transmittals 499 and 500 that there are distinct costs associated with ANI and CND.[27] Ameritech also argues that many of the services cited by Allnet are not analogous to ANI or CND.[28]

14. *Discussion*. ANI and CND do not appear to be similar to the services that Allnet compares to them, and the comparison drawn by Allnet does not provide a basis for investigation.

5. "Strategic" Pricing

15. Several petitioners advance arguments against what they characterize as "strategic pricing."[29] Strategic pricing, as that term was applied in the *Strategic Pricing Order*, described the practice of some LECs who priced a particular special access service substantially above cost to discourage customers from migrating from other services.[30] In the present context, no such broad strategy is described by petitioners specifically; rather, they apply the term "strategic" indiscriminately to rates criticized as excessive on a variety of grounds.

B. Demand Estimation

16. *Pleadings*. Some petitioners maintain that Ameritech's demand estimates for the proposed BSEs may be understated, leading to overrecovery of costs and excessive rates. MCI argues that demand is relevant to the costs of BSEs, because at some optimal level of demand, the switch should gain efficiencies, thereby causing costs for BSEs to decrease.[31] Ad Hoc and Allnet argue that Ameritech fails to include support for its estimates of demand, and that those petitioners are unable to determine whether those estimates are reasonable.[32] In addition, Sprint complains that Ameritech has underestimated Flex ANI demand, leading to charges far in excess of Ameritech's costs.[33]

17. Ameritech replies that the SCIS-based method of determining costs for BSEs results in unit costs, and levels of demand are therefore irrelevant in computing rates. Ameritech maintains that it has no historical bases from which to estimate demand for new BSEs, and so bases its demand estimates on input from ESPs and interexchange carriers (IXCs). Ameritech further explains that it anticipates low IXC demand for BSEs that were developed primarily for ESPs.[34] With respect to Flex ANI, Ameritech concludes that any question about the demand projections will be answered by the quarterly reports it has to file for new services.[35]

18. *Discussion*. The debate over the relevance of demand levels to unit costs, appears to be primarily an issue of whether the SCIS model is accurate at reasonably anticipated demand levels. We will determine whether demand questions must be examined as part of an investigation of rates in a subsequent order.

C. Net Revenue Showing

19. *Pleadings*. MCI also questions the residual-type methodology employed to calculate the LS1 and LS2 rates. MCI claims there is no way to validate that double counting has not occurred using this methodology, and that it produces a revenue neutrality that is nothing more than a mathematical identity.[36]

---

[23] *Id*. at 7512 and App. C.

[24] Allnet Petition (499/500) at 7; Allnet Petition (557) at 5. ANI identifies the telephone number to which the call should be billed. CND identifies the location to which the call is being delivered.

[25] Specifically, Allnet refers to 800 number translation in conjunction with 800 database service, extended super frame (ESF), and CPN. Allnet argues that CPN and ANI are the same in all single line caller cases and most multiline caller cases. *See* Allnet Petition (499/500) at 8; Allnet Petition (557) at 5-6; Letter from R. Morris, Allnet, to Secretary, Federal Communications Commission, Feb. 1, 1991.

[26] MCI Petition (557) at 2-4.

[27] Ameritech Reply (January) at 21-22; Ameritech Reply (September) at 2526.

[28] Letter from B. Gilomen, Ameritech, to Secretary, Federal Communications Commission, Apr. 8, 1991 (CPN is offered only with out of band signalling not at issue here); *see also* Ameritech, Transmittal 557 D&J at 4 (ESF is a BSA alternative, not a BSE). Ameritech's waiver petition to treat ESF as a BSA alternative is now pending.

[29] *See* Ad Hoc Petition (499/500) at 5-10, Allnet Petition (499/500) at 59, Att. 2-3; MCI Petition (499/500) at 1-5; Ad Hoc Petition (509) at 2-5.

[30] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part I, 4 FCC Rcd 4797, 4797-98 (1988) (*Strategic Pricing Order*), *recon*., 5 FCC Rcd 400 (1990), *vacated sub nom*. Ohio Bell v. FCC, Slip Op., No. 90-3146 (6th Cir., Nov. 21, 1991).

[31] MCI Petition (499/500) at 8-9.

[32] Ad Hoc Petition (499/500) at 8; Allnet Petition (499/500) at 1-5, Allnet Petition (526) at 1; *see also* MCI Petition (499/500) at 9.

[33] Sprint Petition (526) at 3-4.

[34] Ameritech Reply (January) at 11-16.

[35] Ameritech Reply (April) at 13-14.

[36] MCI Petition (557) at 7-8.

20. Allnet contends that Ameritech's demonstration of net revenue is flawed because it reflects only demand when all Local Switching is unbundled, and ignores the demand during the transition period, when some customers would choose feature groups rather than unbundled BSEs. Allnet claims that Ameritech's use of a net revenue test is inappropriate in light of the Commission's decision in the *LEC Price Cap Reconsideration*.[37] Ameritech states that, in compliance with the *LEC Price Cap Reconsideration,* it measures demand for the net revenue test at the end of the transition period.[38]

21. MCI claims that Ameritech does not consistently use the same level of demand in the SCIS model as it used to derive the net revenue test.[39] Ameritech explains that it used total interstate and intrastate demand in its SCIS cost development to ensure that recovery of the total cost of the service will come from all subscribers to the service. Ameritech further asserts that, because it does not anticipate recovering the total costs of service from interstate customers, it must use only interstate demand in its net revenue test. Ameritech stresses that it passes the net revenue test.[40]

22. *Discussion.* Some of petitioners' arguments amount to efforts to seek reconsideration of both the *Part 69 ONA Order* and various price cap decisions. For example, BSAs are priced residually under ONA, *i.e.*, BSEs are priced directly, while BSAs recover residual costs. The revenue neutrality showing must demonstrate that projected overall revenues remain equal with historical revenues without double counting. This tariff proceeding is not an appropriate context in which to reconsider prior Commission Orders. Ameritech has complied with the requirement that it demonstrate the net revenue impact of its filing, established by the Commission in the *LEC Price Cap Reconsideration* and the *Part 69 ONA Order*. An investigation of net revenue impact is not warranted at this time.

D. Index Issues

23. Allnet asserts Ameritech has not applied price cap rules properly, instead inventing an "aggregate API formula" that is not consistent with Section 61.46(a) of the Commission's Rules.[41] Ameritech replies that its recalculation of its Actual Price Index (API) to reflect the unbundling of Local Switching elements comports with the general methodology in Section 61.46(a), as required by Section 61.46(c), but states that the exact formula of Section 61.46(a) cannot be used because the term for existing prices does not exist, and the ratio of revised to existing price thus cannot be calculated.[42] Ameritech is correct. The API formula in Section 61.46(a) requires new weighted prices to be divided by existing weighted prices, and therefore cannot be applied in those terms when, as here, there are no existing prices.

III. RATE STRUCTURE ISSUES

A. Introduction

24. In the *ONA* proceeding the Commission's intent was to permit BOCs to provide enhanced services to local customers without burdensome structural separation requirements, while preventing them from discriminating against their independent ESP competitors. To accomplish this, the Commission required the BOCs, including Ameritech, to submit "ONA Plans" listing the BSEs and BSAs the carriers intended to offer as unbundled, "building block" offerings.[43]

B. ANI and CND Rate Structures

25. *Background.* Currently, ANI and CND are offered as nonchargeable options of Feature Groups C and D access. Any ANI and CND costs are included in Local Switching (LS) element costs and recovered by a bundled LS rate assessed on each access minute, at both the originating and terminating ends of the call. The Ameritech transmittal would unbundle ANI and CND as separate, optional trunk side BSEs. Rates would include a non-recurring charge and a charge assessed on each originating message.

26. *Pleadings.* Ad Hoc and Allnet assert, in petitions filed before release of the *Part 69 ONA Order,* that the effect of these new rate elements would be a significant increase in the charge for calls of short duration, with little offsetting reduction in the charges for calls of longer duration. They also contend that the unbundled rate elements represent the type of abrupt change that led to the rejection of a per message call setup charge filed by Bell Atlantic.[44] Ameritech replies that ANI and CND are correctly priced on a per message basis, because the information is passed once per originating call regardless of call

---

[37] Allnet Petition (557) at 4. *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Order on Reconsideration, 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration).*

[38] Ameritech Reply (September) at 19 (*quoting LEC Price Cap Reconsideration,* 6 FCC Rcd at 2693).

[39] MCI Petition (499/500) at 8-9.

[40] Ameritech Reply (January) at 13-14.

[41] Allnet Petition (499/500) at 9-10.

[42] Ameritech Reply (January) at 27-28.

[43] Filing and Review of Open Network Architecture Plans, CC Docket No. 882, Phase I, 4 FCC Rcd 1 (1988) (*BOC ONA Order).* The BOCs were also required to explain why any BSAs or BSEs in the plans were missing from their tariffs. *ONA TRP Order,* 6 FCC Rcd at 5684, para. 18. Allnet complains that provisions for BSA missing elements line side and trunk side BSAs required by the *Part 69 ONA Order* are absent from Transmittal 557. Allnet Petition (557) at 1-2. Ameritech in its reply conceded there is no BSA terminology in the filed tariff, and later added language to its tariff to comply with this requirement. Ameritech Transmittal No. 573, 5th revised page 59.1, original page 59.2, 2nd revised page 115, original page 115.1, original page 115.2, 4th revised page 116, 2nd revised page 116.1, 6th revised page 176.2, 34th revised page 214. The Bureau will consider Ameritech's explanations for its missing BSEs, and the missing BSEs of other BOCs, in a future Order. Ameritech has also petitioned for waiver of Part 69 of the Commission's Rules to offer dedicated network access lines (DNALs) as switched access BSA alternatives. Petitions against Ameritech's ONA tariffs raising issues involving DNALs are considered in our companion Order considering Ameritech's waiver request. *See* Ameritech Petition for Waiver of Part 69 of the Commission's Rules, Memorandum Opinion and Order, DA 91-1629, released Dec. 27, 1991 (Com.Car.Bur.).

[44] Ad Hoc Petition (499/500) at 6-9; Allnet Petition (499/500) at 7-9 (*citing* Bell Atlantic Telephone Companies, Trans. No. 310, 4 FCC Rcd 7210 (1989)).

length. It agrees that some originating calls of short duration that use ANI and CND will be more expensive, but states that the filing is revenue neutral, that prices of all terminating calls will decrease, and that the increases for individual customers will be limited to less than 4 percent.[45]

27. *Discussion*. A goal of the ONA program is to unbundle local switching into reasonable, individual rates. Based upon Ameritech's explanations, the assessment of ANI and CND rates on a per message basis does not warrant investigation.

C. Flex ANI

28. *Background*. In Transmittals 526 and 535, Ameritech would offer Flexible Automatic Number Identification (Flex ANI) service as a BSE. Flex ANI is a software-based option that will extend the existing ANI service by providing additional values for the ANI Information Indicator digits forwarded to access customers. ANI Information Indicator digits enable customers to identify certain types of calls, *e.g.*, hotels, prisons, and hospitals.[46]

29. *Pleadings*. MCI contends that Flex ANI is a network upgrade for which separate charges should not apply.[47] MCI and Allnet note that other carriers consider Flex ANI an extension of the existing ANI service and thus offer it as a non-chargeable option.[48] Ameritech responds that it is not enhancing an existing service, but creating a new process that has the capability of adding new Information Indicator values. Ameritech also notes that this offering is consistent with the Commission's ONA policy which calls for the unbundling of services so that customers may purchase only those services they require.[49]

30. MCI and Sprint argue that ANI Information Indicator digits are part of software needed to implement equal access, so costs for Flex ANI should be recovered through the Equal Access rate element.[50] Sprint also contends that the Flex ANI software has a useful life of many years, and sound ratemaking policy requires recovery of the associated costs over the life of the program rather than through a separate nonrecurring charge.[51] Allnet and MCI note that Ameritech currently does not charge for hard coding new Information Indicator values, and suggests that it is inconsistent to charge now for the same functionality performed via Flex ANI.[52] According to Ameritech, the Modification of Final Judgment[53] only requires that the BOCs provide access to all IXCs on a non-discriminatory basis, and does not prohibit the BOCs from charging for new services or unbundling exchange access services. Ameritech also argues that only access customers using the service should bear the costs of Flex ANI.[54]

31. *Discussion*. Although Flex ANI was not listed in Ameritech's approved ONA plan, Ameritech filed a petition, on August 21, 1991, for expedited approval of Flex ANI as a BSE. Pursuant to the *Part 69 ONA Order*, Flex ANI was automatically approved as a BSE 45 days later.[55] Flex ANI also appears to be a new service under the price cap rules. The Commission established that any service that expanded the range of service options available to consumers would be considered a "new" service for purposes of the price cap rules. Ameritech's Flex ANI service will expand the range of service options available to consumers, because standard ANI service will continue to be available. Petitioners' arguments appear to amount to objections to the ONA and price cap rules and are therefore not germane to any investigation of Ameritech's tariffs.

D. Billing and Collection; Related Issues

32. *Pleadings*. Allnet claims that Ameritech restricts tariffed CDR to 900 Services, while providing an identical function for other services under contracts that vary in price from customer to customer. Allnet maintains that this practice violates the discrimination and tariffing provisions of the Communications Act, and requests that Ameritech be Ordered to eliminate the 900-only restriction.[56] Ameritech replies that, in its ONA plans, CDR was limited to a unique NXX to enable Ameritech's billing systems to identify those calls to be recorded. Ameritech anticipated that ESP industry growth associated with FGD access would principally involve 900 Service, and so tailored CDR to the FGD 900 NXX application.[57]

33. Similarly, Sprint claims that Ameritech's tariffed ANI rate may be discriminatory if Ameritech also provides ANI as part of non-tariffed billing and collection agreements.[58] Ameritech replies that requiring billing and collection to be priced consistently with ANI would be inconsistent with the Commission's policy to keep billing and collection detariffed, and that billing and collection costs are allocated by Subpart D and E of the Part 69 Rules.[59]

34. *Discussion*. The Commission detariffed CDR in the *Billing and Collection Order*, although the Commission retained Title I jurisdiction to require the continued pro-

---

[45] Ameritech Reply (January) at 22-24.

[46] Ameritech Transmittal 526, D&J at 1-2. Bellcore develops industry standard codes for the Information Indicator digits. Currently, ANI Information Indicator digits are "hard-coded" into the switch program. In other words, the values for ANI Information Indicator digits are placed in the switch program at the time of manufacture and can only be changed during switch program updates. Flex ANI, as discussed above, is a software approach to ANI Information Indicator digits that will allow greater flexibility to add new values. *See* Ameritech Reply (April) at 3.

[47] MCI Petition (526) at 4-5.

[48] *Id.* at 7-8; Allnet Petition (526) at 1.

[49] Ameritech Reply (April) at 3-7.

[50] Sprint Petition (526) at 5-6; MCI Petition (526) at 5.

[51] Sprint Petition (526) at 5.

[52] Allnet Petition (526) at 1; MCI Petition (526) at 6.

[53] United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

[54] Ameritech Reply (April) at 4-8.

[55] *See Part 69 ONA Order*, 6 FCC Rcd at 4527, para. 14.

[56] Allnet Petition (499/500) at 6 (*citing* Sections 202(a) and 203 of the Communications Act, 47 U.S.C. §§ 202(a), 203).

[57] Ameritech Reply (January), App. 2 at v-vii.

[58] Sprint Petition (557) at 5.

[59] Ameritech Reply (September) at 26 (*citing* Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, CC Docket No. 91-115, Notice of Proposed Rulemaking, 6 FCC Rcd 3506, 3509, para. 24 & n. 12 (1991)). Sprint's comments on ANI are speculative, and only raise the possibility that ANI may be provided under billing and collection agreements.

vision of CDR to all IXCs at reasonable rates upon reasonable request.[60] This specific exercise of Title I jurisdiction was to end in 1989, or when conversion to equal access was completed, whichever occurred later.[61] Nevertheless, the Commission retained the power to exercise Title I jurisdiction whenever such exercise would protect or promote a statutory purpose.[62] In this case, Ameritech is proposing to reintroduce CDR into its tariffs. While Ameritech did apparently include CDR in its ONA plan, it is questionable that it can properly be tariffed in light of the Commission's *Billing and Collection Order*, and Rules.[63] Therefore, this offering appears to warrant investigation.

E. Simplified Message Desk Interface

35. Sprint complained in response to Ameritech's initial ONA tariffs, Transmittals 499 and 500, that the Simplified Message Desk Interface (SMDI) DNAL will be available only in certain central offices, and a customer wishing to use the BSEs associated with SMDI will need a DNAL between its premise and each central office the customer seeks to access.[64] Sprint's contention is mooted by the availability of SMDI/E in Transmittal 509. With SMDI/E service, the customer can obtain access to all SS7-equipped end offices when it purchases a DNAL to one of those offices.

F. Availability of BSEs with Line Side BSAs

36. Sprint asserts neither ANI nor CDR will be available with line side access, although these functions are necessary for ESPs to bill end users who are casual callers. Although Ameritech states it is conducting trials to determine its ability to record, deliver, and bill the call detail recording information for the line side arrangement, Sprint complains that Ameritech does not suggest when or whether this capability may become available.[65] Ameritech replies that ANI is not technically compatible with line side connection, and efforts to develop line side capable CDR have encountered problems.[66]

37. There is no dispute that the technology does not currently exist to provide cost-effective line side ANI and CDR. We expect to monitor technological developments permitting the expansion of functions available to ESPs.

IV. IMPLEMENTATION ISSUES

A. Transition Period

38. The *Part 69 ONA Order* provides for a transition period, during which both bundled Feature Groups and unbundled ONA services will be available. The Commission concluded that this transition period should end when the ONA service rates are incorporated into the carriers' price cap indexes.[67] For Ameritech, this will occur on July 1, 1992.

1. Conversion

39. *Pleadings*. Allnet questions Ameritech's lack of any charge for conversion of customer service from bundled to unbundled arrangements. Allnet suggests that there must be some costs associated with this conversion. Allnet asserts that, in fairness, these costs should be borne only by customers who convert voluntarily. According to Allnet, conversion should be provided without charge only when conversion is required; *i.e.*, on the last date of the transition. Allnet also contends that Ameritech misinterprets the *Part 69 ONA Order* by forcing customers to make a single choice between bundled and unbundled service for the entire Ameritech territory. Allnet believes that this "all or nothing" approach is especially unfair to IXCs who are also ESPs, and requests that ONA services be available during the transition period on a trunk group basis.[68] Ameritech replies that no separate costs are attributable to early conversion and asserts it does not want to penalize access customers for conversion. In fact, argues Ameritech, it projects a slight decrease in overall revenue after unbundling.[69] Ameritech also offers to permit unbundling on a state-by-state basis, but argues that conversion by trunk group is extremely unlikely and, if permitted, would permit "gaming" the system, and would result in revenue shortfalls and increased costs.[70]

40. *Discussion*. The *Part 69 ONA Order* requires BOCs to offer unbundled arrangements of their feature groups. That Order represents the culmination of the Commission's history of encouraging ONA development. Allnet presents no evidence that Ameritech incurs any additional costs in converting from bundled to unbundled arrangements over the transition rather than in a complete unbundling at the end of the transition. Indeed, Allnet's proposed alternative would discourage an orderly, gradual transition by creating artificial incentives to postpone ONA implementation. Therefore, the Bureau concludes that Allnet offers no argument warranting rejection or investigation of Ameritech's ONA tariffs on this basis. Conversion on a state-bystate basis should allow customers an adequate degree of flexibility without the possible abuses and costs of conversion on the basis of trunk groups.

2. Timetables for Unbundling

41. *Background*. Because Ameritech voluntarily filed its ONA tariff ahead of the other BOCs, it is scheduled to take effect before January 1, 1992. Under the *Part 69 ONA Order*, one result would be that the transition to fully unbundled ONA rates would be implemented on July 1, 1992, one year earlier than for other BOCs.

---

[60] Detariffing of Billing and Collection Services, CC Docket No. 85-88, 102 FCC 2d 1150, 1173-75 (1986) (*Billing and Collection Order*).

[61] *Id.* at 1174, para. 46.

[62] *Id.* at 1170, para. 37.

[63] *See* Section 69.3(e)(9) of the Commission's Rules, 47 C.F.R § 69.3 (e)(9).

[64] Sprint Petition (499/500) at 3.

[65] Sprint Petition (499/500) at 2-3.

[66] Ameritech Reply (January) at App. 2, vii-viii.

[67] *Part 69 ONA Order*, 6 FCC Rcd at 4528, para. 20.

[68] Allnet Petition (557) at 3-4.

[69] Ameritech Reply (September) at 23-24.

[70] Letter from A.M. Alessi, Ameritech, to R.L. Smith, Tariff Division, November 26, 1991.

42. *Pleadings*. Sprint suspects that Ameritech has underestimated both the scope of implementation problems and the costs of unbundling services, especially when certain features and functions are made available to a relatively large group of customers, such as ESPs.[71] Sprint contends that Ameritech has not yet specified ordering and billing standards for ONA offerings.[72] Allnet contends that small carriers are particularly disadvantaged by a short transition period, because they are less able to adapt their ordering and billing systems.[73] According to Sprint, ONA implementation could increase ESP demand for Carrier Identification Codes (CICs).[74] Ad Hoc is concerned that ONA implementation in Ameritech's service region before ONA is implemented in the rest of the Nation will create Regional Anomalies unbundling timing regional anomalies for carriers with ordering and other procedures that cover multiple regions. Ad Hoc also claims that Ameritech's early filing reduces the ability of the Commission and interested parties to assess the reasonableness of Ameritech's rates by comparing them to rates filed by other carriers.[75]

43. Ameritech responds that the July 1992 date is consistent with the explicit language in the *Part 69 ONA Order*, which pegged transition to inclusion of ONA elements under price caps rather than any specific date. Ameritech argues that the transition period established by the *Part 69 ONA Order* is not a proper object for relitigation in the tariff context.[76] Ameritech also contends that the changes required to Ameritech's billing and ordering systems are not extensive. Ordering forms already have fields in which to specify unbundled BSEs; new fields need to be developed only for new BSEs. Ameritech began to meet with IXCs in February 1989, to prepare for these new billing and ordering procedures.[77] Ameritech states that the Commission should judge the reasonableness of ONA rates on their own merits, and that BSE rates may vary between BOCs because the carriers may each employ a different array of technologies. Ameritech also does not expect ESP demand for unbundled elements to accelerate demand for CICs significantly.[78]

44. *Discussion*. Ameritech is correct, that this is not the appropriate forum for reconsideration of any of the provisions of the *Part 69 ONA Order*, including the unbundling timetable. The petitions on this subject do not identify any issue that warrants investigation.

B. ESP Exemption

45. *Pleadings*. Prodigy and BT Tymnet assert that Transmittals 499 and 500 (and Transmittal 501 for Prodigy) affect the ability of ESPs to avoid interstate access charges. BT Tymnet contends that Ameritech prices its BSAs in a similar manner to bundled Feature Group services, thus forcing ESPs to pay carrier access charges.[79] Prodigy contends that Ameritech's "radically revised rates... could seriously undermine the continued provision of innovative services."[80] Ameritech responds that its tariff revisions would not limit ESPs' ability to obtain local business lines, but would require that ESPs that use interstate access components pay certain charges -- as already required. The ESP access charge exemption permits enhanced service providers to use local exchange components in the offering of interstate services, but has never permitted ESPs to purchase components from federal access tariffs and combine those components with intrastate access in order to avoid interstate access charges.[81]

46. *Discussion*. In the *Part 69 ONA Order*, the Commission decided to retain the ESP exemption from federal access charges in order to avoid rate shock and disruptions in the rapidly changing enhanced services industry, and to provide predictability and stability for the industry in the transition to ONA.[82] Since the implementation of federal access charges, ESPs have been allowed to use local business lines or other state-tariffed forms of access for their interstate traffic, enabling them to avoid interstate access charges. While ESPs are not permitted to use interstate access elements in conjunction with intrastate services, they may purchase interstate access service on the same basis as other access customers to obtain other interstate features available through this access service. Therefore, BT Tymnet and Prodigy pleadings on this subject have not presented an issue for investigation.

V. ORDERING CLAUSES

47. Accordingly, IT IS ORDERED, that the petitions for rejection or suspension and investigation of Ameritech Operating Companies Transmittal Nos. 499, 500, 509, 526, 535, 557, and 573, filed by the parties listed in Appendix A of this Order, ARE GRANTED, to the extent indicated above, and otherwise ARE DENIED.

48. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), an investigation is instituted into the

---

[71] Sprint Petition (557) at 1-4; *see also* Ad Hoc Petition (557) at 3-4.

[72] Sprint Petition (557) at 2-3.

[73] Allnet Petition (557) at 2.

[74] Sprint Petition (557) at 3 n. 3.

[75] Ad Hoc Petition (557) at 4-8.

[76] Ameritech Reply (September) at 4-5.

[77] Ameritech also states that its billing changes were approved by the Billing Output Specifications Technical Review Group (BOSTRG), so that these are available for immediate use by Ameritech; they generally involve provisions used to explain billing. Sample ONA bills and customer service records were supplied the IXCs for trial runs in January 1991, and no IXC has complained of any billing difficulties encountered in these trial runs. *Id.* at 8-9.

[78] *Id.* at 7-8. Ameritech points out that CICs are used to route calls to Feature Group B or Feature Group D services and that ESPs have had the ability to order such services prior to the initiation of ONA. *Id.* at 10 n.18.

[79] BT Tymnet Petition (499/500) at 5-8. BT Tymnet also criticizes Ameritech for seeking a waiver for its unbundled BSE services prior to the release of the *Part 69 ONA Order*. BT Tymnet Petition (499/500) at 4-6. As explained, *supra*, the Commission found issues related to Ameritech's waiver request to be moot in the *Part 69 ONA Order*. *See* 6 FCC Rcd at 4537, para. 73.

[80] Prodigy Petition (499/500) at 5.

[81] Ameritech Reply (January) at 7-9.

[82] *Part 69 ONA Order*, 6 FCC Rcd at 4535, para. 60.

lawfulness of the tariff revisions filed by the Ameritech Operating Companies in Tariff F.C.C. No. 2, Transmittal Nos. 499, 500, 509, 526, 535, 557, and 573.

49. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the tariff revisions contained in Transmittal Nos. 499, 500, 509, 526, 535, 557, and 573 ARE SUSPENDED for one day and an investigation of the referenced tariff transmittals IS INSTITUTED.

50. IT IS FURTHER ORDERED that the Ameritech Operating Companies SHALL FILE tariff revisions reflecting this suspension no later than 10 days from the release date of this Order. The Ameritech Operating Companies may file tariff revisions, to be effective on not less than one day's notice, in order to advance the effective dates of the above-referenced transmittals. For these purposes, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, and assign Special Permission No. 91-1152.

51. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, Ameritech Operating Companies shall keep accurate account of all earnings, costs, and returns associated with the rates that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

APPENDIX A

Parties Filing Pleadings in Response to Ameritech's ONA Tariffs

I. Ameritech Petition for Waiver of Sections 69.106(b) and 69.205(c) of the Commission's Rules, filed June 26, 1990.

A. Parties Filing Comments:

Ad Hoc Telecommunications Users Committee (Ad Hoc)
ADAPSO
Allnet Communications Services, Inc. (Allnet)
BT Tymnet, Inc. (BT Tymnet)
California Public Utilities Commission
MCI Telecommunications Corp. (MCI)
US Sprint Communications Company Limited Partnership (Sprint)
Ameritech States
New England Telephone and Telegraph Company and New York Telephone Company (NYNEX)

B. Party Filing Reply:

Ameritech

II. Ameritech Transmittals 499, 500, and 501, filed December 18, 1990.

A. Parties Filing Petitions to Reject or Suspend and Investigate:

Allnet
Alarm Industry Communications Committee
BT Tymnet
MCI
Prodigy Services Company (Prodigy)
Sprint

B. Party Filing Reply:

Ameritech

C. Bureau Releases Order regarding Transmittal 501, 6 FCC Rcd 2085 (Com.Car.Bur. 1991).

III. Ameritech Transmittal 509, introducing SMDI/E Service, filed January 16, 1991.

A. Party Filing Petition to Reject or Suspend and Investigate

Ad Hoc

B. Party Filing Reply

Ameritech

IV. Ameritech Transmittal 526, introducing Flex ANI Service, filed April 2, 1991.

A. Parties Filing Petitions to Reject or Suspend and Investigate:

Allnet
MCI
Sprint

B. Party Filing Reply:

Ameritech

V. Ameritech Transmittal 535, filed May 15, 1991.

VI. Ameritech Transmittal 557, filed August 23, 1991.

A. Parties Filing Petitions to Reject or Suspend and Investigate:

Ad Hoc
Allnet
MCI
Sprint

B. Party Filing Reply:
Ameritech

VII. Ameritech files an amendment to Transmittal 557, October 29, 1991.

VIII. Ameritech Transmittal 573, filed November 1, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 84-1234

In the Matter of

Amendment of Parts 2, 22 and
25 of the Commission's Rules
to Allocate Spectrum for and
to Establish Other Rules and
Policies Pertaining to the
Use of Radio Frequencies in a
Land Mobile Satellite Service
for the Provision of Various
Common Carrier Services

In the Matter of
the Applications of

GLOBAL LAND MOBILE SATELLITE, INC.	File Nos. 1625/1626-DSS-P/L-85
GLOBESAT EXPRESS	File Nos. 1627-DSS-P/L-(50)-85 1628-DSS-P-(5)-85
HUGHES COMMUNICATIONS MOBILE SATELLITE, INC.	File No. 1629-DSS-P/L-85
MCCA AMERICAN SATELLITE SERVICE CORPORATION	File Nos. 1630-DSS-P/L-85 1631-DSS-P-85
McCAW SPACE TECHNOLOGIES, INC.	File No. 1632-DSS-P/L-85
MOBILE SATELLITE CORPORATION	File Nos. 1633/1634/1635-DSS-P/L-85
MOBILE SATELLITE SERVICE, INC.	File Nos. 1636/1637-DSS-P/L-85 1638-DSS-P-85
NORTH AMERICAN MOBILE SATELLITE, INC.	File Nos. 1639-DSS-P/L-85 1640-DSS-P-85
SATELLITE MOBILE TELEPHONE CO.	File Nos. 1646/1647-DSS-P/L-85
SKYLINK CORPORATION	File Nos. 1648/1649-DSS-P/L-85
TRANSIT COMMUNICATIONS, INC.	File Nos. 1650/1651-DSS-P/L-85 1652-DSS-P-85

FINAL DECISION ON REMAND

Adopted: December 27, 1991; Released: January 6, 1992

By the Commission:

TABLE OF CONTENTS

Topic	Paragraph No.
I. INTRODUCTION	1
II. BACKGROUND	2 - 4
III. DISCUSSION	5 - 57
A. Consortium Requirement	7 - 34
1. Legal Authority	7 - 24
2. Considerations Justifying the Consortium Requirement	25 - 34
B. Criteria for Participation in the Consortium	35 - 40
C. Technical Considerations	41 - 49
D. Other Issues	50 - 55
1. *Ex Parte* Communications	50
2. Notice and Comment Procedures	51
3. Needs of Aviation	52 - 53
4. Omninet's Application	54 - 55
E. Affirmation of AMSC as Authorized Licensee	56 - 57
IV. CONCLUSION	58
V. ORDERING CLAUSES	59 - 64
APPENDIX	

I. INTRODUCTION

1. This *Final Decision* resolves issues raised by the court remand of several Commission orders related to the licensing of a domestic mobile satellite service ("MSS") provider in the upper L-band frequencies.[1] After carefully reviewing the *ARINC* Court's instructions as well as comments submitted by interested parties, we generally affirm our tentative conclusions concerning the remand issues as outlined in our recent *Tentative Decision* in this proceeding.[2] Specifically, we conclude that the Commission has statutory authority to adopt in appropriate circumstances a licensing rule which requires that service be provided by a consortium comprised of all willing and eligible applicants in lieu of holding comparative hearings. Next we conclude that compelling factors unique to this MSS licensing proceeding indicate that the mandatory consortium approach, rather than comparative hearings, wil best serve the public interest in these circumstances. In our judgment, a consortium of eligible applicants represents the best, and perhaps the only opportunity for the United States to enjoy an efficient technologically sound

and viable mobile satellite service in the upper L-band spectrum. To this end, active and immediate participation by an authorized licensee is critical to the success of ongoing U.S. efforts to secure scarce spectrum through the international coordination process for a domestic mobile satellite service in the upper L-band. In addition, we modify the financial requirements previously imposed for participation in the consortium to permit the three entities whose applications were reinstated by the court an opportunity to join the consortium at this time. We also address and reject certain procedural challenges and other objections raised by commenters opposed to the consortium requirement. Finally, in light of our conclusions described above, we affirm American Mobile Satellite Corporation ("AMSC") as the authorized licensee to construct, launch and operate a mobile satellite system in the upper L-band, subject to certain terms and conditions outlined in prior Commission orders as modified herein.

II. BACKGROUND[3]

2. In 1986 the Commission, through notice and comment Rule Making procedures, reallocated a portion of spectrum in the upper L-band for MSS purposes.[4] A year later, again by Rule Making, the Commission established licensing procedures and eligibility criteria for applicants for the proposed new mobile satellite service.[5] Specifically, the Commission determined that the public interest would best be served by granting the MSS license to a consortium composed of all willing, qualified applicants, and that each applicant would demonstrate its financial qualifications by making a $5 million cash contribution into the consortium. Subsequently, eight applicants satisfied these eligibility criteria by forming a consortium (now named AMSC) and making the requisite individual financial contributions. In 1989 the Commission authorized AMSC to construct, launch and operate an MSS system in the upper L-band.[6] The Commission concurrently affirmed a prior Common Carrier Bureau decision dismissing the applications of Global, Globesat and MSSI for failure to comply with the financial qualification criteria.[7] The three dismissed applicants sought review of the Commission's orders in the United States Court of Appeals for the District of Columbia Circuit.

3. In March 1991, the court of appeals remanded the MSS licensing proceeding to the Commission with instructions to further consider two aspects of the Commission's decisions.[8] First, the court faulted the manner in which the Commission had required the applicants to demonstrate their financial qualifications by making a cash contribution.[9] Second, the court vacated the Commission's consortium rule for failure to provide sufficient justification for adopting the consortium licensing requirement rather than holding comparative hearings concerning individual applicants.[10] The court also reversed the dismissal of the Global, Globesat and MSSI applications.[11]

4. Following the court's decision, the Commission invited those parties directly affected by the decision to submit their views as to how the Commission should proceed on remand.[12] After reviewing those comments, and the *ARINC* Court's decision, the Commission in August 1991 issued its *Tentative Decision* offering tentative conclusions concerning the remand issues. The Commission solicited comment on those tentative conclusions, and indicated that a *Final Decision* resolving the remand issues would issue within 180 days.

III. DISCUSSION

5. The *Tentative Decision* was our preliminary response to the issues raised by the *ARINC* Court. In that response, we concluded that the Commission has statutory authority to adopt in appropriate circumstances a licensing rule which requires that service be offered only by a consortium of willing and eligible applicants. We also concluded tentatively that the consortium requirement was a reasonable exercise of our Rule Making authority, and that compelling circumstances unique to the MSS licensing proceeding justified the mandatory consortium rule.

6. We affirm those conclusions in this *Final Decision*. The *Tentative Decision*, which contained an extensive analysis of legal issues and set forth in detail the reasons supporting our tentative conclusions, serves as the basis for our *Final Decision* herein. Although we do not repeat that analysis in full in this *Final Decision*, we adopt and incorporate by reference the reasoning outlined in the *Tentative Decision* except where specifically noted below. For the sake of clarity, we briefly summarize by issue the major points made in the *Tentative Decision*, and then address comments submitted by interested parties in response to the *Tentative Decision*.

A. Consortium Requirement

1. Legal Authority

7. As a threshold matter, the *ARINC* Court directed the Commission to consider whether it has authority to impose a consortium in lieu of holding comparative hearings. As discussed below, we conclude that the Commission, consistent with the Communications Act (the "Act"), may adopt a licensing rule requiring service by a consortium of willing and eligible applicants in appropriate circumstances.

8. *Tentative Decision*. We outlined the basis for this conclusion in the *Tentative Decision*.[13] We began by discussing the statutory hearing requirement of section 309(e) of the Act,[14] which provides that the Commission may not deny an application without affording an opportunity for hearing.[15] We observed that the right to a "comparative" hearing under section 309(e), which developed from the Supreme Court's decision in *Ashbacker Radio Corp. v. FCC*,[16] is not absolute, and identified exceptions to the *Ashbacker* doctrine as recognized by the courts and Congress. We emphasized that, in determining that the consortium licensing approach would best serve the public interest in this instance, the Commission exercised its Rule Making authority consistent with the Supreme Court's holding in *U.S. v. Storer Broadcasting* [17] to establish a threshold eligibility criterion for MSS license applicants.

9. We next discussed the Commission's general Rule Making authority under the broad public interest standard embodied in the Communications Act.[18] We surveyed Supreme Court decisions which recognize that the Commission possesses broad discretion under the statutory public interest standard, and may implement its view of that standard so long as that view is based on consideration of permissible factors and is otherwise reasonable.[19]

We concluded that the Commission was authorized to adopt the consortium rule pursuant to the broad public interest standard.

10. We further examined the public interest standard in the specific context of common carrier satellite licensing.[20] We observed that the Commission has not awarded satellite licenses through comparative hearings in the past due to public interest considerations that are unique to satellite services. We emphasized the contrast between satellite licensing on the one hand, in which the Commission has a longstanding, deliberate and well-known practice of avoiding comparative hearings, and the terrestrial broadcast services on the other, where the Commission traditionally has employed comparative hearing procedures to award licenses. We noted that the court of appeals, in a context not involving mutually exclusive applicants, has approved the Commission's general policy of avoiding administrative hearings in satellite licensing.[21] We further noted that the Commission consistently has interpreted the statutory public interest standard as permitting it to require a consortium for satellite and common carrier services in certain circumstances, and has in fact required such consortia in limited instances.[22] In light of these factors, we concluded that our use of a consortium instead of comparative hearings in the satellite context is a permissible exercise of our broad Rule Making authority under the public interest standard of the Communications Act.

11. *Comments*. Five parties commented on this issue. ARINC/ATA, Global, Globesat and MSSI dispute the Commission's tentative conclusion that it has authority to require a consortium of eligible applicants in lieu of comparative hearings.[23] AMSC contends that the Commission has the requisite authority.[24]

12. Commenters opposing the mandatory consortium requirement argue that the Commission must hold comparative hearings to select among mutually exclusive applicants in all cases, unless specific statutory authority exists for using an alternative selection method such as a lottery. These parties contend that the Communications Act provides only two specific methods for selecting among mutually exclusive applicants: comparative hearings and lotteries. Since no statutory provision explicitly authorizes the Commission to adopt a consortium rule, these parties maintain that the Commission is prohibited from requiring a consortium of eligible applicants in the MSS licensing proceeding.[25]

13. In addition, these commenters challenge the Commission's general Rule Making authority as a basis for imposing a mandatory consortium. In this regard, these commenters criticize the Commission's reliance on the *Storer* decision.[26] *Storer*, these parties maintain, permits the Commission to narrow the field of mutually exclusive applicants, but does not enable the Commission to avoid comparative hearings altogether by requiring that willing, *bona fide* applicants join a consortium. Global argues that rather than narrowing the field of *bona fide* applicants, the Commission's consortium requirement effectively establishes the applicant itself and eliminates any opportunity for an individual applicant to argue the superiority of its individual application.[27]

14. Moreover, these commenters argue that no exception to the hearing requirement exists in the context of satellite licensing. These parties maintain that the Commission has not held comparative hearings in prior satellite proceedings because there has been enough spectrum and orbital locations to accommodate all applicants and thus no problem of mutual exclusivity arose.[28] They also dismiss prior instances cited in the *Tentative Decision* in which the Commission required a consortium in the satellite context, arguing that these examples either did not involve mutually exclusive applicants or carry no precedential effect since they were not subjected to appellate review.[29]

15. *Decision*. As a threshold matter, we note that commenters have failed to identify any specific statutory provision supporting their contention that the Commission is prohibited from employing a mandatory consortium licensing rule. Section 309(e) does not stand for such a flat prohibition. The *ARINC* Court itself interpreted that section only to establish a "presumption" in favor of comparative hearings.[30] Moreover, section 309(e) does not mandate hearings in all circumstances, nor preclude us from addressing in Rule Making all significant public interest considerations that affect our licensing decisions. Indeed, as the court of appeals has recognized, the Supreme Court implied in the *Ashbacker* decision itself that the Commission could, without a hearing, grant one of two competing applications for a permanent license "if it found that the public interest demanded such urgency."[31] Further, as the court of appeals has made clear subsequent to our *Tentative Decision*, the *Ashbacker* Court did not dictate that the Commission open a frequency for competing applications whenever it makes a new frequency available.[32]

16. Moreover, the very nature of the remand in this case undermines the commenters' assertions that the Commission is prohibited from adopting a mandatory consortium of all qualified applicants simply because the Communications Act does not expressly provide for the use of consortia in licensing proceedings. In this regard, AMSC observes that the *ARINC* Court remanded this issue to the Commission with full knowledge that the Communications Act does not expressly authorize the use of consortia.[33] If the issue turned on the absence of statutory language explicitly authorizing a mandatory consortium, no purpose would be served by following the court's instructions to further consider the Commission's statutory authority to impose a consortium requirement.

17. As we discussed in detail in the *Tentative Decision*, we believe we may adopt a mandatory consortium licensing requirement pursuant to our broad authority under the Communications Act to prescribe reasonable rules in the public interest. The Supreme Court's decision in *Storer* supports our conclusion. In *Storer*, the Court held that the hearing requirement of section 309(e) of the Act, as interpreted by *Ashbacker*, does not withdraw the Commission's Rule Making authority.[34] Under *Storer*, the Commission may adopt rules in the public interest establishing licensing eligibility criteria which effectively preclude a hearing under section 309(e) for those applicants who do not satisfy the prescribed eligibility requirements.[35] That is exactly what we are doing in this MSS licensing proceeding: the Commission has determined through notice and comment Rule Making that the public interest will best be served by requiring a consortium of all willing and qualified applicants, and, consistent with *Storer*, has established the consortium requirement as a threshold eligibility criterion for MSS licensing purposes.[36] The consortium requirement represents the Commission's judgment that a joint venture of all willing and eligible applicants will best serve the public interest in

these circumstances. As such, the consortium requirement is fundamentally an eligibility criterion that applies evenhandedly to all applicants. No application satisfying the eligibility requirement is denied; all *bona fide* applicants may participate in the licensed MSS consortium.[37] As we emphasized in the *Tentative Decision*, this procedure is fully consistent with *Storer* and thus satisfies the established legal requirement for denying any MSS applications that do not meet the consortium eligibility requirement.[38]

18. We reject Global's contention that the consortium requirement eliminated any opportunity for an individual applicant to demonstrate the technical superiority of its individual proposal.[39] A central purpose of the MSS Rule Making proceeding was to evaluate technical options, through the proposals submitted by any prospective MSS applicants, to determine what, if any, technical requirements we should impose on the MSS system. Through comments submitted in the Rule Making, prospective applicants thus were invited, and had a full opportunity, to argue the merits of various technical options represented by their proposals. Rule Making procedures are well-suited to resolution of such issues and, indeed, the Commission routinely decides such broad technical issues through Rule Making.[40]

19. Commenters criticizing the discussion in the *Tentative Decision* concerning the Commission's historical practice of avoiding comparative hearings in satellite licensing misapprehend the thrust of that discussion. The Commission did not assert that comparative hearings are never appropriate in the context of satellite licensing. Rather, this discussion addressed whether, under the broad public interest standard of the Act, comparative hearings are required by statute as the "exclusive means" of effectuating the public interest in the context of common carrier satellite licensing.[41] The discussion noted that, due to a number of public interest considerations, the Commission consistently has avoided hearings, comparative or otherwise, in satellite licensing proceedings, and has adopted a mandatory consortium requirement in certain limited instances in the satellite and common carrier services. While commenters correctly observe that there is no judicial precedent affirming our prior use of consortia in the satellite context, these prior administrative decisions are relevant to the issue of the Commission's historical view of its public interest obligations under the Act, even when faced with mutually exclusive satellite applications.[42]

20. The fact that mutual exclusivity generally was not present in the Commission's prior satellite licensing proceedings does not diminish the relevance of the Commission's longstanding practice of avoiding administrative hearings in satellite licensing as a means of advancing the public interest. As we noted in the *Tentative Decision*:

> [I]n some situations the Commission adopted policies for satellite service that accommodated all who applied, and thus there was no situation of mutual exclusivity. These policies, however, clearly underscore the lengths to which the Commission went in order to avoid administrative hearings for satellite authorizations.[43]

Thus, the Commission's historical practice evidences a consistent and longstanding view that the Communications Act does not establish comparative hearings as the exclusive means of effectuating the public interest in satellite and common carrier licensing proceedings. This history is fully consistent with the view that the Commission may adopt a mandatory consortium requirement under its broad Rule Making authority.[44]

21. Finally, we address the relevance to this proceeding of section 309(i) of the Act,[45] which authorizes the Commission in some circumstances to grant an initial license or construction permit to a qualified applicant through the use of a system of random selection, *i.e.*, a lottery. Although we originally stated that it was "not clear" that the statutory requirements for using a lottery could be met in this instance,[46] upon further reflection we expressed the view in the *Tentative Decision* that we could use a lottery.[47] We affirm herein our tentative conclusion that use of a lottery in this MSS licensing proceeding would be permissible. As we observed in the *Tentative Decision*, in authorizing the selection of licensees purely by random selection, Congress indicated in the legislative history that lotteries might be used for satellite services in lieu of comparative hearings.[48]

22. Our conclusion that use of a lottery in this proceeding is consistent with the Communications Act, however, does not mean, as MSSI contends, that a lottery is the most appropriate selection method in these circumstances.[49] For reasons outlined in the *Tentative Decison*,[50] we continue to believe that a consortium of all eligible applicants will best serve the public interest and is preferable to a licensee established through random selection.[51]

23. In one important sense, the lottery provision contained in section 309(i) is instructive to the resolution of the basic authority question in this case. That provision is a clear indication that Congress does not consider the comparative hearing process the exclusive means of effectuating the public interest.[52] As we explained in the *Tentative Decision*:

> Congress' assessment in the lottery amendments of the public benefits of comparative hearings, in comparison to the benefits of expediting service to the public, lends support to the manner in which we have balanced public interest factors in the MSS Rule Making proceeding, through our similar determination that an overriding public interest in prompt authorization of MSS -- by a consortium -- outweighs the benefits of comparative hearings.[53]

The 1982 lottery amendments did not purport to alter our pre-existing Rule Making authority under the public interest standard, nor is our action in adopting the consortium requirement inconsistent with policies reflected in section 309(i).[54] Thus, we view Congress' enactment of the lottery provision as consistent with our determination through the exercise of our Rule Making authority that a mandatory consortium in lieu of comparative hearings will best serve the public interest.[55]

24. *Conclusion*. In sum, we find no statutory prohibition to our use of a consortium in these circumstances. We find on the contrary that our adoption of a consortium requirement is a permissible exercise of our Rule Making authority under the broad public interest standard, and is consistent with our longstanding practice of avoiding administrative hearings in common carrier and satellite licensing proceedings. We therefore conclude that the Commission has authority to adopt in appropriate

circumstances a licensing rule which requires that service be provided by a consortium comprised of all willing and eligible applicants.

2. Considerations Justifying the Consortium Requirement

25. The *ARINC* Court held that any departure from holding comparative hearings to select among mutually exclusive applications must be premised on "truly compelling grounds" that are "special" to this proceeding.[56] Finding that the Commission's stated reasons for adopting the consortium requirement failed to meet this standard, the *ARINC* Court vacated the consortium rule and remanded the issue to the Commission.[57]

26. *Tentative Decision*. In the *Tentative Decision*, the Commission, in addition to concluding that a consortium rule was reasonable, also concluded tentatively that compelling circumstances unique to the MSS licensing proceeding justified the adoption of a mandatory consortium.[58] Specifically, the Commission pointed out that active and immediate participation by an authorized licensee is imperative for the U.S. to secure necessary spectrum through the international frequency coordination process for a domestic mobile satellite system in the upper L-band. The Commission emphasized that the international negotiations were at a critical juncture, and explained that the delay caused by conducting time-consuming comparative hearings would severely weaken the U.S. negotiating position and disserve the public interest. The Commission tentatively concluded:

> A consortium approach is the *only* option at this time under which the United States can continue with international coordination. Failure to proceed in this way will, we believe, make it virtually impossible to secure sufficient spectrum with sufficient operational flexibility to support a U.S. domestic MSS system.[59]

27. *Comments*. Commenters opposed to the consortium rule argue that the Commission erred in tentatively concluding that there are compelling reasons unique to the MSS proceeding that justify a consortium requirement. As a procedural matter, these commenters argue that the Commission may not rely on post-appeal facts and circumstances concerning the current state of international spectrum negotiations to justify reimposition of the consortium requirement. This is so, they maintain, because the present situation regarding international coordination arises because of delay caused by the actions of the Commission,[60] or because section 402(h) of the Communications Act[61] purportedly requires the Commission to base its decision on remand on the record that existed in 1987.[62] In addition, these commenters allege that the compelling reasons cited in the *Tentative Decision* to justify the consortium were already considered and rejected by the *ARINC* Court.[63] Finally, these parties dispute the Commission's conclusion that the U.S. would be unable to coordinate the domestic MSS system internationally without the presence of an authorized MSS licensee.[64]

28. *Decision*. Initially, we disagree with Global and Globesat that section 402(h) of the Act limits our examination on remand strictly to the record as it existed in 1987 when the Commission adopted the consortium requirement. Section 402(h) provides that on remand the Commission, "unless otherwise directed by the court," must carry out the judgment of the court "upon the basis of the proceedings already had and the record upon which the appeal was heard and determined."[65] The *ARINC* Court directed the Commission on remand to reconsider the consortium rule and to conduct "further proceedings consistent with this opinion."[66] We believe this language enables the Commission to examine in this Rule Making proceeding any public interest considerations that are relevant to the specific issues remanded by the court. Such considerations clearly include the current status of the international coordination process and its relationship to and effect on the selection of an MSS licensee in a manner that will best serve the public interest. In response to the court's decision, the Commission conducted further proceedings and solicited comment from interested parties in an effort to develop fully the record concerning the remand issues, including whether the circumstances present in this proceeding support the consortium requirement in lieu of comparative hearings.[67] This procedure appears fully consistent with the *ARINC* Court's instructions and with judicial precedent concerning the scope of the record on remand under section 402(h).[68]

29. Moreover, ignoring clearly relevant public interest considerations would, in our view, be contrary to our obligations under the Communications Act. In considering how best to serve the public interest on remand, we must address real, practical problems that confront the U.S. today involving the international coordination process and the MSS proceeding. We cannot pretend that these problems do not exist. Therefore, we reject the contention that section 402(h) requires us to ignore the current state of the international frequency coordination process when determining which selection method will best serve the public interest in these circumstances.[69]

30. Similarly, we reject the claim that the Commission's actions somehow "caused" the current international threat facing the U.S. MSS system. As AMSC correctly notes,[70] our decision to adopt the consortium requirement did not cause the activity in the international coordination process by other countries seeking spectrum for mobile satellite purposes which makes prompt authorization of an MSS licensee imperative.[71] As we pointed out in the *Tentative Decision*, the international considerations that necessitated an expeditious MSS authorization process also existed in 1987 when we originally adopted the consortium requirement.[72] Indeed, had the Commission in 1987 sought to conduct comparative hearings to evaluate all 12 original MSS applicants, it almost certainly would not have been in a position to engage in coordination discussions as promptly as it did nor would it be as far along in the international process as it is today. The initial adoption of the consortium rule did not delay the Commission's participation in the process; the rule instead ensured and expedited U.S. participation.

31. Likewise, we reject ARINC/ATA's contention that the U.S. is experiencing difficulties in coordinating AMSC's system internationally because AMSC's system will provide a variety of land, maritime and aeronautical mobile services rather than aeronautical mobile satellite service ("AMSS") only. ARINC/ATA states that coordination of AMSC's system is inconsistent with the U.S. advance publication information, which identified the U.S. system as an AMSS system, and with the international allocation. The U.S. advance published an AMSS system in the upper L-band so that the U.S. proposal would fall

within the umbrella of the international allocation. The U.S. has nonetheless consistently pursued a generic allocation in the upper L-band as being a more efficient use of the orbit spectrum resource and has, indeed, proposed that a generic allocation be adopted at the upcoming World Administrative Radio Conference ("WARC"). While the upper L-band is allocated internationally to the aeronautical mobile satellite service (R) (10 MHz) and to the land mobile satellite service (4 MHz), we disagree with ARINC/ATA's contention that AMSC's system has caused undue coordination difficulties. All space and earth system parameters of AMSC's system fall within the parameters for the internationally allocated services and do not pose any additional interference threat or require any more protection. Coordination of the system is proceeding apace. Although it appears that the collective needs of the parties seeking to implement systems in the upper L-band may not be able to be fully accommodated in the available spectrum, we expect to be fully successful in procuring sufficient spectrum to support a domestic system. Coordination efforts would not be facilitated if AMSC were limited to providing AMSS services only, while the U.S. public would be deprived of needed land and maritime MSS voice services.

32. Commenters opposed to the consortium rule also incorrectly assert that the *ARINC* Court previously considered and rejected the reasons cited in the *Tentative Decision* which justify the consortium requirement. In the *Tentative Decision*, we acknowledged that our previous order adopting the consortium requirement focused on the undue delay inherent in comparative hearings and had not articulated the international considerations unique to the MSS proceeding which justify adoption of the consortium rule.[73] Those special considerations include the relationship of the international frequency coordination process to the MSS licensing proceeding and, more generally, the unique concern for undue delay in the satellite field. Thus, the *ARINC* Court did not have an opportunity to consider, much less reject, the compelling factors outlined in the *Tentative Decision*.

33. Finally, for reasons set forth in the *Tentative Decision*, we affirm that active and immediate participation of an authorized MSS licensee in the ongoing international coordination process is critical to our success in securing scarce spectrum for a domestic MSS system in the upper L-band. Global, however, asserts that the Commission could coordinate the MSS system with the assistance of a committee of the interested MSS applicants.[74] Global's assertion is impracticable and exhibits a fundamental misunderstanding of the international spectrum negotiation process. The Commission explained in the *Tentative Decision* why it is imperative that the U.S. participate in the ongoing coordination effort with a licensee that is implementing a real proposal backed up by firm business plans.[75] Without an actual licensee that can provide assurances to the other parties to the negotiation that the system will be built, these parties, which are currently building and coordinating their own upper L-band MSS systems, will be unlikely to make any operational concessions to accommodate a U.S. system. As a practical matter, moreover, we have no reason to believe that a "composite" system could be agreed to by these applicants during the pendancy and conduct of comparative proceedings. For example, at least one entity, Globesat, proposes a low-earth orbit ("LEO") satellite system that is flatly incompatible with the geostationary satellite system developed by AMSC.[76]

34. *Conclusion*. In sum, we affirm that compelling circumstances unique to this MSS licensing proceeding justify the adoption of the consortium requirement. The procedural challenges advanced by commenters opposed to the consortium rule are unavailing. Moreover, commenters have offered no persuasive substantive argument refuting our analysis of the compelling circumstances present in this proceeding which justify adoption of the consortium rule. Accordingly, we reinstate the requirement that MSS service shall be provided by a consortium of all willing and eligible applicants.[77]

B. Criteria for Participation in the Consortium

35. The *ARINC* Court faulted the manner in which we required MSS applicants to demonstrate their financial qualifications by making a $5 million cash contribution into the consortium. The court vacated the cash contribution rule and reinstated the three applications that had been dismissed on this basis.[78]

36. *Tentative Decision*. In light of the *ARINC* Court's holding, the Commission proposed to modify the financial criteria for participation in the consortium by the three reinstated applicants. The Commission found that the fundamental goal of the financial eligibility standard had been met, *i.e.*, that AMSC has become a fully operational enterprise with sufficient financial resources to construct, launch and operate the MSS system. The Commission therefore proposed to eliminate the $5 million cash contribution requirement that was imposed on existing consortium members and to allow the three reinstated applicants to join the consortium in accordance with their ability and willingness to invest in the MSS venture.[79]

37. *Comments*. Some commenters opposed to the consortium rule maintain that it is unfair to force them to join the existing AMSC consortium under the terms proposed in the *Tentative Decision*. This is so, they argue, because the consortium has already made substantial business decisions and executed binding contractual arrangements without their participation. Thus, Global submits that the three reinstated applicants should be permitted to join the consortium under the terms and conditions in existence at the time their applications were dismissed.[80] MSSI asserts that if the Commission affirms the consortium rule, the consortium must be a newly formed entity.[81] For its part, AMSC states its willingness to accept the three reinstated applicants as participants in the consortium under the terms and conditions proposed in the *Tentative Decision*. [82]

38. *Decision*. We affirm the modified entry criteria proposed in the *Tentative Decision* under which the three reinstated applicants may seek to join the consortium absent any mandatory contribution requirement. Global, Globesat and MSSI will be afforded the opportunity to join the existing AMSC consortium in accordance with their willingness and ability to invest in AMSC. These modified entry criteria are consistent with the holding of the *ARINC* Court and provide the reinstated applicants an opportunity to participate in the consortium subject to the same rights and obligations that currently apply to existing consortium members.

39. Contrary to the claims of Global and MSSI, the Commission is not "forcing" the reinstated applicants to join the existing AMSC consortium. Rather, the Commission is affording these applicants an opportunity to join the consortium on terms which go beyond the holding of the *ARINC* Court and eliminate any mandatory financial contribution. Moreover, permitting these applicants to join AMSC is consistent with our determination that immediate and active participation by the consortium is essential to ensure the success of the U.S. in international frequency coordination efforts. The entry conditions advocated by Global and MSSI are impracticable and ill-advised. Dissolving the AMSC consortium at this late date and forming a new venture, or returning the consortium to its formation state (if this were even possible), would engender substantial delay, nullify the substantial progress achieved to date by the consortium and significantly weaken the U.S. negotiating position in the international coordination process.[83] In short, these proposals would advance the private interests of the reinstated applicants at the expense of the public interest. Any alleged unfairness to the reinstated applicants is outweighed by the overriding public interest in resolving this proceeding promptly to support U.S. efforts to secure scarce spectrum for a domestic MSS system. Accordingly, we will not alter the fundamental entry conditions: Global, Globesat and MSSI will be permitted to join the existing AMSC consortium with no mandatory financial contribution.

40. We are persuaded, however, by MSSI's argument that it would be unfair to require the reinstated applicants to join the consortium within 180 days of release of this *Final Decision*.[84] MSSI states that it will seek appellate review of any final Commission decision adopting a consortium rule in this proceeding. MSSI maintains that the six month participation timetable proposed in the *Tentative Decision* places opponents of the consortium requirement in a difficult position: they will be forced to invest in AMSC pending an appeal in order to preserve their rights to participate in the consortium, while concurrently challenging the consortium rule in court and thereby placing their investment in AMSC at risk. We find merit to this argument. We will adopt MSSI's suggestion to revise the timetable governing participation in the consortium to allow for an appeal of the Commission's final order in this proceeding. Accordingly, the 180 day timetable specified in the *Tentative Decision* will not begin until this *Final Decision* is no longer subject to judicial review.[85]

C. Technical Considerations

41. Globesat and Motorola contend that, contrary to the Commission's discussion in the *Tentative Decision*, low-earth orbit satellite systems can be afforded international recognition and protection. They assert that international procedures already exist for recognition of these systems and that such systems may, because of their lower interference potential, be easier to coordinate than would systems in geostationary satellite orbit ("GSO"). They note that several LEO satellite systems have been advance published and notified by the implementing country and recorded in the Master International Frequency Register by the International Frequency Registration Board ("IFRB"). They therefore conclude that the Commission improperly rejected a LEO satellite system proposal in the upper L-band on the basis that it would not be feasible to coordinate such a system.[86]

42. We have carefully considered the benefits and drawbacks associated with implementing MSS through LEO satellite systems in the upper L-band. We agree that LEO systems may in the future offer many technical and other advantages.[87] Nevertheless, after careful analysis, we continue to believe that pursuing a LEO satellite system in the upper L-band as the source of domestic MSS service would have been a risky course of action in 1985, and, in any event, is not a practical option today. To require that MSS be provided through a LEO satellite system would entail a substantial risk that the U.S. MSS system would not be afforded full interference protection once it is launched.

43. The Commission initially addressed the issue of GSO versus LEO satellites[88] for provision of MSS when Globesat originally proposed a low-earth orbit satellite system. At the time, the Commission did not believe it feasible to consider attempting to coordinate a LEO satellite system in the upper L-band. Given the uncertainties that still exist for this sort of coordination and the interests at stake, we believe that a LEO satellite system in this band is still not practicable.

44. In light of the interest demonstrated by other countries in the upper L-band spectrum in the early-to-mid-1980's, the Commission and the National Telecommunications and Information Administration ("NTIA") agreed that it was imperative that the U.S. act quickly to protect its interest in these bands.[89] In 1985, no commercial LEO satellite systems had been launched or coordinated.[90] Because the interference considerations and other technical matters relating to LEO satellite systems differ significantly from those relating to geostationary satellite systems, the existing coordination procedures -- which apply only to geostationary satellites -- cannot be used. In 1985, the Commission had no reason to believe that a timely international agreement adopting procedures to govern coordination of LEO satellite systems could be reached or even that LEO satellite systems could be successfully coordinated in this portion of the spectrum given their operational characteristics. These uncertainties, and the need for the U.S. to proceed quickly and effectively to secure spectrum in the upper L-band, led us to conclude that a LEO satellite system was not a feasible option in 1985. Consequently, the U.S. advance published a geostationary MSS system.

45. The coordination difficulties associated with LEO satellites stem in part from the absence of specific coordination procedures for LEO systems in the International Telecommunication Union ("ITU") Radio Regulations. The coordination phase of the international registration process does not apply to LEO satellite systems. Only the advance publication and notification phases of the process apply. As a practical matter, however, a responsible country will not launch and operate a system if legitimate interference concerns have been raised by other countries after advance publication and have not been resolved. Absent coordination, consultation and negotiation with other affected countries, the system could not expect a full remedy if another duly notified system interferes with it. Moreover, interference objections to a proposed LEO system in the upper L-band would certainly arise as the system must be able to operate on a fully protected basis with continuous oper-

ations over its intended service area, in a frequency band to be shared with existing or planned GSO systems.[91] Thus, some type of coordination and operating agreement regarding a LEO satellite system's operations would be needed. Adopting the necessary procedures, however, will require an international consensus. Until that occurs, the U.S. cannot have adequate assurance that the operations of a LEO satellite system in the upper L-band potentially could be fully agreed to and protected by the affected countries currently implementing GSO systems.[92]

46. Moreover, potential interference difficulties cannot be remedied simply by "turning off" particular satellites as they pass over countries in which they are not authorized to operate, as Globesat states. We do not reject Globesat's contention that LEO satellites can be "turned off" for portions of its orbit. The global nature of these systems, however, raises international issues which have yet to be dealt with in the appropriate forum. LEO satellites typically transmit to the earth with circular or elliptical spot beams. It is not possible to shape these satellites' coverage areas to conform with each nation's boundaries.[93] Even assuming that LEO satellites could be turned on and off with extreme accuracy, and that their transmission beams could be reshaped as they pass over various borders, some spillover is inevitable.

47. As we pointed out in our *Tentative Decision*, coordination procedures for LEO satellite systems still have not been developed. In any event, while the U.S. is exploring the possibility of LEO satellite systems in other bands,[94] as a practical matter such an option is not available in the upper L- band. Domestically, the Commission has serious reservations that a LEO satellite system could satisfy the priority and preemption requirements for AMSS(R).[95] Moreover, internationally, changing the U.S. MSS systems to a LEO satellite system would result in the U.S. losing its priority status in the ITU coordination process.[96] This would mean that the U.S., as the "last in line," would bear the burden of coordinating its LEO satellite system with the geostationary satellite systems that have been advance published and that are currently being built and coordinated.[97] Thus, at this juncture, we conclude that coordination of proposed LEO satellite systems with operational geostationary satellite systems in the upper L-band is not feasible.

48. Thus, after consideration, we concluded that the Globesat LEO proposal for an MSS system in the upper L-band was risky in 1985 and conclude it is not feasible today. Globesat's proposal, while technically sound, raises significant problems if implemented in the upper L-band spectrum.[98] Until there is a full airing and resolution of the complex international issues associated with coordinating LEO satellite systems, we conclude that it would be inadvisable to pursue a LEO satellite system as the sole source for the U.S. domestic MSS system in the upper L-band. The U.S. public's need for satellite mobile voice services by a domestic provider must be met by a dependable MSS system protected from interference. For a number of reasons, achieving successful coordination of a LEO satellite system with the GSO systems currently being implemented in the upper L-band is highly unlikely. Therefore, on balance, we continue to believe our decision to coordinate a GSO satellite system in this band better serves the public interest.[99]

49. By this decision, the Commission is not prejudging the issue of LEO satellite service in other bands. To the contrary, the Commission is actively pursuing in other fora allocation proposals for LEO satellite service.[100] However, we cannot recommend a LEO satellite system in a band where entities have advance published their plans to implement geostationary satellite systems, and where the operational requirements of the various GSO systems will need to be tightly coordinated in order to facilitate sharing of the limited spectrum resource.

D. Other Issues

1. Ex Parte Communications

50. ARINC/ATA alleges that unlawful *ex parte* communications between AMSC and Commission personnel during the international coordination process taint both the MSS Rule Making and licensing proceedings.[101] We reject these arguments. The Commission fully considered and rejected these contentions in a previous order denying a Freedom of Information Act ("FOIA") request by ARINC's counsel, holding that the communications at issue did not violate the Commission's *ex parte* rules.[102] We determined that the disputed communications were not *ex parte* "presentations" under the Commission's rules because they were not directed to the merits or outcome of any restricted Commission proceeding, including the MSS licensing proceeding.[103] We also found that, even if the communications could be considered *ex parte* presentations with respect to the licensing proceeding, they were permissible as authorized by the Commission's rules[104] or came within the foreign affairs exception to the *ex parte* restrictions.[105] The conclusions set forth in our prior ruling apply with equal force to ARINC/ATA's similar argument in this proceeding.

2. Notice and Comment Procedures

51. Several commenters argue that the Commission's actions in the international coordination process violate the Administrative Procedure Act ("APA"). ARINC/ATA, for example, contends that by conducting international negotiations based on AMSC's technical proposal, the Commission has unlawfully promulgated a technical MSS service rule without following applicable notice and comment requirements.[106] Similarly, Globesat asserts that our decision to withhold disclosure of materials concerning the international coordination process violates the notice and comment provisions of the APA.[107] We reject these arguments. Section 553(a)(1) of the APA provides that notice and comment requirements do not apply to a "foreign affairs function of the United States."[108] The Commission's efforts to coordinate a domestic MSS system through the international frequency coordination process are a foreign affairs function of the U.S. government and thus are not subject to notice and comment requirements.

3. Needs of Aviation

52. ARINC/ATA contends that AMSC's system will not adequately serve the needs of the aviation industry. ARINC/ATA argues that counsel for AMSC stated "in substance," in an August 1991 CCIR study group meeting, that AMSC would not release any of its spectrum to international satellite systems such as INMARSAT to meet international AMSS(R) needs. ARINC/ATA states that this is further evidence of the prejudice that the coordination process has caused to other interested parties, and dem-

onstrates that the Commission must convene open proceedings to deal with core issues such as the needs of the aviation community.[109]

53. ARINC/ATA has not provided us with a transcript or with a verbatim account of what AMSC's counsel stated or the context in which it was said. Without this information, we cannot even begin to reply substantively to the alleged statement. However, we have no reason to believe that the needs of the Federal Aviation Administration ("FAA") are being prejudiced as AMSC builds its system. The domestic allocation for the upper L-band recognizes that AMSS(R) communications have priority and preemptive access throughout the band. Moreover, the Commission has strongly urged AMSC and the FAA to maintain a dialogue to address the FAA's concerns,[110] and this dialogue is ongoing. Because the upper L-band frequencies have been allocated domestically to both government and nongovernment use, NTIA also has been participating in the international coordination process on behalf of the FAA and other executive branch agencies. Further, the Commission is currently negotiating with INMARSAT in the coordination of the AMSC and INMARSAT MSS systems. The needs of the international aviation community should be well represented by INMARSAT, which will be carrying all of the international aviation traffic over ocean areas.[111] In any event, AMSC, like all other Commission-licensed satellite system operators, has received its authorization "subject to change by summary order of the Commission and [without] confer[ring] any permanent right to use the orbit and spectrum."[112] Should systems such as INMARSAT find that international AMSS(R) needs cannot be satisfied within the spectrum in which it is authorized to operate, the Commission would be able to consider the merits of that claim and initiate any necessary action at that time.

4. Omninet's Application

54. In the *Tentative Decision*, the Commission denied a request by Omninet to reinstate its application, which Omninet had filed prior to the March 1985 cutoff date but subsequently had withdrawn in June 1987.[113] Omninet now asks the Commission to reverse this determination and reopen the MSS proceeding to accept its application. Omninet asserts that it did not voluntarily withdraw its application, as the Commission found in the *Tentative Decision*. Rather, Omninet maintains that the Commission "forced" Omninet to withdraw its application in 1987 by improperly imposing the cash deposit requirement.[114]

55. We are not persuaded by Omninet's argument. In our view, Omninet's decision to withdraw its application in 1987 was the product of its own free will presumably based on business considerations and judgment. Moreover, as we noted in the *Tentative Decision*, Omninet did not appeal the Commission's financial requirement or otherwise contest the rules and policies established for MSS in the *Second Report and Order*. Under these circumstances, we affirm our finding in the *Tentative Decision* that Omninet has no more right to enter the proceeding at this time than any other entity that is not currently a party. Therefore, we will not disturb our prior ruling denying Omninet's request. Omninet's application will not be reinstated.

E. Affirmation of AMSC as Authorized Licensee

56. In light of the conclusions described above, we reaffirm our grant of the domestic MSS license to the American Mobile Satellite Corporation consortium. AMSC is hereby authorized to construct, launch and operate an MSS system in the upper L-band frequencies subject to the terms, conditions and specifications of the applications on file with the Commission, as amended, and as modified by prior Commission orders in this proceeding and by this *Final Decision*. This authorization is conditioned on compliance with this *Final Decision*.

57. Our grant of final authorization to AMSC herein supersedes the temporary authorization we conferred upon AMSC in the *Tentative Decision*. [115] Therefore, we dismiss as moot petitions for reconsideration filed by Globesat and MSSI, and a motion for stay filed by Globesat, concerning the grant of temporary authorization to AMSC in the *Tentative Decision*. [116] Consistent with our pledge in the *Tentative Decision*, [117] we have acted expeditiously to complete this proceeding and resolve the remand issues in an effort to minimize any possible prejudice to the applicants. Our dismissal of the petitions for reconsideration and motion for stay concerning the temporary authorization does not prejudice the right of parties to seek judicial review of this *Final Decision* affirming AMSC as the authorized licensee for a domestic MSS system.

IV. CONCLUSION

58. We find that we have statutory authority to adopt a consortium licensing rule in lieu of holding comparative hearings in appropriate circumstances pursuant to our broad Rule Making authority under the public interest standard embodied in the Communications Act. We further find that adoption of a consortium licensing requirement in this instance is reasonable and fully justified by compelling circumstances involving the international frequency coordination process which are unique to the MSS licensing proceeding. We modify the participation criteria to permit Global, Globesat and MSSI to join the existing AMSC consortium without making a mandatory financial contribution. Finally, we affirm AMSC as the authorized licensee to construct, launch and operate a mobile satellite system in the upper L-band.

V. ORDERING CLAUSES

59. Accordingly, IT IS ORDERED that the tentative conclusions set forth in the *Tentative Decision* in this proceeding concerning the issues remanded by the court of appeals ARE AFFIRMED as indicated above.

60. IT IS FURTHER ORDERED, pursuant to sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), that the consortium requirement vacated by the court of appeals IS REINSTATED as indicated above. The consortium requirement shall be effective immediately upon publication in the Federal Register.[118]

61. IT IS FURTHER ORDERED, pursuant to sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), that American Mobile Satellite Corporation IS AFFIRMED as the authorized licensee to construct, launch and operate an MSS system in the upper L-band frequencies, subject to the terms, conditions and specifications set forth in the ap-

plications, as amended, and as modified by prior Commission orders in this proceeding and by this *Final Decision*. This authorization shall be effective immediately upon publication in the Federal Register.

62. IT IS FURTHER ORDERED that Global Land Mobile Satellite, Inc., Globesat Express, and Mobile Satellite Service, Inc., MAY PARTICIPATE in the licensed consortium subject to the terms and conditions specified in the *Tentative Decision* and this *Final Decision*. Failure by the above-referenced applicants to satisfy the specified terms and conditions for participation in the consortium will result in the dismissal of their applications for noncompliance with the Commission's rules and policies.

63. IT IS FURTHER ORDERED that the Petitions for Reconsideration filed by Globesat Express and Mobile Satellite Service, Inc. on September 3, 1991, and September 4, 1991, respectively, concerning the grant of temporary authorization to American Mobile Satellite Corporation ARE DISMISSED as moot.

64. IT IS FURTHER ORDERED that the Motion for Stay filed by Globesat Express on September 20, 1991, concerning the grant of temporary authorization to American Mobile Satellite Corporation IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

PLEADINGS FILED IN RESPONSE TO TENTATIVE DECISION

Comments (September 4, 1991):

1. Aeronautical Radio, Inc., and the Air Transport Association of America ("ARINC/ATA")
2. American Mobile Satellite Corporation ("AMSC")
3. Global Land Mobile Satellite, Inc. ("Global")
4. Globesat Express ("Globesat")
5. Mobile Satellite Service, Inc. ("MSSI")
6. Motorola Satellite Communications, Inc. ("Motorola")
7. Omninet Corporation ("Omninet")
8. TRW Inc. ("TRW")

Reply Comments (September 23, 1991):

1. ARINC/ATA
2. AMSC
3. Global
4. Globesat
5. MSSI

Petitions for Reconsideration

1. Globesat (September 3, 1991)
2. MSSI (September 4, 1991)

Opposition to Petitions for Reconsideration

1. AMSC (September 23, 1991)

Motion for Stay

1. Globesat (September 20, 1991)

Opposition to Motion for Stay

1. AMSC (October 3, 1991)

FOOTNOTES

[1] *See Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428 (D.C. Cir. 1991) ("*ARINC*"). The specific frequencies involved in this proceeding are the 1545-1559 MHz and 1646.5-1660.5 MHz bands.

[2] *See Tentative Decision*, 6 FCC Rcd 4900 (1991). A listing of parties filing comments and other pleadings in response to the *Tentative Decision* is attached to this *Final Decision* as an Appendix. The abbreviations for the parties as indicated in the Appendix are used throughout this *Final Decision*.

[3] For a more detailed discussion of the procedural history of this proceeding, *see Tentative Decision*, 6 FCC Rcd at 4901, paras. 2-7.

[4] *Report and Order*, 2 FCC Rcd 1825 (1986), *recon. denied*, 2 FCC Rcd 6830 (1987), *further recon. denied*, 4 FCC Rcd 6016 (1989).

[5] *Second Report and Order*, 2 FCC Rcd 485 (1987) ("*Second Report and Order*"), *recon. denied*, 4 FCC Rcd 6029 (1989).

[6] *Memorandum Opinion, Order and Authorization*, 4 FCC Rcd 6041 (1989) ("*AMSC Authorization Order*").

[7] *Memorandum Opinion and Order*, 4 FCC Rcd 6029 (1989), *affirming Order*, 2 FCC Rcd 5552 (Com.Car.Bur. 1987).

[8] *See ARINC, supra*, 928 F.2d at 428. Aeronautical Radio, Inc. ("ARINC") also sought appellate review of the Commission's allocation decision, *see* n.4, *supra*, and its decision to dismiss ARINC's nonconforming application, which had been filed after the established cutoff date. *See Order*, 2 FCC Rcd 5990 (1987), *recon. denied*, 4 FCC Rcd 6067 (1989). The *ARINC* Court upheld both the allocation decision and the ARINC dismissal. *ARINC*, 928 F.2d at 438-445. The court later denied ARINC's suggestion of rehearing.

[9] *ARINC*, 928 F.2d at 446-48.

[10] *Id.*, 928 F.2d at 450-53.

[11] *Id.*, 928 F.2d at 448, 453.

[12] *Public Notice*, 6 FCC Rcd 2087 (1991).

[13] 6 FCC Rcd at 4002-6, paras. 12-32.

[14] 47 U.S.C. § 309(e).

[15] *Tentative Decision*, 6 FCC Rcd at 4902-3, paras. 12-15.

[16] 326 U.S. 327 (1945).

[17] 351 U.S. 192 (1956).

[18] *Tentative Decision*, 6 FCC Rcd at 4903-4, paras. 16-18.

[19] *See FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981); *FCC v. Pottsville Broadcasting*, 309 U.S. 134 (1940); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

[20] *Tentative Decision*, 6 FCC Rcd at 4904-6, paras. 19-27.

[21] *See United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980) (*en banc*).

[22] *See, e.g.*, *Comsat Corporation*, 40 FCC 2d 496 (1973) (Commission required Comsat and three maritime carriers to form joint venture for provision of MARISAT maritime satellite system); *Final Decision and Policy Statement*, 49 Fed. Reg. 9727 (March 15, 1984) (Commission required competing applicants to form joint venture to provide common carrier satellite earth station facilities in the Alaskan bush communities); *Report and Order, Establishment of Domestic Communications-Satellite Facilities by Nongovernmental Entities, Appendix C -- Memorandum on Legal Issues*, 22 FCC 2d 86, 130 (1970) (Commission indicated that it was empowered to require joint-ownership arrangements in appropriate circumstances).

[23] *See* ARINC/ATA Comments at 7-10; Global Comments at 1-7; Globesat Comments at 4-11; MSSI Comments at 3-10.

[24] AMSC Comments at 7-14.

[25] *E.g.*, MSSI Comments at 4-5.

[26] ARINC/ATA Comments at 10; Global Comments at 3; Globesat Comments at 7; MSSI Comments at 6-7.

[27] Global Comments at 2-3.

[28] ARINC/ATA Comments at 12-13; Global Comments at 5; Globesat Comments at 10; MSSI Comments at 8-9.

[29] Global Comments at 6; Globesat Comments at 7; MSSI Comments at 8 n.3, 10.

[30] *See ARINC*, 928 F.2d at 452. The *ARINC* Court also stated that the comparative hearing process is "unquestionably the standard method for the Commission to resolve mutually exclusive applications." *Id.*, 928 F.2d at 450. In fact, however, the Commission's use of comparative hearings for initial licensing proceedings is now more the exception than the rule. Generally, comparative hearings are used primarily for full service broadcast stations. The Commission uses lotteries for initial licensing in the vast majority of other services in which mutually exclusive situations are a regular occurrence.

[31] *La Star Cellular Telephone Co. v. FCC*, 899 F.2d 1233, 1235 (D.C. Cir. 1990), *citing Ashbacker*, 326 U.S. at 333. *See Tentative Decision*, 6 FCC Rcd at 4902, para. 13 & n.29.

[32] *See Rainbow Broadcasting Co. v. FCC*, No. 90-1591, slip op. at 8 (D.C. Cir. Nov. 8, 1991).

[33] AMSC Reply Comments at 7.

[34] *Storer*, 351 U.S. at 202.

[35] *See ARINC*, 928 F.2d at 439 (Supreme Court has recognized that right to Section 309(e) hearing is not absolute; Commission may reject, without a hearing, applications which do not meet valid eligibility requirements). *Accord*, *Rainbow Broadcasting*, *supra* n.32, slip op. at 11 ("Congress delegated to the FCC the authority to deny the eligibility of applicants for television licenses [without a hearing] where such denial serves the public interest . . . .").

[36] We disagree with those commenters who contend that our adoption of the consortium requirement went beyond the holding of *Storer* and effectively established the licensee by rule. *See* para. 13, *supra*. As we noted in the *Tentative Decision*, the Commission did not award the MSS license to any party in the context of the MSS Rule Making. Rather, the Commission granted the MSS license in a separate authorization proceeding, conducted pursuant to Section 309 of the Act, after establishing the consortium requirement. *See Tentative Decision*, 6 FCC Rcd at (4903, n.31.

[37] *See id.*

[38] *See id.*, 6 FCC Rcd at 4903, para. 14.

[39] Global Comments at 2.

[40] In addition, Global and other applicants have at all times been free to petition the Commission to waive the consortium rule for good cause shown. 47 C.F.R. § 1.3 (1990). A demonstration that an individual application is technically superior to the proposed system submitted by the consortium and would otherwise better serve the public interest would support a waiver of the consortium requirement. As discussed in the *Tentative Decision*, however, Global, Globesat and MSSI have failed in the Rule Making proceeding as well as on remand to demonstrate that their applications are technically superior to the proposed system submitted by the consortium. *See Tentative Decision*, 6 FCC Rcd at 4911-12, paras. 54-60. *See also* Section III.C, *infra*. Nor have these three applicants offered any other persuasive showing that special circumstances unique to their applications warrant a deviation from the consortium rule and that such deviation will serve the public interest. *See Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). Therefore, we find no reason to conclude that application of the consortium requirement will disserve the public interest in these circumstances. *Cf. Storer*, 351 U.S. at 204-5.

[41] *Tentative Decision*, 6 FCC Rcd at 4903, para. 18.

[42] As we noted in the *Tentative Decision*, the Commission has required a joint venture in a mutually exclusive common carrier application context. *Tentative Decision*, 6 FCC Rcd at 4905, para. 22 & n.51 (citing *Final Decision and Policy Statement*, 49 Fed. Reg. 9727 (March 15, 1984) (common carrier satellite earth station facilities in Alaskan bush communities)).

[43] *Tentative Decision*, 6 FCC Rcd at 4905, n.47.

[44] *Cf. Rainbow Broadcasting*, slip op. at 8 (Even where Commission has expressed its view that public interest is best served by open competition for frequencies allotted to a community, Commission may permissibly determine, with reasoned explanation, that its open competition policy should no longer apply to new frequencies allotted in context of channel exchanges).

[45] 47 U.S.C. § 309(i).

[46] *See Second Report and Order*, 2 FCC Rcd at 487, para. 16.

[47] *Tentative Decision*, 6 FCC Rcd at 4905, nn. 56, 57.

[48] *Id.*, 6 FCC Rcd at 4905, para. 26 & n.55 (citing H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 41, *reprinted in* 1982 U.S. Code Cong. & Ad. News 2261, 2285). A lottery, for example, would speed the authorization process, one of the guiding public interest factors mentioned in the legislative history to the lottery statute favoring random selection, and a critical concern in the MSS proceeding. *See* H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 37, *reprinted in* 1982 U.S. Code Cong. & Ad. News 2261, 2281. *See also Telecommunications Research and Action Center v. FCC*, 836 F.2d 1349, 1362 (D.C. Cir. 1988) (factors cited in legislative history of lottery statute do not rise to level of binding statutory requirements).

[49] *See* MSSI Comments at 9, 12-14. MSSI further suggests that the Commission could ensure the financial viability of the MSS licensee (a principal objective of the consortium rule) by requiring the winning lottery applicant to allow others to participate in some type of joint venture. MSSI would establish the licensee purely by random selection and would then require the licensee to restructure its ownership plan to become a consortium of applicants. This proposal, while it might further some private interests, in our view offers no public benefits beyond those already achieved by the consortium rule. Likewise, we see no benefit at this juncture, as the *ARINC* Court suggests, in conducting formal hearings to determine if any one individual application might be technically superior to the other applications, and subsequently permitting or requiring the winning applicant to form a consortium with the other applicants. *See*

ARINC, 928 F.2d at 452. After carefully examining the diverse technical proposals and comments of numerous applicants in the Rule Making proceeding, we have already determined what technical requirements are in the public interest for the MSS system.

[50] *See Tentative Decision*, 6 FCC Rcd at 4905, n.57.

[51] Instituting a lottery and determining the qualifications of the selectee would involve significant delays which would seriously impair the ability of the United States to negotiate effectively in the ongoing international coordination process (*see* Section III.A.2, *infra*). A lottery, moreover, offers no public interest benefits not already obtained by the consortium rule. A comparative proceeding, of course, would be even more harmful to U.S. interests than a lottery. This is so because the time required to conduct lengthy comparative hearings in all probability would negate U.S. efforts in international spectrum negotiations and would likely destroy the prospects for development of a domestic MSS system in the upper L-band.

[52] *See Tentative Decision*, 6 FCC Rcd at 4905, para. 25. In this regard, AMSC states that the 1982 lottery amendments represent "an unambiguous determination that comparative hearings are not justified in all cases" and that the right to a comparative hearing is "not absolute". AMSC Reply Comments at 12.

[53] *Tentative Decision*, 6 FCC Rcd at 4905, para. 25.

[54] *See id.*, 6 FCC Rcd at 4905, n.57.

[55] For reasons discussed at paras. 15-17, *supra*, we reject Globesat's contention that Congress' enactment of the lottery provision demonstrates that the Commission may not deny an applicant a comparative hearing without explicit authority granted by the legislature. *See* Globesat Comments at 11.

[56] *ARINC*, 928 F.2d at 452.

[57] *Id.* In announcing the new standard by which it would evaluate Commission decisions to employ other selection methods in lieu of comparative hearings, the *ARINC* Court relied on the "strong presumption" in favor of such hearings it perceived in the statute and the case law. *Id.* AMSC observes that Congress' adoption of Section 309(i) of the Act providing for lotteries eliminates the need for the Commission to have a "compelling reason" for departing from comparative hearings. AMSC Reply Comments at 12. As explained in the *Tentative Decision*, we believe we may adopt a consortium rule in this proceeding pursuant to our Rule Making authority under the broad public interest standard so long as our view "is based on consideration of permissible factors and is otherwise reasonable." *Tentative Decision*, 6 FCC Rcd at 4906, para. 28 (citing *FCC v. WNCN Listeners Guild*, 450 U.S. at 594). In any event, we believe that the reasons justifying the consortium requirement in this proceeding are both reasonable and compelling and thus satisfy the standard enunciated by the *ARINC* Court.

[58] *Tentative Decision*, 6 FCC Rcd at 4906-11, paras. 33-53.

[59] *Id.*, 6 FCC Rcd at 4911, para. 53 (emphasis in original).

[60] ARINC/ATA Comments at 5-6; Globesat Comments at 13-14.

[61] 47 U.S.C. § 402(h).

[62] Global Comments at 8; Globesat Comments at 14-15.

[63] ARINC/ATA Comments at 10-12; MSSI Comments at 9.

[64] Global Comments at 9; Globesat Comments at 23.

[65] 47 U.S.C. § 402(h).

[66] *ARINC*, 928 F.2d at 453.

[67] In this regard, as AMSC notes, interested parties have been afforded a full and equal opportunity on remand to submit, and have in fact submitted, new information concerning the reconsideration of the consortium rule and relevant public interest factors. *See* AMSC Reply Comments at 28. Any new information which became a part of the record on remand has been subject to public scrutiny through submission of comments and reply comments in this proceeding.

[68] *See, e.g., Eastern Carolinas Broadcasting Co. v. FCC*, 762 F.2d 95, 101 & n.8 (D.C. Cir. 1985) (Commission free to apply any reasonable interpretation of Section 402(h) to post-remand proceedings; usual judicial practice is to allow agency to determine whether post-remand filings are necessary to comply with court's mandate).

[69] Indeed, the inflexible interpretation of Section 402(h) advanced by Global and Globesat could easily lead to absurd results which would disserve the public interest.

[70] AMSC Reply Comments at 24.

[71] In any event, even if our prior adoption of the consortium rule could be viewed as related to the current international threat facing the U.S. MSS system, we disagree with those commenters who contend that we would be precluded from considering that threat. These parties offer no legal authority for such a proposition. Our task in this Rule Making proceeding is to determine which policies and rules will best ensure a domestic MSS system. In order to achieve that goal, we must take into account all relevant public interest considerations as they exist today. Therefore, it is necessary and appropriate that we consider the current state of the international coordination process in deciding how to proceed on remand.

[72] *Tentative Decision*, 6 FCC Rcd at 4907, para. 35. As we observed in the *Tentative Decision*, those considerations have become more significant today in light of the advanced state of international spectrum negotiations. *Id.* However, it was clear in 1987 that the U.S. must act quickly to secure scarce spectrum in the upper L-band for a domestic MSS system through the international coordination process. It was also apparent that the U.S. negotiating posture would be significantly enhanced by the presence of an authorized U.S. MSS licensee in negotiations with other countries. Thus, in 1987, there was an obvious need to expedite the authorization of the MSS licensee. We therefore believe the circumstances present in 1987 would have supported the adoption of the consortium rule as the best available means to achieve a domestic MSS system in the upper L-band.

[73] *Tentative Decision*, 6 FCC Rcd at 4907, para. 35 & n.66.

[74] Global also maintains that the Commission must seek to coordinate all applicants' proposals, or some composite of them agreed to by all applicants. Global Comments at 9.

[75] *See Tentative Decision*, 6 FCC Rcd at 4908, 4910, paras. 42, 48-52.

[76] *See* Section III.C, *infra*.

[77] TRW, which has an application pending in a separate satellite licensing proceeding involving the RDSS bands, urges the Commission to clarify that the reasons which justify reimposition of the consortium rule in this proceeding do not apply to other multiple applicant satellite proceedings. TRW Comments at 5-9. Our decision to adopt the consortium rule herein is based on factors unique to the MSS licensing proceeding, which are present in the record before us. Our holding in this *Final Decision* relates to the MSS licensing proceeding and does not address circumstances present in other pending Commission licensing proceedings.

[78] *ARINC*, 928 F.2d at 446-8. We note that while the *ARINC* Court faulted the *cash-only* requirement of the Commission's financial qualification rule, it expressly did not pass on the validity of requiring a financial contribution as a threshold eligibility criterion. *Id.*, 928 F.2d at 448, 449 n.59.

[79] *Tentative Decision*, 6 FCC Rcd at 4912, paras. 61-65.

[80] Global Comments at 11-12; Global Reply Comments at 3-5.

[81] MSSI Comments at 10-11; MSSI Reply Comments at 4-6.

[82] AMSC Comments at 3-4; AMSC Reply Comments at 34-37. AMSC urges the Commission, however, to shorten by half the six month timetable proposed in the *Tentative Decision* for participation by the reinstated applicants in order to resolve the MSS proceeding as soon as possible.

[83] Further, AMSC and Telesat Canada have agreed to procure identical systems so that immediate back-up capacity can be provided to the other, if necessary. Nullification of this agreement could significantly affect the close U.S.--Canadian cooperation necessary to coordinate MSS systems in the North/South American region.

[84] MSSI Reply Comments at 4-5.

[85] To the extent that the reinstated applicants seek to join AMSC before the termination of their litigation regarding this decision, the Commission will examine the conditions and parameters of their participation on a case-by-case basis.

[86] Globesat Comments at 16-20; Motorola Comments at 3-8.

[87] *See Report*, 6 FCC Rcd 3900, 3906-8, paras. 43-57 (1991) (LEO proposals for WARC-92).

[88] Geostationary satellites revolve around the Earth over the plane of the equator at the same rate as the Earth rotates and therefore appear stationary from any given location on Earth. In contrast, LEO satellites orbit the Earth at lower altitudes and in various orbital planes. Consequently, LEO satellites do not appear stationary from a fixed point on the Earth and, in fact, pass over all countries in the plane of their orbits. Up to one or two dozen LEO satellites are needed if continuous coverage of a service area is to be provided. To provide continuous coverage, a new satellite must come into view from the particular service area as the first one disappears over the horizen.

[89] *See Tentative Decision*, 6 FCC Rcd at 4909, para. 45.

[90] The National Oceanic and Atmospheric Administration ("NOAA") and NASA had launched several low-earth orbit meteorological and scientific satellites. These satellites, however, are only required to be advance published and notified. No coordination is required with other satellite systems.

[91] *See, e.g., Telesat Canada Feasibility Study of Spectrum Sharing between LEO/MSS and GSO/MSS and Fixed Services and FPLMTS (Final Report)* (April 25, 1991). GSO satellite systems generally operate with significantly higher powers than do LEO satellite systems. In the *Tentative Decision*, the Commission referred to the Telesat Canada study, which indicates that GSO system transmissions are 2,000 to 500,000 times stronger than are transmissions from a LEO satellite system. The Telesat Canada study therefore concludes that co-channel interference from GSO satellite system mobile earth terminals to LEO satellite systems is insurmountable.

Although we expressly cited to and fully identified this study in the *Tentative Decision* (6 FCC Rcd at 4912, para. 59, n.95), Globesat Express alleges that the Commission afforded inadequate notice and opportunity to comment on the study. In this regard, we note that the study in question was not an internal FCC report consisting of data known only to the Commission. The Telesat Canada study is widely available, and the Commission, therefore, simply took official notice of its existence and conclusions when seeking comment on the *Tentative Decision*. Indeed, the two parties who commented on the study, Motorola and Globesat, indicated through their comments that they have had full access to the study's contents. (Globesat, for example, mentions facts about the study that were not revealed in the *Tentative Decision.)* In these circumstances, we believe the parties had full notice and opportunity to comment on the study, and certainly any commenter who desired a copy of the document could have readily obtained it from the Commission. In any event, the study is not the central basis for our conclusions regarding LEO satellite systems but is merely additional evidence of one factor that we have considered.

[92] None of the examples of LEO satellite systems cited by Motorola or Globesat is comparable to the circumstances presented by use of LEO satellites for an MSS system in the upper L-band. The Space Shuttle and Glonass (with respect to certain frequencies) were subject to the supplementary coordination procedures contained in Article 14 of the ITU Radio Regulations by virtue of a footnote in the allocation table. COSPAS is an emergency communications system and has absolute priority over all other transmissions in the band pursuant to Article 39. Molnia operates on a secondary, non-interference basis to GSO fixed-satellite service systems in accordance with Radio Regulation 2613, the NOAA satellites operate on an intermittent basis only, and Navstar and Glonass (with respect to the remaining frequencies) were implemented in bands in which no other satellite systems were then being planned.

[93] For example, a typical LEO system could not provide service to the entire continental United States without illuminating some portions of Canada, Mexico, the Carribean and Central America. This "spillover" would be increased if domestic coverage included Alaska, Hawaii, and Puerto Rico/Virgin Islands. While transmission beams from GSO systems also may cover portions of neighboring countries, coordination procedures are in place to resolve interference issues. No similar procedures are in place for LEO systems.

[94] *See An Inquiry Relating to Preparation for the International Telecommunication Union World Adminstrative Radio Conference for Dealing with Frequency Allocations in Certain Parts of the Sprectrum, Report*, 6 FCC Rcd 4900 (1991); *Second Notice of Inquiry*, 5 FCC Rcd 6046 (1990); *Supplemental Notice of Inquiry*, 6 FCC Rcd 1914 (1991).

[95] The U.S. allocation scheme for the upper L-band provides that AMSS(R) shall have priority access with real-time preemptive capability in the whole band. *See* 47 C.F.R. § 2.106, footnote US309. For this reason, the Commission recently stated that it was "reluctant" to consider the LEO proposals for WARC-92 that had been filed by Motorola Satellite Corporation and Ellipsat Corporation in the 1646.5-1660.5 MHz. band. *See Supplemental Notice of Inquiry*, 6 FCC Rcd at 1917, paras. 22-23.

[96] Because the status that vested for coordination purposes was conferred on a geostationary satellite system, the U.S. would be deemed to have abandoned its previous MSS system and would be required to begin the coordination process anew. Globesat correctly notes this would provide the U.S. with an additional time period in which to complete coordinating the satellite system and bring it into use. Obtaining this additional time, however, is largely irrelevant if insufficient spectrum remains to accommodate the newly proposed system or if the system could not be successfully coordinated at all.

[97] During the time that the U.S. is attempting to select and coordinate a LEO satellite system through comparative hearings or another selection process, the other entities that are building systems will continue to develop and finalize coordination agreements for their upper L-band systems. Coordination will become more difficult as new countries submit proposals. For example, most recently Mexico announced its plans to implement a GSO satellite system in the upper L-band and advanced published its proposed system. Significantly, entities that have advanced published are under no obligation to accommodate fully a later U.S. LEO proposal and, indeed, may not be able to do so even if they attempt to make such accommodations. The likely result is that most, if not all, of the available spectrum

will be divided up in coordination discussions among the other counties and INMARSAT, thus leaving insufficient spectrum for a domestic U.S. system.

[98] Contrary to Globesat's assertions (*see* Globesat Reply Comments at 3), INMARSAT's announcement that it is considering a LEO satellite system as its fourth generation system does not have any implications regarding the likelihood of procuring full international recognition and protection for a LEO system in the upper L-band. In making its announcement, INMARSAT did not commit itself to a LEO design and, more significantly, did not mention the frequency bands on which it intends the system to operate. As noted, the U.S. is similarly pursuing the possibility of LEO satellite systems in a variety of frequency bands. Our decision not to pursue a LEO system in the upper L-band is based on the circumstances unique to the MSS licensing proceeding. The Commission retains flexibility to authorize LEO satellite systems to provide MSS in other frequency bands.

[99] As we stated in the *Tentative Decision*, coordination of a domestic GSO satellite system ordinarily does not require the involvement of countries on the other side of the Earth. Nevertheless, as Globesat notes, the Commission stated that Papua New Guinea and Australia will be involved in the coordination of a U.S. GSO mobile satellite system in the upper L-band. A transmission beam on the proposed Papua New Guinea upper L-band system directly covers Hawaii, triggering the need for a negotiated coordination agreement. The technical characteristics and beam patterns of the proposed Australian system have triggered the conservative coordination mechanism in Appendix 29 of the ITU Radio Regulations. As a practical matter, however, the interference potential between an Australian GSO mobile satellite system and a U.S. GSO mobile satellite system is minimal and specific problems, if any, should be readily resolved using existing procedures.

[100] *See* n.94, *supra*.

[101] ARINC/ATA Comments at 20-27; ARINC/ATA Reply Comments at 9.

[102] *Robert J. Butler*, FOIA Control No. 91-120, 6 FCC Rcd 5414, 5417-18, paras. 25-30 (1991).

[103] *See* 47 C.F.R. § 1.1202(a) (1990).

[104] *See* 47 C.F.R. §§ 1.1204(b)(1), 25.202(c) (1990).

[105] *See* 47 C.F.R. § 1.1204(b)(4) (1990).

[106] ARINC/ATA Comments at 13-17; ARINC/ATA Reply Comments at 6-7.

[107] *See* Globesat Comments at 24.

[108] 5 U.S.C. § 553(a)(1).

[109] ARINC/ATA Reply Comments at 8.

[110] *See AMSC Athorization Order*, 4 FCC Rcd at 6055.

[111] As a signatory to INMARSAT, it is incumbent on the U.S. to ensure that the needs of the international aviation community are met.

[112] *AMSC Authorization Order*, 4 FCC Rcd at 6060.

[113] *Tentative Decision*, 6 FCC Rcd at 4914, paras. 74-75.

[114] Omninet Comments at 2-3.

[115] In the *Tentative Decision*, we granted AMSC temporary authority pursuant to 47 U.S.C. § 309(f) to continue as the authorized U.S. MSS system pending release of this *Final Decision*. The grant of temporary authority was premised on the need for an authorized licensee to participate in critical international negotiations during the interim period. *Tentative Decision*, 6 FCC Rcd at 4915, paras. 78-80.

[116] Likewise, objections raised by other commenters to the temporary authorization are moot in light of our action herein.

[117] 6 FCC Rcd at 4915, para. 80.

[118] Due to the exigent circumstances noted above concerning the international frequency coordination process, we find good cause for making the consortium requirement effective immediately upon publication in the Federal Register. 5 U.S.C. § 553(d)(3). Immediate implementation of the consortium rule is necessary to grant final authorization to a domestic MSS licensee. As described above, the presence and participation of an authorized domestic MSS licensee during the ongoing international negotiations is critical to U.S. efforts to secure needed spectrum for a domestic MSS system. Unless the consortium requirement takes effect immediately, there will be no final, authorized MSS licensee to assist the Commission in the international frequency coordination process.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 9, 1992

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC Record.

The decisions are placed in General Docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

Schaberg, David C. - Request for waiver and refund of filing fees for a new FM station at Glen Arbor, Michigan - **Denied** (November 29, 1991).

Southwestern Bell Telephone Company - Request for a refund of filing fees paid for four petitions for waiver of the Part 69 tariff rules - **Granted** (December 26, 1991).

Locke Supply Company - Request for a refund of filing fees paid for four petitions for extensions of time to construct low power television stations - **Granted** (December 26, 1991).

Lea County Broadcasting - Request refund of filing fee for radio station license KLEA-FM, Lovington, New Mexico - **Granted** (December 26, 1991).

Contel Corporation - Request for refund of filing fee for petition for waiver of Part 69 of the rules - **Granted** (December 26, 1991).

Rossi, Thomas J. - Request for reinstatement of 18 applications for 220 MHz trunked systems - **Granted** (December 30, 1991).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE E. PRIDE, CHIEF, FEE SECTION ON (202) 632-0241.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

Mr. William A. Blase, Jr.
Southwestern Bell Telephone Company
Director-Federal Regulatory
1667 K Street, N.W.
Suite 1000
Washington, D.C. 20006

Dear Mr. Blase:

This is in response to the request made by Southwestern Bell Telephone Company (Southwestern) for a refund of the fee payments that Southwestern made in connection with its filing of four petitions for waiver of the Part 69 tariff rules.

You state that a refund is due because the Commission has clarified that no fee requirement applies to petitions for waiver of the Part 69 tariff rules.

Our review of this matter demonstrates that a refund is warranted. In its recent reconsideration of its FEES II decision, the Commission determined that a fee payment is required only with petitions for waiver of the Part 69 accounting and audit rules. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558 (1990), reconsidered in part, 6 FCC 5919, 5923 (1991). More specifically, the Commission decided that no fee requirement applies to petitions for waiver of the tariff rules and requirements contained in Part 69 of the rules. Id.

Accordingly, your request is granted. A check, drawn in the amount of $18,640.00 and made payable to Southwestern Bell Telephone Company, representing a refund for fee payments covering four petitions for waiver of the Part 69 tariff rules, will be forwarded to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 26 1991

Robert L. Olender, Esquire
Baraff, Koerner, Olender
& Hochberg, P.C.
5335 Wisconsin Avenue, N.W.
Suite 300
Washington, D.C. 20015-2003

Dear Mr. Olender:

This is in response to your request for a refund of the fee payments submitted by Locke Supply Co. to cover four petitions for extensions of time to construct low power television stations.

Our review of this matter discloses that no fee is required under the Fee Schedule to cover petitions for extension of time to construct low power television stations. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558, 3601 (1990). Accordingly, your request is granted.

A check, drawn in the amount of $800.00 and made payable to Locke Supply Co., will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 26 1991

Richard J. Bodorff, Esq.
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Bodorff:

This is in response to your "Fee Refund Request" submitted on behalf of Lea County Broadcasting (Lea County), licensee of KLEA-FM, Lovington, New Mexico.

You state that Lea County tendered a $1,565 rulemaking fee upon filing a petition for rulemaking to amend the FM Table of Allotments. You further state that the FCC fee filing instruction form provides that this fee is not due until an applicant files to effectuate the rulemaking proposal subsequent to the Commission's authorization of the changes proposed. You now request refund of Lea County's $1,565 rulemaking fee pursuant to Section 1.1111(a)(1) of the Commission's Rules, as you contend this fee was prematurely filed.

Section 1.1111(a)(1) of the Commission's Rules provides for refund of a fee when no fee is required for the application or the filing. 47 C.F.R. § 1.1111(a)(1). Although Lea County's petition for rulemaking requires a $1,565 fee (see 47 C.F.R. § 1.1104), this fee is not payable at the time of filing the petition. Rather, the rulemaking fee is payable at the time of filing the application for change. See "Mass Media Services Fee Filing Guide" n. 12. Because the fee for Lea County's petition for rulemaking is not due until Lea County files its application for change (in addition to the fee for the minor change), your "Fee Refund Request" will be granted.

Accordingly, a check for $1,565, payable to Lea County Broadcasting, will be forwarded you at the earliest practicable time. If you have any questions about this refund, please call Chief, Fee Section, at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 26 1991

Mr. Mark L. Billings
Director-Tariffs
GTE Telephone Operations
600 Hidden Ridge, HQE01F04
P.O. Box 152092
Irving, Texas 75015-2092

Dear Mr. Billings:

This is in response to your request for a refund of the fee payment submitted by Contel Corporation (Contel), shortly before its merger with GTE Corporation, in connection with its filing of a petition for waiver of Part 69 of the rules requesting permission to establish a new access tariff rate element related to Operator Services.

You state that a refund is due because Section 1.1105 is unclear as to whether the filing of petitions for waiver of the Part 69 tariff rules is subject to a fee requirement.

In its recent reconsideration of its FEES II decision, the Commission determined that a fee payment is required only with petitions for waiver of the Part 69 accounting and audit rules. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558, (1990), reconsidered in part, 6 FCC Rcd 5919, 5923 (1991). More specifically, the Commission clarified that no fee requirement applies to petitions for waiver of the tariff rules and requirements contained in Part 69 of its rules. Id.

Accordingly, your request for a refund is granted. As you have requested, a check, drawn in the amount of $4,660.00 and made payable to GTE Telephone Operations, will sent to you at the above address at the earliest practicable time.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 30 1991

Gerald S. McGowan, Esquire
Lukas, McGowan, Nace
& Gutierrez
1819 H Street, N.W.
Seventh Floor
Washington, D.C. 20006

Dear Mr. McGowan:

This is in response to your request for reinstatement, nunc pro tunc, of 18 applications for 220 MHz trunked systems filed by Mr. Thomas J. Rossi.

You state that Mr. Rossi timely filed his applications and the requisite fees, but the applications were returned because his fee payment checks were dishonored. The checks were drawn on the Madison National Bank (Bank), but subsequent to Mr. Rossi's submission of the checks to the Commission, the Federal Deposit Insurance Corporation (FDIC) assumed control of that Bank. The FDIC froze Mr. Rossi's account when he was erroneously identified as a delinquent borrower of the Bank's and, as a consequence, the FDIC dishonored his fee payment checks. See letter by John W. Hyche, Account Officer, Federal Deposit Insurance Corporation to Thomas J. Rossi, dated October 11, 1991.

Our review of this matter discloses that Mr. Rossi's fee checks were dishonored due to bank error. In such cases, where the payment of a fee is dishonered because of bank error, as evidenced by a letter from an appropriate bank official, the Commission will reinstate the associated applications, nunc pro tunc. See 47 C.F.R. § 1.1114(a)(2).

Accordingly, your request is granted.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 30 1991

Gerald S. McGowan, Esquire
Lukas, McGowan, Nace
& Gutierrez
1819 H Street, N.W.
Seventh Floor
Washington, D.C. 20006

Dear Mr. McGowan:

This is in response to your request for reinstatement, nunc pro tunc, of 18 applications for 220 MHz trunked systems filed by Mr. Thomas J. Rossi.

You state that Mr. Rossi timely filed his applications and the requisite fees, but the applications were returned because his fee payment checks were dishonored. The checks were drawn on the Madison National Bank (Bank), but subsequent to Mr. Rossi's submission of the checks to the Commission, the Federal Deposit Insurance Corporation (FDIC) assumed control of that Bank. The FDIC froze Mr. Rossi's account when he was erroneously identified as a delinquent borrower of the Bank's and, as a consequence, the FDIC dishonored his fee payment checks. See letter by John W. Hyche, Account Officer, Federal Deposit Insurance Corporation to Thomas J. Rossi, dated October 11, 1991.

Our review of this matter discloses that Mr. Rossi's fee checks were dishonored due to bank error. In such cases, where the payment of a fee is dishonered because of bank error, as evidenced by a letter from an appropriate bank official, the Commission will reinstate the associated applications, nunc pro tunc. See 47 C.F.R. § 1.1114(a)(2).

Accordingly, your request is granted.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

Mr. William A. Blase, Jr.
Southwestern Bell Telephone Company
Director-Federal Regulatory
1667 K Street, N.W.
Suite 1000
Washington, D.C. 20006

Dear Mr. Blase:

This is in response to the request made by Southwestern Bell Telephone Company (Southwestern) for a refund of the fee payments that Southwestern made in connection with its filing of four petitions for waiver of the Part 69 tariff rules.

You state that a refund is due because the Commission has clarified that no fee requirement applies to petitions for waiver of the Part 69 tariff rules.

Our review of this matter demonstrates that a refund is warranted. In its recent reconsideration of its *FEES II* decision, the Commission determined that a fee payment is required only with petitions for waiver of the Part 69 accounting and audit rules. *See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989*, 5 FCC Rcd 3558 (1990), *reconsidered in part*, 6 FCC 5919, 5923 (1991). More specifically, the Commission decided that no fee requirement applies to petitions for waiver of the tariff rules and requirements contained in Part 69 of the rules. *Id*.

Accordingly, your request is granted. A check, drawn in the amount of $18,640.00 and made payable to Southwestern Bell Telephone Company, representing a refund for fee payments covering four petitions for waiver of the Part 69 tariff rules, will be forwarded to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 26 1991

Robert L. Olender, Esquire
Baraff, Koerner, Olender
  & Hochberg, P.C.
5335 Wisconsin Avenue, N.W.
Suite 300
Washington, D.C. 20015-2003

Dear Mr. Olender:

This is in response to your request for a refund of the fee payments submitted by Locke Supply Co. to cover four petitions for extensions of time to construct low power television stations.

Our review of this matter discloses that no fee is required under the Fee Schedule to cover petitions for extension of time to construct low power television stations. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558, 3601 (1990). Accordingly, your request is granted.

A check, drawn in the amount of $800.00 and made payable to Locke Supply Co., will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
  for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 26 1991

Richard J. Bodorff, Esq.
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Bodorff:

This is in response to your "Fee Refund Request" submitted on behalf of Lea County Broadcasting (Lea County), licensee of KLEA-FM, Lovington, New Mexico.

You state that Lea County tendered a $1,565 rulemaking fee upon filing a petition for rulemaking to amend the FM Table of Allotments. You further state that the FCC fee filing instruction form provides that this fee is not due until an applicant files to effectuate the rulemaking proposal subsequent to the Commission's authorization of the changes proposed. You now request refund of Lea County's $1,565 rulemaking fee pursuant to Section 1.1111(a)(1) of the Commission's Rules, as you contend this fee was prematurely filed.

Section 1.1111(a)(1) of the Commission's Rules provides for refund of a fee when no fee is required for the application or the filing. 47 C.F.R. § 1.1111(a)(1). Although Lea County's petition for rulemaking requires a $1,565 fee (see 47 C.F.R. § 1.1104), this fee is not payable at the time of filing the petition. Rather, the rulemaking fee is payable at the time of filing the application for change. See "Mass Media Services Fee Filing Guide" n. 12. Because the fee for Lea County's petition for rulemaking is not due until Lea County files its application for change (in addition to the fee for the minor change), your "Fee Refund Request" will be granted.

Accordingly, a check for $1,565, payable to Lea County Broadcasting, will be forwarded you at the earliest practicable time. If you have any questions about this refund, please call Chief, Fee Section, at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 26 1991

Mr. Mark L. Billings
Director-Tariffs
GTE Telephone Operations
600 Hidden Ridge, HQE01F04
P.O. Box 152092
Irving, Texas 75015-2092

Dear Mr. Billings:

This is in response to your request for a refund of the fee payment submitted by Contel Corporation (Contel), shortly before its merger with GTE Corporation, in connection with its filing of a petition for waiver of Part 69 of the rules requesting permission to establish a new access tariff rate element related to Operator Services.

You state that a refund is due because Section 1.1105 is unclear as to whether the filing of petitions for waiver of the Part 69 tariff rules is subject to a fee requirement.

In its recent reconsideration of its *FEES II* decision, the Commission determined that a fee payment is required only with petitions for waiver of the Part 69 accounting and audit rules. *See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989*, 5 FCC Rcd 3558, (1990), *reconsidered in part*, 6 FCC Rcd 5919, 5923 (1991). More specifically, the Commission clarified that no fee requirement applies to petitions for waiver of the tariff rules and requirements contained in Part 69 of its rules. *Id*.

Accordingly, your request for a refund is granted. As you have requested, a check, drawn in the amount of $4,660.00 and made payable to GTE Telephone Operations, will sent to you at the above address at the earliest practicable time.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

NOV 29 1991

Mr. David C. Schaberg
P.O. Box 21055
Lansing, Michigan 48909-1055

Dear Mr. Schaberg:

This is in response to your requests for a waiver and refund of filing fees related to your two applications for extension of time to construct a new FM station at Glen Arbor, Michigan. Your requests were directed to the FM Branch of the Mass Media Bureau.

First, let me apologize for failing to respond earlier to your requests for refund and waiver of your fee payments. You should note, however, that the Commission's rules require that petitions for a fee waiver or refund are handled by the Office of the Managing Director and not with the Bureau having processing responsibility for the application underlying the fee payment. See 47 C.F.R. § 1.1115(c).

After you obtained your construction permit for the station at Glen Arbor, you filed a petition for rulemaking requesting to substitute Channel 240C2 for Channel 240A at Glen Arbor. The Mass Media Bureau granted your petition and initiated the requested rule making. See Amendment of Section 73.202(b) (Glen Arbor and Scottsville, Michigan), Docket 89-385, 4 FCC Rcd 6700, released September 6, 1989. You also filed an application to modify your construction permit consistent with your proposal under consideration in the rulemaking. On August 20, 1990, while the rulemaking was pending, you filed an application for an extension of time to complete construction of the Glen Arbor station. You submitted the requisite application fee accompanied by a request for refund because you believed that sufficient time had passed for the rulemaking to be concluded and your modification application granted.

Subsequently, the Bureau amended the FM Table of Allotments, but substituted Channel 238C2, rather than Channel 240C2, for Channel 240A at Glen Arbor (due to technical deficiencies in your proposal), effective February 25, 1991. See Report and Order in Docket 89-385, 6 FCC Rcd 147, released January 11, 1991. On March 30, 1991, you filed a request for a second extension of time to complete construction, stating that you would soon file an application to amend your construction permit in the manner permitted by the rulemaking. You submitted no fee to cover this extension, but advised that your earlier fee payment should be credited to this filing since you had received no response on your petition for waiver, and you again stated that the staff's failure to timely conclude the rulemaking proceeding made necessary your request for the extension of time.

Our review of the merits of your requests discloses that no waiver or refund of the required fee payments is warranted. You obtained a construction permit for an FM station at Glen Arbor and, before constructing the station, filed for a change in the station's assigned channel. Your extension applications were filed while you awaited the outcome of proceedings initiated by you in lieu of constructing the Glen Arbor station. Nothing in the rules or elsewhere entitles an applicant to rely on an expectation of when a particular matter before the Commission will be concluded in order to obtain a waiver or refund of a required fee, since the timing of any Commission action depends on the workload of the staff and the complexity of the particular case. In the instant case, the pendency of the rulemaking and your application to modify do not justify non-payment of a required fee. You voluntarily decided to withhold construction of your station. Had you constructed the station in a timely fashion pursuant to the terms of the initial construction grant, no fees would be due.

Accordingly, your requests for waiver and refund of the fee requirement are denied.

As a final matter, the Commission has ruled that if a request for fee waiver is denied and the fee has not been submitted with the waiver request, the underlying application will be dismissed. See FEES II, 5 FCC Rcd 3558, 3572 (1991). In view of the delay in resolving your requests, you will be afforded additional time to submit your fee payment. Failure to make payment within thirty days from the date of this letter will result in the dismissal of your second construction permit and, the consequent dismissal of your station authorization.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-295

In the Matter of

Amendment of Part 90 to Increase the Number of Frequencies in the 72-76 MHz Band for Low-Power Mobile Use — RM-7182

NOTICE OF PROPOSED RULE MAKING

Adopted: October 3, 1991; Released: October 31, 1991

Comment Date: December 23, 1991
Reply Comment Date: January 7, 1992

By the Commission:

I. INTRODUCTION

1. On November 3, 1989, the Manufacturers Radio Frequency Advisory Committee, Inc. (MRFAC), filed a Petition for Rule Making (Petition)[1] requesting an increase in the number of 72-76 MHz frequencies available in the Manufacturers Radio Service for low-power use. No comments responsive to the Petition were filed. By this *Notice of Proposed Rule Making* (*Notice)*, we propose to amend Part 90 of the Commission's Rules to make available 20 additional frequencies in the 72-76 MHz band for low-power mobile use by licensees in the Manufacturers Radio Service.

II. BACKGROUND/DISCUSSION

2. The frequency band 74.8 MHz to 75.2 MHz is allocated for Aeronautical Radionavigation use. Ground-based aeronautical marker beacon transmitters operate in this band on the frequency 75.0 MHz with an authorized bandwidth of 6 kHz. The adjacent bands, 74.6-74.8 MHz and 75.2-75.4 MHz, are allocated for Fixed and Mobile use, but are currently not used because they serve as guard bands to minimize interference to the airborne marker beacon receivers operating at 75.0 MHz.[2]

3. MRFAC petitions that because the Footnote 572 constraint on the use of the guard bands expired on December 31, 1989, the Commission should channelize the two bands and make the new frequencies available to the Manufacturers Radio Service for low-power operations. MRFAC thus petitions that Sections 90.79 and 90.257 of the Rules, 47 C.F.R. §§ 90.79 and 90.257, be amended to expand the number of 72-76 MHz frequencies available for low-power use by the Manufacturers Radio Service.[3]

4. With the expiration of the footnote 572 constraint, it is now possible to channelize and use new frequencies in the guard bands for other purposes. The MRFAC petition proposes that each guard band be divided into 9 channels, resulting in 18 additional frequencies spaced 20 kHz apart. After analysis of the MRFAC petition, we find that by modifying MRFAC's frequency plan in each guard band, two additional channels can be obtained. Therefore, we propose instead a channeling plan that contains ten 20 kHz-wide channels in each guard band, resulting in a total of 20 additional channels.

5. In its petition, MRFAC indicates that Footnote US273 to Section 2.106 currently limits stations in the fixed and mobile services in the two guard bands to a maximum power of 1 watt, and that this is the same as the power limitation for mobile use of the 72-76 MHz frequencies as specified in Section 90.257(b)(2) of the Rules. The 1 watt limitation limits the usefulness of these frequencies for purposes other than mobile operations so we are therefore proposing that the same conditions outlined in Sections 90.257(b)(1) and (b)(2) govern the additional low-power mobile channels.[4] These provisions should maintain protection of the 75.0 MHz aeronautical marker beacon frequency. We solicit, however, comments on whether additional protection to the marker beacon frequency is necessary, and if so, how this can be accomplished while still providing for land mobile operations in the guard bands.

6. MRFAC also proposes that nine of the new frequencies be designated for digital transmission applications for such manufacturing operations as inventory control, bar code readers, remote control, etc. MRFAC asserts that conventional (analog) voice operations have a high potential for interference to co-channel non-voice operations due to the mobility characteristics of portable hand-held units, and that restricting some of the new frequencies to digital transmissions would minimize such interference and enhance the safety of personnel and

---

[1] RM-7182, Report 1804, December 20, 1989.

[2] Footnote 572 to the Table of Frequency Allocations in Section 2.106, 47 C.F.R. § 2.106, states that the frequency 75.0 MHz is assigned to aeronautical marker beacons, and that until December 31, 1989, internationally, administrations should refrain from assigning frequencies to stations of other services in the adjacent bands of 74.6-74.8 MHz and 75.2-75.4 MHz (guard bands). Footnote 572 also states that in the future every effort should be made to improve further the characteristics of airborne receivers.

[3] Section 90.79 of the Rules, 47 C.F.R. § 90.79, governs frequency assignments in the Manufacturers Radio Service and Section 90.257, 47 C.F.R. § 90.257, governs the assignment and use of frequencies in the 72-76 MHz band for fixed and mobile operations. Currently, §§ 90.79 and 90.257 of the Rules permit the Manufacturers Radio Service to use 68 frequencies in the 72-76 MHz band for fixed use on a shared basis with other Land Mobile, Aviation, and Maritime Mobile Radio Service users, and 30 frequencies in the 72-76 MHz band for mobile use, ten of which are shared with Part 90 users in the Forest Products, Special Industrial, and Railroad Radio Services.

[4] Pursuant to § 90.257(b)(1), mobile operations in the 72-76 MHz band are permitted on a secondary basis to television reception on Channels 4 and 5. § 90.257(b)(2) specifies a maximum mobile transmitter power of one watt, and that while each station will be authorized as a mobile station, it may also be used to provide the operational functions of a base or fixed station.

property. In this *Notice* we are not proposing to restrict the use of the additional channels to a specific modulation technique. We are interested, however, in minimizing potential interference to all operations using the new channels. Therefore, we solicit comments on the expected use of the frequencies, the type of modulation, digital or analog, that would be potentially dominant, and whether it is necessary that some frequencies should be restricted to digital only use because of potential interference from digital to analog systems. Also, because there are currently ten mobile-only frequencies being shared by four Part 90 radio services, we ask for comments whether additional private land mobile radio services should be included in sharing these new frequencies.

III. CONCLUSION

7. In summary, this *Notice* proposes to amend Section 90.79(c) to provide 20 additional frequencies in the 72-76 MHz band for low-power mobile use in the Manufacturers Radio Service. Operations on these frequencies will be subject to the provisions of Section 90.257(b).

IV. PROCEDURAL MATTERS

Ex Parte Rules - Non-Restricted Proceeding

8. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules. *See generally* - 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

Initial Regulatory Flexibility Analysis

9. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rule making proceeding because if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

Comment Dates

10. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commissions Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **December 23, 1991,** and reply comments on or before **January 7, 1992.** To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W. Washington, D.C. 20554.

11. For further information concerning this rule making, contact Eugene Thomson, Private Radio Bureau, Room 5202, Federal Communications Commission, Washington, D.C. 20554, telephone (202) 634-2443.

12. Authority for issuance of this *Notice of Proposed Rule Making* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 303(r).

FEDERAL COMMUNICATION COMMISSION

Donna R. Searcy
Secretary

APPENDIX

It is proposed to amend 47 C.F.R. Parts 2 and 90 as follows:

1. The authority citation for Part 2 continues to read as follows:

Authority: Sections 4, 302, 303, and 307, of the Communications Act of 1934, as amended, 47 U.S.C. § 154, 302, 303, and 307, unless otherwise noted.

2. 47 C.F.R. § 2.106 is amended by adding entries in the FCC use designators column for the frequency bands 74.6-74.8 and 75.2-75.4 as listed in the United States table column to read as follows:

§ 2.106 Table of Frequency Allocations.

International table			United States table		FCC use designators	
			* * * * *			
(1)	(2)	(3)	(4)	(5)	(6)	(7)
			* * * * *			
			74.6-74.8 FIXED MOBILE 572 US273	74.6-74.8 FIXED MOBILE 572 US273	PRIVATE LAND MOBILE (90)	
			* * * * *			
			75.2-75.4 FIXED MOBILE 572 US273	75.2-75.4 FIXED MOBILE 572 US273	PRIVATE LAND MOBILE (90)	

* * * * *

3. The authority citation for Part 90 continues to read as follows:

Authority: Secs. 4, 303, and 331, 48 Stat. as amended, 1066, 1082, 47 U.S.C. 154, 303 and 332, unless otherwise noted.

4. 47 C.F.R. § 90.79 is amended by revising the frequency table in paragraph (c) by adding the frequencies 74.61, 74.63, 74.65, 74.67, 74.69, 74.71, 74.73, 74.75, 74.77. 74.79, 75.21, 75.23, 75.25, 75.27, 75.29, 75.31, 75.33, 75.35, 75.37, and 75.39 MHz together with their associated class of station(s) and limitations to read as follows:

§ 90.79 Manufacturers Radio Service.

* * * * *

(c) * * *

Manufacturers Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
* * * * *		
74.61	do	2
74.63	do	2
74.65	do	2
74.67	do	2
74.69	do	2
74.71	do	2
74.73	do	2
74.75	do	2
74.77	do	2
74.79	do	2
75.21	do	2
75.23	do	2
75.25	do	2
75.27	do	2
75.29	do	2
75.31	do	2
75.33	do	2
75.35	do	2
75.37	do	2
75.39	do	2

* * * * *

5. 47 C.F.R. § 90.257 is amended by revising the first sentence in paragraph (b)(1) to read as follows:

§ 90.257 Assignment and use of frequencies in the band 72-76 MHz.

* * * * *

(b) * * *

(1) Mobile operation on frequencies in the 72-76 MHz band (see §§ 90.67(b), 90.73(c), 90.79(c), and 90.91(b)) is subject to the condition that no interference is caused to the reception of television stations operating on Channel 4 or 5. * * *

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-497

In the Matter of

Amendment of Part 65 of
the Commission's Rules to
Prescribe Components of the
Rate Base and Net Income
of Dominant Carriers

DECISION ON REMAND

Adopted: October 15, 1991; Released: October 31, 1991

By the Commission:

I. INTRODUCTION

1. In *Illinois Bell v. FCC,*[1] the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) remanded to the Commission for further consideration two issues addressed in the Commission's *Rate Base Orders:*[2] (1) the exclusion of non-cash expenses, such as depreciation, from lead-lag studies used to determine the cash working capital allowance: and (2) the presumptive exclusion from the rate base of the premium paid for plant (*i.e.,* plant acquisition adjustment) in the case of plant without traffic acquired from a non-affiliated carrier. In this Order, we reaffirm our decision to exclude non-cash expenses from lead-lag studies. We find that the time lag between recording and actual recovery of depreciation and other non-cash expenses need not be recognized in determining cash working capital because that lag is already compensated for in the allowed rate of return. We alter our treatment of the plant acquisition adjustments so as to allow a carrier presumptively to include in the rate base the premium paid for plant without traffic acquired from a non-affiliated carrier.[3] This treatment is appropriate because such transactions are at arm's length and do not increase the revenue requirement for existing ratepayers solely by virtue of an ownership change.

II. BACKGROUND

2. A carrier's rate base consists generally of telecommunications plant, noncurrent assets, materials and supplies, and cash working capital.[4] Under a traditional rate base/rate of return regulatory system, it is necessary to determine the rate base both to calculate the return-on-investment component of the revenue requirement and to compute the earned rate of return. Carriers subject to price cap regulation no longer use revenue requirements to set rates. The price cap plan we adopted for the largest local exchange carriers (LECs), however, still requires rate base calculation in order to determine earned rate of return.[5]

3. Prior to divestiture, the components of American Telephone and Telegraph's (AT&T) rate base were established in ratemaking proceedings. The Commission concluded the last AT&T rate case that comprehensively addressed rate base issues in 1977.[6] After divestiture, the Commission adopted §§65.800 -.830 of its Rules,[7] which, for the most part, codified the Commission's established methods for determining rate base. These rules apply to both LECs and dominant interexchange carriers.[8]

4. Working capital, in a regulated environment, is the capital required to finance the day-to-day activities of the business.[9] In the *Docket 19129 Decision*, the Commission found that working capital for regulated entities consisted of "cash and cash items necessary to pay current expenses" and "investment in materials and supplies." The Commission decided that it would use lead-lag studies[10] to determine the cash element of AT&T's working capital,

---

[1] Illinois Bell Telephone Co. v. FCC, 911 F.2d 776 (D.C. Cir. 1990) (*Illinois Bell).*

[2] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order,* 3 FCC Rcd 269 (1987) (*Rate Base R&O), recon.,* 4 FCC Rcd 1697 (1989) (*Rate Base Recon. Order)* (*Rate Base Orders* or *Rate Base Proceeding); remanded sub nom.,* Illinois Bell Telephone Co. v. FCC, 911 F.2d 776 (D.C. Cir. 1990).

[3] A premium, or plant acquisition adjustment, results from a carrier paying an amount for plant above that plant's net original cost at the time it was put into regulated service less depreciation reserve. We will refer to this premium, recorded in Account 2005 of the Uniform System of Accounts, as "plant acquisition adjustment(s)" throughout this Order.

[4] *See* 47 C.F.R. § 65.820.

[5] Policy and Rules Concerning Rates for Dominant Carriers, *Notice of Proposed Rulemaking,* 2 FCC Rcd 5208 (1987), *Further Notice of Proposed Rulemaking,* 3 FCC Rcd 3195 (1988), *Report and Order and Second Further Notice of Proposed Rulemaking,* 4 FCC Rcd 2873 (1989), *Supplemental Notice of Proposed Rulemaking,* 5 FCC Rcd 2176 (1990), *Second Report and Order,* 5 FCC Rcd 6786 (1990), *Memorandum Opinion and Order on Reconsideration,* 6 FCC Rcd 665 (1991), *Order on Reconsideration,* FCC No. 91-115, Mimeo No. 38145 (released April 17, 1991). The earned rate of return is used under price cap regulation to determine the shared earnings between LECs and ratepayers, and to determine whether a carrier with low earnings is eligible for automatic increases in its price cap indices. *See Second Report and Order,* 5 FCC Rcd at 6806-6807.

[6] American Telephone and Telegraph Co., *Phase II Final Decision and Order,* 64 FCC 2d 1, (1977) (*Docket 19129 Decision), recon. in part,* 67 FCC 2d 1429 (1978) (*Docket 19129 Recon. Decision).*

[7] 47 C.F.R. §§ 65.800 -.830.

[8] *Rate Base Orders, supra* at n. 2.

[9] The Commission adopted this definition in the AT&T and Western Union Private Line Cases, *Final Decision,* 34 FCC 217, 221 (1963) ("[Working capital] furnishes the means by which business is transacted. It meets the payroll and the current bills for materials and other running expenses. A capital fund for these purposes, present from day to day in amounts adequate for the reasonable needs of the Company, must be supplied." *quoting* Vincennes Water Supply Co. v. Public Service Comm'n, 34 F.2d 5, 8 (7th Cir. 1939)), *aff'd sub nom. Wilson & Co. v. U.S.,* 335 F.2d 788 (7th Cir. 1964), *cert. denied,* 380 U.S. 951 (1965).

[10] For a discussion of lead-lag studies, *see infra* para. 9.

i.e., the cash working capital allowance. The Commission concluded that, because cash working capital is the amount of investor-supplied cash required to finance the day-to-day activities of the business, non-cash expenses, which do not represent a current expenditure of cash, should not be included in leadlag studies.[11]

5. In the *Rate Base Orders*, during the course of examining its rate base rules, the Commission again addressed its treatment of cash working capital. In comments filed in that rulemaking proceeding, carriers argued that computation of lead-lag studies should be changed to include non-cash expenses. They argued that lead-lag studies that exclude a non-cash expense such as depreciation expense are unfair to shareholders because the studies fail to consider the time lag between the reduction of the rate base through depreciation of an asset and the recovery from ratepayers of the depreciation expense.[12] The Commission reaffirmed the position it had taken in the *Docket 19129 Decision*, holding that non-cash expenses did not require the outlay of cash, and therefore were not within the scope of the definition of cash working capital.[13]

6. Plant acquisition adjustments arise when a carrier purchases telecommunications plant from another regulated telecommunications entity. The purchasing carrier can record in its plant accounts only the original cost less depreciation reserve of the plant. Plant acquisition adjustment is the difference between the purchase price of that plant and the amount recorded in the carrier's plant accounts. In the *Docket 19129 Recon. Decision*, the Commission, on its own motion, considered the rate base treatment of plant acquisition adjustments. The Commission placed upon the carrier the burden of proving that any amount of the adjustment should be included in the rate base.

7. The Commission did not distinguish between transactions involving affiliates and non-affiliates; nor did it treat transactions involving plant without traffic differently from those involving plant with traffic. Rather, the Commission reasoned that "acquisition by one utility of the property of another utility presents the possibility of abuse, or at least confuses the question of the proper value to be placed on such property for ratemaking purposes."[14] In the *Rate Base Proceeding*, carriers argued, *inter alia*, that transactions between non-affiliated carriers resulting in plant acquisition adjustments should not fall within the Commission's presumption of exclusion from the rate base. The Commission, however, reaffirmed its treatment of plant acquisition adjustments on the basis of the reasoning stated in the *Docket 19129 Recon. Decision*.

8. On review before the D.C. Circuit, the carriers reiterated the positions they had taken in the *Rate Base Orders* proceeding. In regard to the cash working capital issue, the court found that the Commission's rationale for excluding non-cash expenses such as depreciation was insufficient. The court remanded this issue to the Commission for "further explication."[15] The court found that the Commission had adequately justified presumptively excluding from the rate base all plant acquisition adjustments resulting from purchases of plant with traffic, as well as those resulting from purchases from an affiliate of plant without traffic. However, the Court remanded for further consideration the Commission's policy of presumptively excluding from the rate base a plant acquisition adjustment resulting from a transaction in which a carrier purchases plant without traffic from a non-affiliate.[16]

III. DISCUSSION

A. Cash Working Capital

9. To determine the cash working capital component of a carrier's interstate rate base, this Commission has traditionally used the lead-lag study approach.[17] As the D.C. Circuit has observed," [lead-lag studies essentially determine] whether the company has need for idle cash and is entitled to a cash working capital addition to rate base."[18] This approach determines a cash working capital allowance by conducting studies which measure the cash needed by the carrier to cover its cash expenses between the time expenses are paid and the time revenues are received. "Lead" refers to those revenue and expense items that are received or paid before a service is rendered. "Lag" refers to those revenue and expense items that are received or paid after service is rendered. Mechanically, lead-lag studies determine the number of days between receipt of revenues and payment of expenses; then that net number of revenue lag days is multiplied by the average daily cash expenses to determine cash working capital. For example, assume a revenue lag of 45 days and an expense lag of 30 days; the net revenue lag days are 15. If the carrier's average daily cash expenses are \$10, then the carrier's cash working capital allowance would be \$150 (15 days multiplied by \$10).[19]

10. We continue to believe that our lead-lag study approach should not include lags related to non-cash expenses such as depreciation. While we recognize, as the court noted, that depreciation expense relates to a cash expense that occurred at the time of investment,[20] depreciation expense is different from the types of cash expenses included in lead-lag studies in that it does not require a *current* outlay of cash and thus does not give rise to a need for cash working capital. The Commission has always viewed lead-lag studies as having a single, narrow

---

[11] *Docket 19129 Decision*, 64 FCC 2d at 76, n.1. *See also*, American Telephone and Telegraph Co., *Phase II Decision of the Administrative Law Judge*, 64 FCC 2d 131, 404 (1977) (*Initial Decision*).

[12] *See* Ameritech Comments on Reconsideration at 3 ("[t]he problem is that the rate base is reduced by *recorded* depreciation which occurs when service is provided, not when ratepayers pay for such service. Recovery of depreciation does not occur until the ratepayers pay for service.").

[13] *Rate Base Recon. Order*, 4 FCC Rcd at 1700. *See also Docket 19129 Decision*, 64 FCC 2d at 72, *affirming Initial Decision*, 64 FCC 2d at 404-405.

[14] *Docket 19129 Recon. Decision*, 67 FCC 2d at 1438.

[15] *Illinois Bell*, 911 F.2d at 784.

[16] *Id.* at 785.

[17] We note that in the *Rate Base Orders*, the Commission also adopted a simplified alternative to the lead-lag methodology, as well as an even simpler methodology for small carriers. *See* 47 C.F.R. §65.820(e).

[18] Trunkline LNG Co. v. FERC, 921 F.2d 313, 318 (D.C. Cir. 1990).

[19] Minimum bank balances, another element of working capital are added to the resulting figure. This Commission includes materials and supplies in the rate base separately, 47 C.F.R. § 65.820(b).

[20] *Illinois Bell*, 911 F.2d at 783.

purpose: determining the amount of cash required for the day-to-day activities of the business. We have not viewed lead-lag cash working capital studies as a generalized method of accounting for each and every timing difference between the outlay of investor funds and the recovery of that outlay from ratepayers, and we see no reason to change our views on this issue. Moreover, we note that many regulators using the lead-lag approach exclude non-cash expenses on this basis.[21]

11. Throughout this proceeding, carriers have argued that our lead-lag studies deprive investors of full compensation on their investment by failing to consider the time lag between the reduction of the rate base through depreciation of an asset and the recovery from ratepayers of the depreciation expense. As discussed below, we conclude that investors are not denied earnings opportunities by this approach since the time lag is compensated for in the allowed rate of return.

12. In finding the Commission's prior explanation of the exclusion of depreciation from lead-lag studies to be inadequate, the court focused on the following example from the carriers' pleadings:

> [Assume] a $1000 investment with a 4-year life and [a] 45-day lag between when service is rendered and payment is made. [After two years], the rate base [has been depreciated to $500, but the carrier] has collected only $469. Thus, the investor is short $31 - he does not earn [a return] on it in the rate base: it has not been returned for reinvestment. As this phenomenon continues over the life of the plant, ratepayers have continuous use of $31 of the investor's money at no cost.[22]

13. We acknowledge that the time lag demonstrated in the example does exist, and that investors will only recover the amount in the lag -- the $31 -- a certain number of days after the asset is completely removed from the rate base. It does not follow, however, that ratepayers have the "continuous use" of this $31 at no cost. Rather, the time lag is recognized by investors, and is compensated for in the allowed rate of return, as opposed to being factored into the calculation of a carrier's cash working capital. That is, in prescribing an allowed rate of return, this Commission uses market-based cost of capital methodologies which incorporate investors' perceptions and requirements, including the investors' perception of the time lag. Thus, to use the above example, the ratepayers' cost for the use of the investors' $31 is the higher rate of return investors receive because of their perception of the Commission's historical depreciation recovery policy. If depreciation were included in lead-lag studies, and thus, in cash working capital, investors would not expect as high a rate of return, and thus, the allowed rate of return would, all other things remaining constant, be lower. [23]

14. Our exclusion of depreciation expenses in the lead-lag approach is well known; it is a matter of public record and has been in place for over fourteen years. Investors have long been aware of the effect of this approach. They are familiar with the fact that every cash flow has to be adjusted for timing, and thus, to the extent that the lag involving depreciation recovery exists, capital markets have knowledge of and adjust for the time lag. Markets adjust for this timing through the price of the stock. That is, the price an investor is willing to pay for a share of stock is a function of the timing as well as the size of future dividends. Therefore, investors, knowing that their capital invested in the regulated enterprise will be returned to them with this lag, demand a higher return than they would if the lag did not exist. Again, because we use market-based cost of capital methodologies (which take into account investor perception and requirements) in prescribing a rate of return, the revenue lag of which the carriers complain is reflected in, and compensated for, by our allowed rate of return. [24]

B. Property Acquisition Adjustments

15. In the *Rate Base Orders*, the Commission reaffirmed its historical practice of presumptively excluding the amounts recorded in Account 2005 (*i.e.*, plant adjustments) from the rate base unless a carrier can specifically justify the amount be included on a case-by-case basis. In response to complaints that its case-by-case standard was vague, the Commission clarified that, as a general rule, plant adjustments resulting from the purchase of plant with traffic (*i.e.*, buying another carrier's plant along with the right to provide service to the customers that are served by that plant) require a higher degree of justification than adjustments resulting from the purchase of plant without traffic.

16. The Commission also stated that rate base recognition would beeasier to justify when a carrier purchases plant without traffic from another carrier at or below the price it could obtain from other sources. This is because both the carrier and the ratepayer stand to benefit from such an acquisition assuming the plant is needed. However, in those cases where the purchase involves plant with traffic, a showing must be made why rate payers should pay rates based on a higher value for equipment and service that are the same as before the acquisition. In excluding Account 2005 from the rate base, the Commission did not distinguish between cases involving the purchase of plant with traffic from non-affiliates and those involving the purchase of plant without traffic from non-affiliates.

17. The court found that the Commission adequately justified its presumption of exclusion from the rate base of plant acquisition adjustments resulting from purchases of plant with traffic from an affiliate or a non-affiliate and

---

[21] *See* Opinion 55, Southern Edison Company, Docket No. E-8570, *Opinion And Order,* 8 FERC 61.099 (1979); Western Massachusetts Electric Co., D.P.U. 89-255, *Order of the Massachusetts Dept. of Public Utilities,* 114 P.U.R. 4th 1 (1990); Indiana Gas Co., Inc., Cause No. 38080, *Order of Indiana Utility Regulatory Commission,* 86 P.U.R. 4th 241 (1987); *but see* Office of Consumers' Counsel v. Public Utilities Commission, 495 N.E. 2d 930 (Ohio 1986) (affirming the PUC's inclusion of non-cash expenses in lead-lag studies).

[22] *Illinois Bell,* 911 F.2d at 783.

[23] We note that there is no legally mandated methodology for determining cash working capital. Thus, we could change our policy and allow carriers to include depreciation expense in lead-lag studies. However, if we were to make such a significant change in our rate base practices, we would also have to consider changes in the allowed rate of return.

[24] *See* Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, *Order,* 5 FCC Rcd 7507, 7521, para. 120 (1990).

plant without traffic from an affiliate. However, it remanded for further Commission consideration the policy of presumptively excluding from the rate base the plant acquisition adjustment resulting from a transaction in which a carrier purchases the plant without traffic from a non-affiliate. The court stated that the Commission had given no reason for assuming that an acquisition price for plant without traffic from a non-affiliated carrier would not reflect fair market value.

18. After further review of this matter, we conclude that there is no reason to continue to presumptively exclude from the rate base the premium paid for plant without traffic acquired from a non-affiliated carrier. We believe that a transaction involving the acquisition of plant without traffic from a non-affiliate should be treated no differently than any other arm's length transaction with a non-affiliate. When the price of anasset is determined by an arm'slength transaction in the normal course of business, we believe there is reasonable assurance that the price paid would not be manipulated to the detriment of ratepayers. We see no incentive for a carrier to inflate the rate base in such situations. Further, since such a transaction would not involve traffic, it would not result in an increased revenue requirement for existing ratepayers that is attributed solely to a change in ownership. Therefore, we will presumptively allow the full cost of plant acquired without traffic from a non-affiliate to be included in the rate base.

IV. CONCLUSION

19. We reaffirm our rule to exclude non-cash expenses from lead-lag studies used to determine cash working capital. Although we recognize the time lag between reduction of the rate base and recovery of non-cash expenses resulting from such reduction, any amount of investor capital included in the time lag is compensated for in our rate of return. We also will now allow carriers to presumptively includein their rate bases any plant acquisition adjustments which result from acquisition of plant without traffic from a non-affiliated carrier. The adjustments resulting from such arm's length transactions provide no incentive for an unnecessary inflation in rate base.

V. ORDERING CLAUSE

20. Accordingly, IT IS ORDERED, that pursuant to Sections 4(i), 4(j), 201-205, and 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201-205, and 220, and 47 C.F.R. §65.820(d) the Commission's prescribed methodology for calculating cash working capital IS REAFFIRMED.

21. IT IS FURTHER ORDERED, that plant acquisition adjustments found in Account 2005 of the Uniform System of Accounts that are the result of an acquisition of plant without traffic from a non-affiliated carrier presumptively ARE TO BE INCLUDED in the rate base effective from the date of adoption of this Order.

22. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

FCC 91-334

In the Matter of TELEPHONE COMPANY- CABLE TELEVISION Cross-Ownership Rules, Sections 63.54 - 63.58	))))))	CC Docket No. 87-266

FURTHER NOTICE OF PROPOSED RULEMAKING
FIRST REPORT AND ORDER AND
SECOND FURTHER NOTICE OF INQUIRY

Adopted: October 24, 1991 Released: November 22, 1991

Comment Date: January 23, 1992
Reply Comment Date: February 24, 1992

By the Commission: Commissioners Barrett, Marshall, Quello and Duggan issuing separate statements.

Table of Contents

Paragraph No.

- I. Introduction 1
- II. Background 3
- III. Further Notice of Proposed Rulemaking 6
  - A. Commission Goals 7
  - B. Video Dialtone 10
    - 1. Video Dialtone and the Public Interest 12
      - a. Infrastructure Considerations 13
      - b. Marketplace Efficiency Considerations 15
      - c. Diversity Considerations 17
    - 2. Video Dialtone and Advanced Network Design 18
    - 3. Authority to Implement Video Dialtone 20

        a. Statutory Authority 20

        b. Modification of Final Judgment 22

    C. Implementation of Video Dialtone 23

        1. Objectives for Implementing Video Dialtone 24

        2. Regulatory Approaches 25

        3. Revisions to Section 63.54 37

        4. Other Rule Changes 41

IV. First Report and Order 43

    A. Applicability of Section 613 to Interexchange Carriers 44

    B. Franchising under Section 621 47

V. Second Further Notice of Inquiry 53

    A. Direct Provision of Video Programming by Local Exchange Carriers 53

    B. Investment Incentives 57

VI. Conclusion 59

VII. Ex Parte Presentations 60

VIII. Initial Regulatory Flexibility Analysis 61

IX. Comment Filing Dates 69

X. Ordering Clauses 70

APPENDIX A: PARTIES FILING COMMENTS

APPENDIX B: PROPOSED RULE CHANGES

I. Introduction

1. We here propose to modify our rules to permit local telephone companies to provide video dialtone, thereby encouraging development of a competitive video marketplace in the United States. A video dialtone policy should serve the public interest by promoting the competitive provision of non-programming video and non-video services by both telephone companies and other service providers. In order to encourage development of a truly competitive and innovative communications infrastructure that ensures a

diversity of information sources and that is flexible enough to accommodate technological advances, the Commission should permit advanced telecommunications networks to develop free from unnecessary regulation. Moreover, by ensuring that artificial regulatory barriers do not thwart the growth and satisfaction of consumer demand for video and non-video services, our proposal for video dialtone should encourage competition to develop wherever possible.

2. In this Further Notice of Proposed Rulemaking (FNPRM), we consider the public interest benefits of a video dialtone model for the distribution of video programming by telephone companies. We describe how the proposed video dialtone model meshes with the emerging advanced network and describe some of the basic characteristics of the video dialtone model. We also analyze our statutory authority to permit video dialtone and describe alternative regulatory approaches to implementing video dialtone and ask for comment on other possible approaches. We also ask for comment on proposed changes to our rules to facilitate the deployment of video dialtone and ask parties to identify other changes to our rules that may be desirable. In the First Report and Order, we conclude that the telephone/cable cross ownership ban of Section 613 of the Cable Communications Policy Act of 1984 (Cable Act)[1] does not apply to interexchange carriers. We also find that Section 621 of the Cable Act[2] does not mandate that a local exchange carrier or its customer-programmer obtain a municipal cable television franchise in order to offer video dialtone service. In the Second Further Notice of Inquiry, we examine the issue of direct provision of video programming by local exchange carriers (LECs) and seek comment on whether we should recommend to Congress that it make any changes in the current statutory prohibition. We also seek comment on what safeguards would be appropriate for local exchange carriers if they were permitted to provide video programming directly to subscribers. We also seek comment on whether any other statutory or regulatory changes would be desirable in order to expand investment incentives for video dialtone.

II. Background

3. Over the past several decades, the Commission has on a number of occasions considered the proper role for local telephone companies in the distribution of video programming. Currently, Sections 63.54 - 63.58 of the Commission's rules,[3] and Section 613(b) of the Cable Act,[4] make it unlawful for any common carriers to "provide video programming directly to subscribers in its telephone service area."

---

[1] Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 et seq., 533.

[2] 47 U.S.C. § 541.

[3] 47 C.F.R. §§ 63.54-63.58.

[4] 47 U.S.C. § 533(b).

4. In 1987, the FCC issued a Notice of Inquiry (NOI)to review the telephone/cable cross ownership restrictions set forth in the Commission's rules and incorporated into the Cable Act.[5] Generally, the NOI sought comment on whether the original reasons for the cross-ownership rules were still valid, given changing technology and the developing communications marketplace; whether a different regulatory approach would better serve the public interest; and whether, in order to encourage an environment of greater competition in the provision of cable facilities and services, direct provision of video programing by telephone companies should remain restricted.

5. In 1988, the FCC issued the Further Notice of Inquiry and Notice of Proposed Rulemaking (FNOI).[6] In the FNOI, the Commission tentatively concluded that the Commission should recommend to Congress that the cross-ownership ban be repealed or modified to permit the local telephone companies to provide video programming within their service areas subject to Computer III-type safeguards.[7] Additionally, we sought comment on: whether the Cable Act required the telephone common carriers or customer programmers of such carriers to obtain a local franchise as a prerequisite to providing such service; whether the cable cross-ownership ban applied to interexchange carriers; whether the standards of affiliation between the local telephone companies and cable operators should be modified to permit a greater degree of ownership affiliation; and whether we should grant waivers of the cross ownership ban for "good cause" for advanced integrated broadband systems. The Commission received extensive comments on its proposed conclusions.[8]

---

[5] Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, 2 FCC Rcd 5092 (1987); 47 U.S.C. § 533(b); 47 C.F.R. §§ 63.54-63.58.

[6] See Telephone Company-Cable Television Cross Ownership Rules, Sections 63.54-63.58, 3 FCC Rcd 5849 (1988) (FNOI).

[7] The Computer III safeguards included a set of cost accounting safeguards to protect against possible cross-subsidization of nonregulated activities, as well as a series of reporting and disclosure requirements to protect against discrimination. See Amendment of Section 64.702 of the Commission's Rules and Regulations, Phase I, Report and Order, 104 FCC 2d 958 (1986) (Computer III), reconsideration, 2 FCC Rcd 3035 (1987) (Phase I Reconsideration), further reconsideration, 3 FCC Rcd 1135 (1988) (Phase I Further Reconsideration), second further recon., 4 FCC Rcd 5927 (1989) (Phase I Second Further Reconsideration), Phase I Order and Phase I Reconsideration Order vacated, California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Phase II, 2 FCC Rcd 3072 (1987) (Phase II Order), recon., 3 FCC Rcd 1150 (1988) (Phase II Reconsideration Order), Phase II Order vacated California v. FCC, 905 F.2d 1217; pending petition for review of Phase II Order and Phase II Reconsideration Order pending, BellSouth v. FCC (9th Cir. No. 88-7290, filed April 20, 1988).

[8] The history of the Commission's rules regarding the ownership of cable television systems and provision of video programming by telephone companies is set forth more fully in the FNOI, 3 FCC Rcd at 5849, paras. 2-9

III. Further Notice of Proposed Rulemaking

6. In light of the comments filed in the record and the evolving technology of public telecommunications networks, we examine first, the Commission's earlier determination that LEC entry into the cable television business would best serve the public interest. We tentatively conclude here that a "video dialtone" policy will provide the best foundation to achieve our goals of promoting the development of an efficient, nationwide, publicly accessible, advanced telecommunications infrastructure, facilitating robust competition, and fostering the First Amendment goal of ensuring a diversity of information sources.[9] Video dialtone would be common carrier-based with the addition of competitive non-common carrier services that would provide end users access to video programming and other information sources. We envision video dialtone as analogous to the ordinary telephone dialtone so as to give consumers access to a wide variety of services. These services might include video programming (provided by entities other than the LECs), videotext, and videophone, as well as other advanced telecommunications services. We tentatively conclude that deployment of video dialtone is permitted under the Cable Act and examine alternative ways video dialtone could be implemented. We further tentatively conclude that a video dialtone approach utilizing a two-level gateway would best serve our objectives and invite comment on the feasibility of deploying such a system as well as the advantages and disadvantages to the public of so proceeding. We recognize other regulatory approaches to implementing video dialtone and seek comment on such alternatives. Finally, we examine what changes to our rules are necessary or desirable for the deployment of video dialtone and whether our rules create incentives or disincentives for investment in an advanced infrastructure.

A. Commission Goals

7. At the outset, we revisit and reformulate the Commission's goals in this proceeding based upon the comments filed in this proceeding as well as upon technological advances. First, we believe that under Section 1 of the Communications Act (the Act)[10], the Commission should seek to make

---

(1988). Comments were submitted by the parties listed in Appendix A. In the Notice of Inquiry in MM Docket 89-600, we invited commenters to assess the extent to which the outcome in the instant proceeding could enhance or thwart the development of vigorous competition in the video marketplace. Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, Notice of Inquiry, 5 FCC Rcd 362, 363 n.18 (1989).

[9] See Associated Press v. United States, 326 U.S. 1, 20 (1945).

[10] Communications Act of 1934, as amended, 47 U.S.C. § 151. Section 1 defines the purpose of the Communications Act and mission of the FCC to "make available, so far as possible, to all the people of the United States a

available nationwide, publicly accessible, advanced telecommunications networks able to provide adequate facilities at reasonable charges. Such an advanced infrastructure might some day include switched, broadband capability and integrated voice, data, and video services.[11] Development of such an infrastructure may provide the opportunity for expanded economic development in many communities. The potential demand for video network capabilities is evidenced by the growing interest of educational, medical, governmental and business institutions in public broadband networks.[12] The need to reexamine our regulatory policies also is driven by the increasing convergence of previously separate markets embracing voice, data, graphics and video.[13] As cost-effective technology evolves, a Commission policy facilitating a universally available advanced telecommunications infrastructure capable of providing integrated voice, data and video services will serve the public interest.

8. Second, we believe that our regulatory approach should foster competition in the video and communications markets, so that free market forces rather than governmental regulation will determine the success or failure of new services. Market demand, rather than governmental edict, should stimulate the construction and use of advanced telecommunications networks, including broadband networks. Local exchange carrier provision of video dialtone could provide important competition for existing cable systems. We believe that by promoting competitive alternatives, consumers

---

rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges...."

[11] Broadband capability may, but need not, depend on the use of fiber optic cable transmission. Digital compression technology may make it possible to transmit video over existing copper facilities. See generally, High Speed Digital Subscriber Lines, IEEE Journal on Selected Areas in Communications, vol. 9, No. 6. (Aug. 1991).

[12] See U.S. Congress, Office of Technology Assessment, Critical Connections: Communications for the Future, OTA-CIT-407 (U.S. Government Printing Office, Jan. 1990); D. Bollier, 1988 Review Conference on New Electronic Technologies for the Elderly; Issues and Projects (Aspen Institute, Communications and Society Forum Report, 1989); L. Gallagher and D. Hatfield, Distance Learning: Opportunities in Telecommunications Policy and Technology (Washington Annenberg Program, 1989). See generally Networks of the Future: En Banc Hearing Before the FCC (May 1, 1991) [hereinafter Networks of the Future] (testimony of Dr. James A. Woodward, and Dr. Barry K. Gilbert). Copies of the written testimony given in the hearing have been placed in the record of this proceeding.

[13] See generally, Networks of the Future, supra note 12. See also M.L. Dertouzos, Building the Information Marketplace, Technology Review, Jan. 31, 1991 at 29; G.A. Keyworth, II and B. Abell, Competitiveness and Telecommunications, America's Economic Future: The House-to-House Digital Fiber Optic Network (Hudson Institute 1990).

will reap the maximum benefits from technological innovation. Moreover, by creating a favorable environment for competition in the distribution of video as well as other telecommunications services, we will enable consumers to benefit through increased services, lower prices and new features.

9. Finally, we believe that fostering a diversity of information sources for the American public should be a fundamental tenet underlying all policy decisions in this area.[14] In fact, diversity concerns heavily influenced our original decision in 1970 to ban LEC involvement in cable television.[15] Just as others have argued for a separation of content from conduit[16] in order to ensure the "widest possible dissemination of information from diverse and antagonistic sources,"[17] we must tailor our actions here and now to promote a diversity of information sources.

B. Video Dialtone

10. Our view of video dialtone is that it is an enriched version of video common carriage under which LECs will offer various non-programming services in addition to the underlying video transport. Video common carriage encompasses the transmission of entertainment video programming and other forms of video communications, both interstate and intrastate.[18] Video common carriage may be a private line, or point-to-multipoint offering; or it may be switched, although switched systems still are largely experimental. Ultimately, video common carriage could be offered over a broadband network analogous to the existing nationwide switched narrowband network. Such a network would enable any subscriber to transmit and receive a video signal to

---

[14] See Associated Press v. U.S., 326 U.S. at 20.

[15] See Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems, 21 FCC 2d 307, 324-326 (1970) (Section 214 Certificates Order), recon. in part, 22 FCC 2d 746 (1970), aff'd, General Telephone Co. of S.W. v. United States, 449 F.2d 846 (5th Cir. 1971). We note that the diversity principle is an underlying goal in the cable area as well. See Sections 601(4) and 612(a) of the Cable Act, 47 U.S.C. §§ 521(4), 532(a).

[16] See, e.g., Report to the President, The Cabinet Committee on Cable Communications, Office of Telecommunications Policy (1974); Video Program Distribution and Cable Television, National Telecommunications and Information Administration (NTIA) Report No. 88-233 (1988) at 54-58.

[17] Associated Press v. U.S., 326 U.S. at 20.

[18] Video communications may include "video programming" as defined in the Cable Act, i.e., programming provided by, or generally considered comparable to, programming provided by a television broadcast station, or it may be other video communications. See 47 U.S.C. § 522(16).

or from any other subscriber. Broadband video common carriage networks might run parallel to the narrowband network, or they might be integrated with switched narrowband communications.

11. Some forms of video common carriage are already offered. For example, video conferencing services currently are available from a number of interexchange carriers. In addition, transport of information and graphics that can appear on a video display terminal is offered on a common carrier basis over the existing narrowband telephone network. Local exchange carriers have provided point-to-point private line video transport services between a program source and a distributor to broadcasters, cable television systems and television networks for many years. Some LECs currently offer, on a common carrier basis, complete video transport services to cable operators from a cable system's headend to residential customers' premises.[19] The plant used for this service generally is of the same kind and architecture as traditional cable television distribution plant. Several LECs, however, are currently providing experimental video common carrier transport services to cable operators using fiber optic transmission media to subscribers' homes.[20] Local exchange carriers are also experimenting with early forms of integrated telephone and video transport services.

1. Video Dialtone and the Public Interest

12. Video dialtone would enrich the video common carriage services that link customers to video programmers by facilitating the provision of additional non-programming services and of enhanced video gateways including detailed menus, information search capabilities, and subscriber-driven data processing. In this regard, video dialtone will provide a "platform" through which subscribers can access video and other information services. Consideration of the extensive comments filed in this and other

---

[19] This is referred to as "channel services." See 47 C.F.R. § 63.08. The Commission has granted blanket authority for LEC provision of channel service outside of the carrier's telephone service area, but such service within the carrier's service area still requires prior approval, pursuant to Section 214 of the Act. Blanket Section 214 Authorization for Provision by a Telephone Common Carrier of Lines for its Cable Television and other Non-Common Carrier Services Outside its Telephone Service Area, 96 FCC 2d 623 (1984).

[20] See, e.g., Indiana Bell Telephone Co., Inc., W-P-C 6630, adopted Dec. 3, 1990; Contel of California, Inc., 5 FCC Rcd 1711 (1990); General Telephone Company of California, 4 FCC Rcd 5693 (1989) remanded National Cable Television Assoc., Inc. v. FCC, 914 F.2d 285 (1990); Southern Bell Telephone Company, W-P-C 6166, adopted September 27, 1988. These trials include both fiber-to-the-curb and fiber-to-the-home architectures.

proceedings[21] has led us to tentatively conclude that the video dialtone policy will promote the Commission's goals in this proceeding by encouraging the provision of an accessible, feature-rich network that can accommodate the needs of all users. Consistent with this approach, we have decided to reexamine, in the context of video dialtone, the Commission's previous proposal to recommend to Congress the elimination of the ban on LEC involvement in video programming.[22]

13. a. Infrastructure Considerations. We tentatively conclude that development of an advanced cost-effective telecommunications infrastructure is likely to be achieved more quickly if we adopt a video dialtone policy. Permitting the LECs to provide video dialtone services will remove unnecessary barriers to the development and construction of broadband facilities and will offer incentives to develop and construct, operate, and promote such facilities for the general public benefit. If carriers construct the underlying broadband common carrier network used to provide enhanced services, they will have strong incentives to promote the growth and use of the network, even though in doing so they improve the capabilities of competing enhanced service providers.[23] Under the video dialtone model, LECs will be able to respond to marketplace demand for video common carriage and advanced telecommunications services in the multimedia environment by providing both the underlying video dialtone common carriage as well as their own competitive non-programming services. On this basis, we tentatively conclude that video dialtone will directly contribute to the development of a nationwide, advanced telecommunications infrastructure. We invite comments on the nature of LEC incentives and the likely infrastructure benefits and costs of proceeding with video dialtone at this time.

14. Local exchange carrier networks with the capability to establish switched broadband connections could potentially further our goals to an even greater degree, such as by increasing competition and information diversity. For instance, if a LEC were to build a broadband network under the video dialtone model using current technologies and architectures, it is possible that demand for system capacity would exceed supply, resulting in service suppliers being denied access to the non-discriminatory gateway. In contrast, a switched broadband network might offer virtually unlimited capacity since the number of service suppliers on the platform would not be constrained by the transmission capacity of the network.[24] We seek comment on whether video dialtone regulation should impose some minimum broadband switching requirement, and the feasibility of LECs being able to implement such a requirement. There may also be significant public benefits from the development of integrated networks which enable video, voice and data to be transmitted over the same facility. We seek comment on the likely evolution of such networks and the feasibility of so proceeding. We also seek comment on the costs of constructing a system with broadband switching capability.

---

[21] See, e.g., Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, Report in MM Docket 89-600, 5 FCC Rcd 4962 (1990); Networks of the Future, supra note 12 (testimony of Dr. Barbara O'Conner).

[22] See Second Further Notice of Inquiry, infra Section V.

[23] The question of whether LECs should be permitted, along with others, to provide video programming directly is a separate question and is raised below in the Second Further Notice of Inquiry, see infra Section V.

15. b. Marketplace Efficiency Considerations. Second, we believe that by proceeding with video dialtone, with its emphasis on robust competition among service providers, significant benefits for the public will accrue. For example, the presence of an alternative broadband network generally available on a common carrier basis, could be expected to stimulate enhanced service providers overall, and video service providers in particular, to offer new choices to consumers. By stimulating overall use of facilities, the public would secure significant efficiency benefits and prices could be expected to decline. Such a vigorous enhanced services market also would be likely to encourage service providers to offer competitive prices and develop better customer services.

16. Improved service quality and declining prices for existing video delivery services are similarly likely to follow as competitors seek to retain existing market shares and attract new viewers. Indeed, the availability of video dialtone should alleviate to some extent the current market power maintained by the cable industry, while at the same time stimulating all cable operators to offer better customer service and more competitive prices to subscribers.[25] Additionally, we believe that the video dialtone model is sufficiently flexible to allow competitors to satisfy public demand with technological innovations to the network which are impossible even to foresee today. Parties should comment on the extent to which the video dialtone regulatory framework can accommodate technological advances and the extent to which the video dialtone model is likely to produce such competitive benefits.

17. c. Diversity Considerations. Finally, among the benefits we see coming from the video dialtone model is the increase in the diversity of information sources. The video dialtone model will foster the dissemination of information by encouraging a multitude of voices that could reach every household -- the bedrock principle of the First Amendment.[26] Video dialtone

---

[24] In the context of video program distribution, a switched broadband network can offer "on demand" video services when the network can establish a one-way, point-to-point broadband connection between the central office or headend and the subscriber. If the network can establish a two-way, point-to-point broadband connection, it can also provide a videophone service.

[25] See e.g., Report in MM Docket No. 89-600, 5 FCC Rcd at 5003, 5006, 5031.

[26] Associated Press v. U.S., 326 U.S. at 20.

would offer an alternate route to the American household for program producers and program packagers who now must largely depend upon television broadcast stations and cable television systems to reach their markets. Each of these systems is free to treat program suppliers differently based upon the content of their services. Numerous commenters have argued that by proceeding with video common carriage rather than LEC ownership of programming from the outset, a number of potential discrimination problems triggered by LEC involvement in the selection and ownership of video programming will be avoided.[27] Further, some commenters have stated that, if permitted to do so, they would provide video programming in the manner of traditional cable system operators.[28] We believe there is no public gain from merely substituting one such entity for another, and that the diversity benefits we seek are premised upon non-discriminatory access for program suppliers and consumers. Moreover, if local exchange carriers offer non-programming services under the video dialtone model, their presence as a second wireline transport provider in competition with cable systems could substantially increase information diversity. We also seek comment on whether it would be in the public interest to permit a local exchange carrier to acquire the facilities of a cable television system in the LEC's service area without obtaining a cable franchise and operate those facilities under the video dialtone regulatory structure, with its attendant nondiscrimination obligations enhancing competition among service providers.

2. Video Dialtone and Advanced Network Design.

18. There have been significant developments in technology in the past several years concerning the capabilities of advanced telecommunications networks. We believe that the video dialtone model will accommodate evolving technology. Advances in fiber optic and other new broadband technologies compel us to anticipate more widespread video common carriage.[29] Today, LECs generally confine their use of fiber optic transmission facilities to interoffice and feeder network applications, where sufficient traffic exists to justify the additional bandwidth relative to traditional copper cable. Over time, as optical transmission technologies mature and costs decline, we expect to see fiber optic cable deployed incrementally closer to the end user. Fiber will continue to be deployed in the feeder network until telephone companies decide to extend fiber to within a few hundred meters of the home using a "fiber to the curb" system. The final step may be to extend fiber optic cable all the way to the subscriber.[30] Despite the apparent advantages of fiber optic cable, we do not intend, however, to endorse any particular medium or network architecture. We ask that parties comment upon the impact fiber-based and other transmission technologies might have on the evolution of advanced networks.

---

[27] See, e.g., United Church of Christ Comments at 17-18 (filed Dec. 16, 1988); Florida Public Service Commission Comments at 4-5 (filed Dec. 16, 1988).

[28] See, e.g., Pacific Telesis Comments at 2 (filed Dec. 16, 1988); Ameritech Operating Companies Reply Comments at 16 (filed Jan. 27, 1989).

[29] Fundamental advances in the manufacture of microelectronic devices and fiber optic cable have led to large reductions in the cost of optical transmission systems. Optical networks can transport high bandwidth video services as well as traditional narrowband services. In addition, digital technology makes it possible to develop integrated broadband networks that combine voice, data, and video services on one cable. Moreover, advances in hardware are being followed by the development of new standards to administer how these networks will be operated. Already, the International Telephone and Telegraph Consultative Committee (CCITT) has agreed to a synchronous optical network (SONET) standard which determines the underlying transmission structure of the telephone network, and agreements may be close at hand for a B-ISDN standard which defines the required interfaces to the network. See generally B-ISDN: High Performance Transport, IEEE Communications Magazine, vol. 29, no. 9 (Sept. 1991).

19. Such broadband networks could serve as a platform through which subscribers can efficiently gain access to a broad array of telecommunications services. The history of common carriage offers a number of examples of demand stimulated by the supply of new network capabilities.[31] We tentatively conclude that under the video dialtone model, the LECs would receive the regulatory structure and incentives they need to establish a network platform that will enable entrepreneurial providers of voice, data, and video services to develop services responsive to the demands of the customers. Parties are requested to comment on the nature of services and markets that may develop as the advanced network emerges under the video dialtone model.

3. Authority to Implement Video Dialtone

a. Statutory Authority

20. Some parties have argued that current rules and statutes allow common carriers to distribute video services on a common carrier basis.[32] We tentatively agree.

---

[30] A substantial benefit of a fiber optic network is the flexibility it affords the network operator in organizing network facilities to be used for new and existing services. With fiber, the role of the network operator becomes one of bandwidth management rather than facilities management. With a traditional copper network, a request for a new telephone line requires the network operator to physically locate an unused copper wire pair to provide service. With a digital platform, the request for a new service could be accommodated through software changes without the need for facilities management in the distribution network.

[31] For example, the development of touch tone dialing and out-of-band signalling networks, designed initially to facilitate efficient interconnection of callers, precipitated introduction of custom calling features for users. In addition, the establishment of 800 and 900 service continues to provide customers with a wide range of audiotext services.

21. Section 613(b)(1) of the Cable Act[33] states that it is unlawful for a common carrier subject to Title II to "provide video programming directly to subscribers in its telephone service area."[34] While the term "provide video programming directly to subscribers" is nowhere defined in the Act, a review of the legislative history evidences the Congressional concern behind the prohibition: to bar local exchange carriers from becoming cable operators in their service areas.[35] This ban was intended to ensure that LECs do not provide video programming directly to subscribers in the same manner as traditional cable operators in order to prevent the development of local media monopolies and to encourage a diversity of ownership of communications outlets.[36] Yet, some commenters contend that this prohibition restricts telephone companies from "providing" video programming by means of common carrier services.[37] Since under our proposed video dialtone model the LEC could not itself provide video programming in the manner of cable television operators, either by selecting such programming or having a financial interest in such programming, we tentatively conclude that Section 613(b) presently imposes no bar to the implementation of video dialtone.[38] We request comment on this analysis.

---

[32] See, e.g., United States Telephone Association Comments at 11-12 (filed Dec. 16, 1988); NYNEX Telephone Companies Comments at 11-12 (filed Dec. 16, 1988); Contel Corporation Comments at i-iv, 35-38 (filed Dec. 16, 1988).

[33] 47 U.S.C. § 533(b)(1).

[34] Id. While the term "video programming" is defined in the Cable Act, 47 U.S.C. § 522(16), we ask parties to address potential difficulties which may arise in the future in applying that definition as new services develop.

[35] See Report of the Committee on Energy and Commerce, to accompany H.R. 4103, Cable Franchise Policy and Communications Act of 1984, H.Rep. 98-934, 98th Cong., 2d Sess. (1984) [hereinafter Cable Report] at 57. ("Section 613(b) prohibits a common carrier from selecting or providing the video programming to be offered over a cable system.")

[36] Cable Report, supra note 35, at 55.

[37] See, e.g., Warner Cable Communications, Inc. Comments at 2-4 (filed Dec. 16, 1988).

[38] In fact, local telephone companies providing video dialtone would be fundamentally different from cable operators, who have been found to share attributes of the traditional press in their broad discretion in the selection of programming. See Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1450-1452 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986); see also Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), cert. denied, 486 U.S. 1032 (1988).

b. Modification of Final Judgment

22. Under the express terms of the *Modification of Final Judgment* (MFJ),[39] the BOCs were prohibited from providing "information services" without a waiver from the trial court. Recently, however, the trial court, in response to an appellate court directive,[40] has lifted the ban on BOC provision of information services.[41] Thus, to the extent we would permit the BOCs to provide enhanced information services as part of video dialtone, the MFJ does not pose a bar. We note, however, the continuing applicability of the inter-LATA restriction which may restrict BOC provision of video dialtone service if separate facilities are required for each LATA.[42] We solicit comment on the way such services may develop and the applicability of this restriction to video dialtone.

C. Implementation of Video Dialtone

23. Implementation of video dialtone could occur under more than one regulatory approach. We set forth below two such approaches. A comparison of these two approaches leads us to tentatively conclude that a "two-level gateway" regulatory structure will better achieve our goals and provide an easy-to-use, flexible framework for video dialtone. Such an approach best serves our objectives and meshes with the existing regulatory framework. It also obviates the need to draw regulatory distinctions between the distribution of video and non-video services -- distinctions that are becoming increasingly problematic as technologies converge. We invite parties to comment on this tentative conclusion and to suggest alternative ways in which video dialtone could be implemented.

---

[39] United States v. Western Electric Co., Inc., 552 F.Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983) ("*Modification of Final Judgment*" or "*MFJ*"). *See also* United States v. Western Electric Co., Inc., 900 F.2d 283 (D.C. Cir. 1990), *cert. denied*, MCI Communications Corp. v. United States, 111 S.Ct. 283 (1990) (*Information Services Restriction Remand*). For the background of the *MFJ* see Consolidated Application of AT&T for Authorization Under Sections 214 and 310(d) of the Act, 96 FCC 2d 18 (1983), *recon.* 98 FCC 2d 141 (1984).

[40] United States v. Western Electric Co., Inc., 767 F. Supp. 308 (D.D.C. 1991), *appeal docketed*, No. 91-5263 (D.C. Cir. Aug. 30, 1991) (stay lifted on Oct. 7, 1991, *application for review denied*, American Newspaper Publishers Association v. United States, 60 U.S.L.W. 3340 (Oct. 30, 1991)).

[41] *Id.*

[42] *See* United States v. Western Electric, 1989-1, Trade Cas. (CCH) ¶ 68,400, 1989 WL 21992 (D.D.C. Jan. 24, 1989) *aff'd.* 907 F.2d 160 (D.C. Cir. 1990), *cert. denied*, Bell Atlantic Corp. v. United States, 111 S.Ct. 1018 (1991).

1. Objectives for Implementing Video Dialtone

24. To further the public interest goals described above, we tentatively conclude that the implementation of video dialtone should be guided by certain core objectives. First, it is important to implement video dialtone in a way that best facilitates competition in the provision of services. Thus, access to video dialtone for video program and other service providers should be on a non-discriminatory basis. This concept of equal access will encourage competition and promote our diversity goals. If video dialtone is to provide the maximum public interest benefits, we must ensure that video dialtone does not give any provider of competitive services an unfair advantage over its competitors. Second, video dialtone should be easy for the average person to use. Just as the average consumer now can easily access an array of services through his or her telephone, we envision video dialtone as facilitating access to a similar plethora of video services. Finally, the video dialtone regulatory framework should be sufficiently flexible to accommodate new technological developments. The capabilities of telecommunications networks have been evolving, and rapid change is likely to characterize this area for decades to come. While it might serve the public interest to begin deployment of video dialtone as soon as possible, we do not want to constrain its development by today's technology. We invite parties to comment upon these fundamental objectives for implementing video dialtone and to suggest any other objectives that they believe the implementation of video dialtone should further.

2. Regulatory Approaches

25. Two-Level Approach. Under this approach, the LEC would provide video dialtone in two levels. The first level would provide an "electronic platform" or "window" that opens to a broader network, giving the user access to video and non-video communication services provided by a multiplicity of competitive service providers. Through this platform, consumers could gain access to video programs (provided by entities other than the local exchange carrier), information services, competing video and videotext gateways, videophone, and other communications services.

26. This first level platform would consist of basic services and services adjunct to basic services, which would be regulated under Title II of the Communications Act, and thus provided on a non-discriminatory common carrier basis.[43] The platform will give video service providers access to end-to-end transmission capabilities to provide their programming to consumers. Although local exchange carriers, rather than the Commission, will ultimately determine the precise basic features and functions they choose to offer as part of the platform, the platform is likely to include basic directory and routing functions. Directory functions might include introductory and orientation information (including tutorial and "help" functions informing consumers how to use the platform) and service provider listings that will permit users to identify and access the various competing services accessible through video dialtone. Similarly, basic routing functions would appear necessary to enable the consumer to connect easily to the desired service provider.

---

[43] As a Title II interstate service, the video dialtone platform would be a tariffed offering governed by Part 61 of our rules. 47 C.F.R. Part 61.

27. On the first level, service providers would be given access to the same functionalities on the same terms and conditions. Service providers would receive the same degree of connectivity including access to non-proprietary technical standards to establish end-to-end connections. Likewise, the LEC would provide service providers with the network information necessary to enable service providers to perform billing and collection for their services. As these functions would be performed as a part of basic service, non-discrimination is required.

28. As a second level of video dialtone, a LEC would be permitted to provide its own advanced video gateway and related services, which would be unregulated services subject to competition from other gateways and video services using the platform. Selected by the consumer via the platform, this advanced gateway could include advanced electronic navigational aids of the gateway provider's own design. Thus, while we cannot know the exact range of such features at this early stage, a gateway provider could provide for menus and key word and subject matter search capabilities that could be tailored to an individual consumer's preferences. Such services also could include the capability to permit the consumer to preview all programs on a particular topic or at a particular time or date. Moreover, a LEC would be permitted to provide on behalf of any video service providers order processing, billing and collection, customer installations, and customer premises equipment for the unregulated video services, pursuant to existing Commission regulatory provisions. Such services could significantly enhance the ability of information service providers to serve "dial-up" customers.[44] A LEC would retain broad discretion in designing and offering second level services and features, and would be permitted to compete on an equal basis with advanced gateway providers. A LEC would not be able to provide video programming directly to subscribers as part of its advanced video dialtone services.[45]

29. We tentatively conclude that this two-level approach would further our core objectives in implementing video dialtone. Most importantly, it would appear to maximize the potential for the growth of competition in the distribution of video communications services (including both video programming and other video services) and of non-video services. First, it would permit competition between gateways provided over separate transport facilities to the home, e.g., between the LEC and cable networks. Second, it would permit video gateway providers to gain access to consumers without having to build their own local distribution facilities. They could instead rely on nondiscriminatory access to the LEC network to provide their services to consumers, and thus might be able feasibly to offer a more specialized array of services. For instance, Prodigy and Compuserve today provide videotext gateway services accessible to consumers over the LEC network. Similarly, competing video gateway providers could decide that they could most economically distribute their video services to consumers over the video dialtone platform. Finally, it would permit individual video program and service providers to compete by listing on the video dialtone platform. We tentatively conclude that offering video service providers this multiplicity of options for delivering their services to consumers should unleash competitive marketplace forces, which will provide consumers with the greatest possible choice in video services at the lowest price. We request comment on this tentative conclusion.

---

[44] We use the term "dial-up" to describe customers without a preexisting contractual relationship or a dedicated link to a service provider and who decide to use that provider's services "on the spur of the moment." For example, with billing and collection services from a LEC, a video service provider could offer pay-per-view options.

[45] In the Second Further Notice of Inquiry, we are seeking comment on whether it would be in the public interest, in the context of video dialtone, to permit LECs to provide video programming directly to subscribers. See Second Further Notice of Inquiry, infra Section V.

30. Preliminary examination of the nature and purpose of the video dialtone platform leads us to tentatively conclude that it causes little, if any, disruption to current regulatory policies, including those longstanding policies adopted in our Computer II and Computer III dockets.[46] The platform would include basic transport and (possibly) switching services. It also would include limited computer processing applications directly related to the facilitation of the connection between the subscriber and the service provider that qualify as adjuncts to basic services.[47] We further conclude on a tentative basis that enrichments to the basic service provided on the second level, such as advanced video gateway functions offered by the LEC, (e.g., customized menus permitting program searches by subject category or time of day), properly would be classified as enhanced services.[48] We also tentatively conclude that, in the video dialtone environment, functions such as the offering of billing and collection services or the provision of customer premises equipment should retain their current regulatory status.[49]

---

[46] Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 FCC 2d 384 (1980) (Computer II), modified on recon., 84 FCC 2d 50 (1980) (Computer II Reconsideration Order), modified on further recon., 88 FCC 2d 512 (1981) (Computer II Further Reconsideration Order), affirmed sub nom., Computer and Communications Industry Association v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983); Computer III, 104 FCC 2d 958 (1986).

[47] Since the adoption of Computer II, the Commission has made clear that whether a service using computer processing technology is classified as basic or enhanced depends not upon a literal reading of the definition, but instead upon the purpose for which that technology is used. Computer II, 77 FCC 2d at 417-423; North American Telecommunications Association, Petition for Declaratory Ruling under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premise Equipment, 101 FCC 2d 349, 356-361 (1985) (NATA/Centrex Order); modified on recon. 3 FCC Rcd 4385 (1986) (NATA/Centrex Reconsideration Order). If a service option or feature is clearly basic in purpose and use and brings maximum benefit to the public through its incorporation in the network, the Commission has consistently categorized that option or feature as adjunct to basic, thus making it subject to Title II regulation. NATA/Centrex Order, 101 FCC 2d at 359, para. 24. Thus, services have been categorized as "adjunct to basic" when they "facilitate the provision of basic services without altering their fundamental character." NATA/Centrex Reconsideration Order, 3 FCC Rcd at 4386. For example, speed calling, which can be

---

characterized as involving "customer interaction with stored information" under the enhanced services definition, has been classified as adjunct to basic because its purpose is to facilitate establishment of a transmission path over which a telephone call may be completed. Computer II, 77 FCC 2d at 421. Similarly, electronic directory assistance, although it involves provision to the customer of "additional, different, or restructured information" and calls for some subscriber interaction with stored information, is adjunct to basic because this offering provides information about another subscriber's telephone number required to place a call to that other subscriber over network facilities. Southwestern Bell Telephone Co., Petition for Waiver of Section 69.4(b) of the Commission's Rules, 5 FCC Rcd 3792 (Com. Car. Bur. 1990). We tentatively conclude that the purpose of the computer processing components found in the platform would be analogous to the purpose of speed dialing or electronic white pages.

[48] Section 64.702(a) provides:

> For the purpose of this subpart, the term "enhanced service" shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under Title II of the Act.

47 C.F.R. §64.702(a).

[49] See, e.g., Detariffing of Billing and Collection Services, 102 FCC 2d 1150, recon. denied, 1 FCC Rcd 445 (1986) and Filing and Review of Open Network Architecture Plans, Phase I, 4 FCC Rcd 1, 59 & n.207 (1988) (BOC ONA Order), recon., 5 FCC Rcd 3084, 3087 & paras. 30-34 (1990) (BOC ONA Reconsideration), petitions for review pending, California v. FCC, No. 90-70336 (9th Cir. filed July 5, 1990) (LEC billing and collection services not regulated as Title II common carrier services, but subject to Commission's Title I authority as services incidental to communications); Computer II, 77 FCC 2d 384 (1980) (customer premises equipment market deregulated); Furnishing of Customer Premises Equipment by Bell Operating Telephone Companies and the Independent Telephone Companies, Report and Order, 2 FCC

Finally, we tentatively conclude that broadband transmission and switching components, if available, would be functionally indistinguishable from the narrowband transmission and switching components of today's telephone network and consequently, access to these facilities can reasonably be regulated as a traditional telecommunications common carriage.[50]

31. We also tentatively conclude that this two-level approach to video dialtone satisfies our objective of implementing video dialtone in a manner that is easy for the average consumer to use. Permitting the LEC to provide at the platform level introductory content, tutorial and help information, and directory information should make it significantly easier for end users to gain access to video service providers electing to be listed on the first level platform. Likewise, the incorporation of directory and routing functions, such as permitting a consumer to list only video or only videotext service providers, could make the video dialtone service truly functional for the subscriber. By bringing additional information sources within the ready grasp of end users, incorporation of these functions within the network would thus appear to further significantly our stated First Amendment diversity goals.

32. We seek comment generally on the two-level approach to video dialtone. In particular, we seek comment on the technical feasibility of deploying such a two-level system in the video dialtone environment as well as the type of service providers which might seek access to the video dialtone platform. We also ask parties to comment on the extent to which the two-level approach makes video dialtone service easily accessible to consumers. We solicit comment as well on our analysis that the two-level approach causes little, if any, disruption to existing regulatory policies.

33. Finally, we ask whether, in the video dialtone context, provision of such services by the local exchange carrier requires any special safeguards in order to prevent anticompetitive conduct in addition to or in

---

Rcd 143 (1987) (BOC CPE Relief Order) (removes structural separation requirements from BOCs' provision of customer premises equipment), modified on reconsideration, 3 FCC Rcd 22 (1987) (modifies and clarifies several aspects of nonstructural safeguards).

[50] LECs presently request and receive authorization under Section 214 to provide non-switched channel service. 47 U.S.C. § 214. Consistent with present non-discrimination obligations which attach to the provision of basic common carriage service, a LEC offering the basic platform would not be permitted to refuse access to programmers and advanced service providers. Further, the LEC would be required to offer rates, terms, and conditions without unreasonable discrimination to all entities wishing to take this basic offering.

place of those we conclude are applicable to enhanced services.[51] Parties are asked to make specific recommendations to the extent possible.

34. Single Advanced Gateway Approach. Under this alternative regulatory approach to implementing video dialtone, only the underlying transport and switching components, where available, would be regulated as basic common carriage under Title II. Rather than having the local exchange carriers offer certain gateway services and other non-programming functions through a basic first level platform, this approach would permit the LECs to offer a single advanced gateway through which consumers could access LEC-provided non-programming video services as well as those of other information providers. Under this approach, we anticipate that the LECs would provide, as enhanced services, such features as detailed menus, navigational aids, search capabilities, and other information designed to make the video dialtone gateway easy to use. We also envision, as with the two-level approach, the LECs would offer as non-basic services other non-programming functions, such as order processing, billing and collection, and the provision of customer premises equipment.

35. Because we seek to achieve equality of access for program suppliers using video dialtone, we seek comment on whether under the single advanced gateway approach, the Commission should require a Bell Operating Company or other local exchange carrier to offer all such users access to the enhanced gateway services under the same terms and conditions. The nature of those terms and conditions could, however, be left to the LEC's discretion. We seek comment on whether this is a case in which the Commission should exercise its ancillary jurisdiction under Section 2(a)[52] to impose such a non-discrimination requirement on the particular enhanced services.[53] We ask commenters to discuss whether the Commission should exercise such authority and if so, to identify any additional conditions they would recommend that the Commission impose. We also ask parties to explain how they would distinguish between video dialtone and other enhanced services, given the increasing convergence of technologies.

36. Other Alternatives. As we noted, video dialtone can be implemented in various ways. While we tentatively conclude that the two-level approach best serves our goals and incorporates the video dialtone objectives, we invite commenters to suggest alternative ways of implementing video dialtone. We ask that such proposals be specific and explain how our overall goals and video dialtone objectives will be furthered by the proposal.

---

[51] Appropriate safeguards for the Bell Operating Company provision of enhanced services are presently under consideration. Computer III Remand Proceedings: Bell Operating Company Safeguards; and Tier 1 Local Exchange Company Safeguards, Notice of Proposed Rulemaking and Order, 6 FCC Rcd 174 (1990).

[52] 47 U.S.C. § 152(a).

[53] Computer II Reconsideration Order, 84 FCC 2d at 92-93.

3. Revisions to Section 63.54

37. As we indicated in the FNOI,[54] under our rules, Note 1 following Section 63.54 of our rules might be interpreted to preclude the offering of video dialtone to the extent the note bars "any financial or business relationship whatsoever by contract or otherwise ... except only the carrier-user relationship."[55] Consequently, we propose to amend Note 1 to make explicit that relationships beyond the carrier-user relationship are permissible in the provision of video dialtone services and, for the reasons set forth in the FNOI and herein, we again tentatively conclude that the Cable Act erects no statutory barrier to our taking such action.[56]

38. As we discussed in detail in the FNOI, nothing in the language of the Cable Act itself suggests Congress required us to retain the language of Note 1 to Section 63.54 without change. Congress did not incorporate the language of, or refer to, Section 63.54 or Note 1 in the Cable Act. Moreover, by adopting a definition of "affiliate" for purposes of the Cable Act that is less restrictive than the standard of Note 1, we tentatively conclude that Congress provided us with discretion to modify Note 1 to adopt a standard that is less restrictive than the current Note 1 standard, so long as it does not permit affiliations beyond those permitted by the language of the Cable Act.[57]

39. The fact that the telephone company/cable television cross-ownership restriction was intended "to codify current FCC rules concerning the provision of video programming"[58] does not alter our tentative conclusion. Congress did not intend by this sentence to etch into stone every one of the Commission's then-existing definitional interpretations of its rules. Indeed, upon adoption of the Cable Act, the Commission had to amend the language of its rules to conform to the different language used in the Act,[59] something that would not have been permissible if the rules were codified verbatim.[60]

---

[54] FNOI, 3 FCC Rcd at 5865.

[55] 47 C.F.R. § 63.54 n.1(a).

[56] FNOI, 3 FCC Rcd at 5865-66, paras. 87-91.

[57] See 47 U.S.C. § 522(1).

[58] See Cable Report, supra note 35, at 56.

[59] See Amendment of Parts 1, 63, and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984, MM Docket No. 84-1296, 50 FR 18637 (1985) (subsequent history omitted).

[60] We also note that to the extent the legislative history is inconsistent with the language of the Cable Act, the language governs. See ACLU v. FCC, 823 F.2d 1554, 1568-69 (D.C. Cir. 1987), cert. denied, 108 S.Ct. 1220 (1988).

40. As set forth in Appendix B, we thus propose to amend Note 1 to add Subsection (c) making clear that the rules do not preclude local telephone companies from providing video dialtone including enhanced services, advanced video gateway functions and other related non-programming functions.

4. Other Rule Changes

41. How video dialtone will develop is uncertain. Video dialtone must have flexibility to develop in harmony with evolving technology and market demand. For this reason it would be premature to set out with specificity how all of our existing rules will impact upon video dialtone. We recognize, of course, that as video dialtone is deployed, some changes in our rules regarding accounting, cost recovery, jurisdictional separations, pricing and access charges may be appropriate. For example, it may be that specific additions to our current Part 69 rate elements may be necessary or desirable. We therefore ask commenting parties to identify issues they believe will arise as video dialtone develops that may require some regulatory response at some future time.

42. In this regard, we seek comment on whether any changes in Part 32, Part 64, Part 36 or Part 69 will be necessary to accommodate the proposals we are making here. Parties are encouraged to offer specific rule changes if they feel changes are necessary.[61]

IV. First Report and Order

43. In this proceeding, we requested comment on the meaning of Sections 613(b) and 621 of the Cable Act. In particular, we sought comment "on whether section 613(b)(1) applies to interexchange carriers."[62] With respect to section 621(b), we sought comment on "whether a customer of tariffed video transmission services would be subject to a franchising requirement under the Cable Act" and, conversely, whether the LEC, when providing such service, would be subject to the franchise obligation of section 621(b).[63] Our intent was to make clear through interpretation of these provisions the extent of their applicability or, alternatively, to seek clarification from Congress. Having reviewed the comments and considered these issues further, we now provide the interpretive rulings set forth below.[64] We believe that these interpretive rulings will reduce uncertainties with respect to the ability of telephone common carriers to proceed with deployment of video dialtone in the future and eliminate disincentives for investment in infrastructure due to ambiguity in statutory interpretation.

---

[61] 47 C.F.R. Parts 32, 64, 36 and 69.

[62] FNOI, 3 FCC Rcd at 5862.

[63] Id. at 5863.

[64] These rules involve the agency's interpretation of specific statutory provisions in the Act, not their implementation, and, therefore, constitute "interpretive" rules, which are exempt from the notice and comment requirements of Section 553(b) of the Administrative Procedure Act. 5 U.S.C.

A. Applicability of Section 613 to Interexchange Carriers

44. Under Section 613 of the Cable Act, it is unlawful for "any common carrier, subject in whole or in part to title II of this Act, to provide video programming directly to subscribers in its telephone service area ...."[65] In the FNOI, the Commission observed that the legislative history of the Cable Act reveals no specific intent to apply the cross-ownership ban to interexchange carriers. The Commission asked whether the ban was not in fact intended to apply only to carriers with local exchange service areas. The majority of the parties addressing the issue stated that the cross-ownership ban was not intended to apply to interexchange carriers and asked that the Commission clarify the statutory meaning.[66]

45. Neither the language of Section 613 nor its legislative history directly address this question. The legislative history, however, does make clear that Congress intended to codify the existing cross-ownership restriction. In light of the underlying purposes of the Commission's original ban and its application by the Commission, we find that the cross ownership ban was intended to apply only to local exchange carriers, i.e., that "telephone service area" in Section 613(b) refers to local exchange service areas.

46. As we noted in the FNOI, the restriction on telephone common carrier involvement in video programming originated with a determination by the Commission that the monopoly position of the local exchange carrier might enable it to engage in anticompetitive conduct toward independent cable operators by denying access to LEC local exchange facilities such as its conduits and telephone poles or by improperly cross-subsidizing from monopoly services.[67] Indeed, we have consistently held that when telephone common carriers (including non-dominant interexchange carriers) do not control essential exchange facilities such as poles and conduit, the concerns about

---

§ 553(b). See, e.g., United Technologies Corporation v. U.S. Environmental Protection Agency, 821 F.2d 714 (D.C. Cir. 1987).

[65] 47 U.S.C. § 533(b)(1).

[66] See, e.g., MCI Telecommunications Corporation Comments at 6 (filed Dec. 16, 1988); National League of Cities Comments at 59-60 (filed Dec. 16, 1988).

[67] FNOI, 3 FCC Rcd at 5862-5863. See Section 214 Certificates Order, 21 FCC 2d at 324.

exclusionary conduct which underlie the rules are not implicated.[68] As such, Commission rules permitted a local exchange carrier to provide video program service in areas where it did not provide local exchange telephone service.[69] While AT&T was subject to the ban prior to divestiture, there is no indication that this was for any other reason other than its control of local exchange facilities.[70] On this basis, we conclude that the phrase "telephone service area" in section 613(b) refers to local exchange service area. Accordingly, in light of the Commission's traditional concerns, we conclude that the statutory cross-ownership ban is properly interpreted to apply only to local exchange carriers within the areas that they own or control facilities that provide exchange service.[71]

---

[68] Blanket Section 214 Authorization for Provision by a Telephone Common Carrier of Lines for its Cable Television and other Non-Common Carrier Services Outside its Telephone Service Area, CC Docket No. 84-28, 98 FCC 2d 354, 356 (1984) (Blanket Section 214 Order) (LECs are not subject to the ban in areas outside their local exchange areas; non-dominant interexchange carriers not affiliated with a LEC are not subject to the ban). See also Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984, MM Docket No. 84-1296, 50 FR 18637 (1985), recon. denied, 104 FCC 2d 386 (1986), remanded on other grounds sub. nom., ACLU v. FCC, 823 F.2d 1554 (D.C. Cir. 1987), cert. denied, 108 S. Ct. 1220 (1988) (non-wireline cellular carriers are not subject to the ban). See also Letter of Chief of Common Carrier Bureau, FCC, to Robert J. Butler, Counsel for Twixtel Technologies, Inc. (July 9, 1990).

[69] Blanket Section 214 Order, 98 FCC 2d at 356.

[70] As discussed in the FNOI, there was some concern about the ability of AT&T to cross-subsidize and otherwise act anticompetitively in the event it were to become involved in the cable television business and it was suggested the Commission consider requiring non-structural safeguards to prevent abuse. See discussion of Comments of Alabama Public Service Commission in FNOI, 3 FCC Rcd at 5862. Due to the lack of control over a local exchange facilities by AT&T, however, we conclude that it is not necessary to apply safeguards in addition to those that already apply to AT&T's provision of enhanced services.

[71] Telephone exchange service is already defined in the Act. Section 3(r) of the Act, 47 U.S.C. § 153(r), provides that:

> "Telephone exchange service" means service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers inter-communicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge.

B. Franchising under Section 621

47. In the FNOI, the Commission tentatively concluded that a telephone company would be required to obtain a franchise if it itself provided cable service directly to subscribers, but questioned whether in a common carrier-based system, the Cable Act still required either the LEC or the video programmer taking the common carrier service to obtain a local cable franchise.[72]

48. In response to the FNOI, some commenters stated that a LEC providing video common carrier service should not be required to obtain a franchise.[73] They urged that the Commission clarify that neither a common carrier that provides video transmission services nor a video programmer that provides video programming over such transmission facilities is subject to the local franchise requirements of Section 621. They argue that it is contrary to the express statutory language and moreover it would be impractical and contrary to Congressional intent to require every programmer using a broadband common carrier system to obtain a franchise.

49. Other parties asserted, however, that LECs and in some circumstances, video programmers, would, or should be subject to a franchise requirement.[74] These parties generally argue that it would be unfair to free local exchange carriers or their customers from franchise requirements while leaving independent cable operators subject to such requirements. The majority of these parties assert that there is no basis in the Cable Act for stating that the LEC provider of channel service is not subject to a franchise requirement. Moreover, some parties conclude that a customer of a common carrier video transport service would also be providing "cable service" over a "cable system" and would therefore be a "cable operator" subject to the franchise requirement.[75] Other parties contend that as to customer-programmers, it is either premature or inappropriate to require a cable franchise.[76]

50. Based on our review of the Act and the legislative history, we conclude that under Section 621(b), neither the LEC providing video dialtone services nor its customer-programmer would be required to obtain a cable franchise in order to offer service. Under Section 621(b) of the Cable Act,[77] a "cable operator" may not "provide cable service" without a franchise. Under the video dialtone model, however, we conclude that the local telephone companies providing video dialtone services would not be providing "cable service"[78] and thus would not come within the definition of

---

[72] FNOI, 3 FCC Rcd at 5863.

[73] See, e.g., BellSouth Comments at 8-10 (filed Dec. 16, 1988).

[74] See e.g., Time, Inc. Comments at 58-59 (filed Dec. 16, 1988); Times-Mirror Cable Television, Inc. Comments at 46-52 (filed Dec. 16, 1988); City of New York Comments at 17-21 (filed Dec. 16, 1988); St. Louis, Missouri Comments at 7 (filed Dec. 16, 1988); Cox Cable Reply Comments at 16-17 (filed Jan. 27, 1989). See also Comments in Continental Cable Vision in MM Docket 89-600 at 69-71 (filed March 1, 1990).

[75] See e.g., Time, Inc. Comments at 58-59 (filed Dec. 16, 1988).

[76] See e.g., St. Louis, Missouri Comments at 7 (filed Dec. 16, 1988); City of New York Comments at 18-21 (filed Dec. 16, 1988).

---

[77] 47 U.S.C. § 541(b).

[78] "Cable service" is defined as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service." 47 U.S.C. § 522(5).

"cable operators"[79] subject to the franchise requirement of Section 621(b).[80]

51. To be a cable operator (and therefore to be required to obtain a cable franchise), an entity must either: (1) provide cable service over a cable system in which it owns a significant interest; or (2) otherwise control or be responsible for the management and operation of a cable

---

[79] "Cable operator" is defined as:

> any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.

47 U.S.C. § 522(4).

See also Section 602(6), 47 U.S.C. § 522(6) which defines a "cable system" as:

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act, except that such facility shall be considered a cable system (other than for purposes of section 621(c)) to the extent such facility is used in the transmission of video programming directly to subscribers; or (D) any facilities of any electric utility used solely for operating its electric utility systems.

[80] See FNOI, 3 FCC Rcd at 5863, para. 74. This interpretation of the Cable Act was presented by NTIA in MM Dkt 89-600, filed March 1, 1990 at 21.

system.[81] A LEC providing video dialtone service does not fall within this definition because the LEC itself is not providing the video programming service directly to subscribers. Rather, the LEC is simply acting as a conduit in providing broadband common carrier-based service that enables its customer/programmers to provide video programming to subscribers.[82] This interpretation is consistent with the fact that telephone companies that have constructed video distribution facilities and leased them to cable operators (i.e., provided channel services) have never been required to obtain a local cable television franchise.[83] We find nothing in the legislative history inconsistent with this interpretation.

52. We also conclude that the LECs' customer/programmers for video dialtone service are not required to obtain a local cable television franchise under Section 612(b). Because they neither own a significant interest in the telephone company broadband facilities, or control, or are responsible for the management and operation of those facilities, the customer/programmers also do not qualify as cable operators under the Cable Act definition. Since such customer/programmers are not cable operators, they are not therefore required to obtain a local cable television franchise.[84] A contrary interpretation would lead to the conclusion that the programmers who lease channels pursuant to Section 612 and the public, educational and governmental entities which are provided with cable access would have to obtain a local cable franchise.[85] We do not find any evidence

---

[81] 47 U.S.C. § 522(4).

[82] To the extent that some parties simply asserted, without analysis, that LECs providing common carrier transmission services and their customer/programmers fall within the definition of "cable operators," we reject these contentions as simply conclusory. *See e.g.*, Time, Inc. Comments at 58 (filed Dec. 16, 1988); Cox Enterprises, Inc. Reply Comments at 18 (filed Jan. 27, 1989).

[83] The Commission has required that LECs offering "channel service" receive authorization under Section 214 of the Communications Act. General Telephone Company of California, 13 FCC 2d 448 (1968), *aff'd*, General Telephone Co. of California v. FCC, 413 F.2d 390 (D.C. Cir. 1969); 47 U.S.C. § 214. Such an authorization is explicitly excluded from the definition of "franchise" under the Cable Act. *See* *Cable Report*, *supra* note 35, at 45.

[84] This is in contrast to the situation when a telephone company leases video distribution facilities to a cable operator for the provision of cable service. *See* Wisconsin Bell, Inc., To Discontinue Service on its Broadband Distribution System in Brookfield, Wisconsin, 4 FCC Rcd 2238, 2240 (Com. Car. Bur. 1989). *See also* NTIA Reply Comments in MM Docket 89-600 at 3-7 (filed April 2, 1990).

[85] 47 U.S.C. §§ 531-32. Some parties suggested that if a customer-programmer markets a large amount of programming on a large number or percentage of a local exchange carrier's transmission channels, then it would be performing functions similar to those performed by cable operators. They

that Congress intended such a result and there is nothing in the legislative history contrary to this interpretation of the Act.[86]

V. Second Further Notice of Inquiry

A. Direct Provision of Video Programming by Local Exchange Carriers

53. In the NOI and the FNOI in this proceeding, we examined the question of LEC entry into the cable television business as video programmers. Draft legislation is now pending in Congress that would authorize telephone companies to provide video programming directly to subscribers.[87] The Departments of Commerce and Justice called for similar freedom of entry last year.[88] There is also draft legislation pending, however, that takes a more restrictive approach to stimulate program and facilities investment and complement video dialtone by the LECs without authorizing unfettered entry into video programming.[89] We now consider whether, in light of these developments and in the context of our video dialtone proposal, our previous analyses concerning the risks and benefits of direct provision of video programming by the LECs warrant reexamination and whether we should recommend to Congress any changes in the statutory ban.

54. We seek comment on whether the tentative conclusion reached in the FNOI finding that the public interest would best be served by permitting telephone companies to provide video programming directly to consumers is still valid in light of the public interest benefits we believe could flow from video dialtone. For instance, we seek comment whether in light of the incentives video dialtone will create for LEC provision of advanced

---

argue that the Commission should recommend that Congress amend the Cable Act in order to address this situation. See City of New York Comments at 20-21 (filed Dec. 16, 1988). That there may be some difficult lines to be drawn does not alter our interpretation of the Cable Act in this regard.

[86] We also note that as a practical matter it would be extremely onerous for both programmers and franchising authorities to require all programmers using video dialtone facilities to obtain a local franchise, especially to the extent that video dialtone could encompass a switched broadband network with programming originating in diverse and distant locations. There is no indication Congress intended such a result.

[87] See Telecommuting Infrastructure Act of 1991, S. 661, 102d Cong., 1st Sess. (1991).

[88] See letter dated March 13, 1991 from James F. Rill, Assistant Attorney General, Antitrust Division, Department of Justice and Robert A. Mosbacher, Secretary of Commerce, to Hon. Ernest F. Hollings, Chairman, Committee on Commerce, Science and Transportation, United States Senate.

[89] Communications Competitiveness and Infrastructure Act of 1991, S. 1200, H.R. 2546, 102d Cong., 1st Sess. (1991) [hereinafter Communications Competitiveness Bill].

telecommunications services, it is desirable to permit LECs to provide video programming directly to subscribers in order to significantly further our goals. Parties should address how the goals we have identified for video dialtone might be impacted by a recommendation that Congress amend the statute to permit direct LEC provision of video programming in the video dialtone environment.

55. We also ask that parties identify and comment on various options for direct LEC participation in video programming. For example, would it serve the public interest to permit the local telephone companies to own a specified percentage of video programming accessible through video dialtone for a limited period of time, subject to future review? Further, would it be appropriate in light of our goals to permit telephone companies to have a limited interest in video programming offered through the video dialtone?[90] Parties should state the advantages and disadvantages of proceeding according to these proposals, with special emphasis on the risks and benefits, including any likelihood of anticompetitive conduct and the incentives for accelerated infrastructure development by LECs. We also encourage suggestions for other approaches to the issue of LEC involvement in video programming.

56. We also ask parties proposing that telephone companies be permitted to have an interest in video programming to address whether special safeguards would be necessary to protect against cross subsidization. For example, would separate subsidiaries for programming be necessary in order to effectively reduce such risks?

B. Investment Incentives

57. For the reasons stated above, we have tentatively concluded that the public interest will be best served by implementation of video dialtone service. We are concerned, however, whether our regulatory incentives will, in fact, support the policy direction enunciated herein. Some commenters have stated that some of our rules and regulatory policies may thwart, rather than encourage, the development of the infrastructure on which video dialtone service will be built.[91] For instance, some argue that our depreciation policies create little incentive for local telephone companies to retire existing copper plant and switches and to replace those facilities with fiber optic cable. Without such a fiber base, they contend, we will never have a broadband "highway to the home" and Americans will suffer as we lag behind other nations.[92] However, with digital compression and perhaps other unforeseen technologies, it may not be necessary to replace copper with fiber on an accelerated basis in order to deliver video services

---

[90] Id. § 301.

[91] See, e.g., NYNEX Telephone System Companies Comments at 7-10 (filed Dec. 16, 1988).

[92] See, e.g., Communications Competitiveness Bill, supra note 89.

over local telephone networks.[93] We solicit comment on the extent to which our policies and rules do in fact discourage investment in advanced technology and whether changes to our rules are necessary to promote our stated goals. Parties are also asked to submit information regarding the costs of constructing broadband networks, taking into account, of course, the evolving technology.

58. We additionally seek comment on whether the public interest would be served by encouraging cooperative investment in and construction of broadband facilities by telephone companies and cable operators whether or not LECs are permitted to provide video programming directly to subscribers. In particular, should the FCC recommend legislative changes in this regard, perhaps in existing tax laws to encourage such joint ventures? For instance, should cable companies be permitted to own a percentage of the underlying video dialtone facilities so that they would be able to reap any tax benefits that attach with ownership? On the other hand, would it be in the public interest to maintain restrictions on such relationships? Further, parties should address whether we should recommend special tax credits for deployment of fiber optic cable or other facilities which allow broadband transmission or whether there should be separate depreciation schedules applicable to deployment of video dialtone. We specifically ask that parties comment on the extent to which the benefits of joint ventures between cable and telephone companies may be outweighed by the increased risk of anticompetitive conduct by those entities and by the reduction of competitive pressures that could result from such relationships. We also ask that any changes which may be desirable be specifically set forth.

VI. Conclusion

59. For the reasons stated above, we tentatively conclude that facilitating the provision of video dialtone by local exchange carriers as a foundation for the provision of advanced telecommunications services is the best public policy at this time. We believe that this policy will remove unnecessary barriers to, and provide incentives for, telephone company construction of modern telecommunications networks that could support the telecommunications services of the future, stimulate robust competition in the video and non-video communications markets and vigorously promote the diversity goals of the First Amendment. We also conclude that section 613 of the Cable Act applies only to local exchange carriers and that section 621 of the Cable Act does not require that either local exchange carriers or their customer-programmers obtain a local franchise to provide video dialtone. We additionally seek comment on whether LECs should be allowed to directly provide video programming and on whether a recommendation to Congress in this regard is desirable.

VII. Ex Parte Presentations

60. This is a nonrestricted notice and comment rule making proceeding. Ex parte presentations are permitted, except during the Sunshine

---

[93] See note 11 supra.

Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

VIII. Initial Regulatory Flexibility Analysis

61. Reason for Action: The Commission is issuing this Further Notice of Proposed Rule Making to consider the adoption of rules which would enable local exchange carriers to offer video dialtone. Allowing local exchange carriers to provide video dialtone will better serve the public interest than the current rules.

62. Objectives: The objective of this Further Notice of Proposed Rule Making is to provide an opportunity for public comment and to provide a record for a Commission decision on the issues stated above.

63. Legal Basis: This Further Notice of Proposed Rule Making is adopted pursuant to Sections 1, 4, 201-205, 215, 218, 220, 303(r) of the Communications Act of 1934, as amended, and Sections 601, 612 and 613 of the Cable Communications Policy Act of 1984, as amended, 47 U.S.C. §§ 151, 154, 201-205, 215, 218, 220, 303(r), 521, 532 and 533; and 5 U.S.C. § 553.

64. Description, potential impact, and number of small entities affected: Amending our rules to permit local exchange carriers to provide video dialtone may directly affect entities which are small business entities, as defined in Section 601(3) of the Regulatory Flexibility Act. The Secretary shall send a copy of this Further Notice of Proposed Rulemaking, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 et seq. (1981).

65. Reporting, recordkeeping and other compliance requirements: Local exchange carriers may be subject to accounting and other recordkeeping requirements.

66. Federal rules which overlap, duplicate or conflict with the Commission's proposal: None.

67. Any significant alternatives minimizing impact on small entities and consistent with stated objective: The proceeding solicits comments on a variety of alternatives.

68. Comments are Solicited: Written comments are requested on this Regulatory Flexibility Analysis. These comments must be filed in accordance with the same filing deadlines set for comments on the other issues in this Further Notice of Proposed Rule Making, but they must have a separate and distinct heading designating them as responses to this Regulatory Flexibility Analysis. The Secretary shall send a copy of the Notice to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 601, et seq.

IX. Comment Filing Dates

69. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **January 23, 1992**, and reply comments on or before **February 24, 1992**. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting documents. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

X. Ordering Clauses

70. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4, 201-205, 218, 220, 303(r) and 403 of the Communications Act of 1934, as amended, and Section 601 of the Cable Communications Policy Act of 1984, as amended, 47 U.S.C. §§ 151, 154, 201-205, 218, 220, 303(r), 403 and 521; and 5 U.S.C. § 553, a SECOND FURTHER NOTICE OF INQUIRY IS HEREBY PROVIDED as explained herein.

71. IT IS FURTHER ORDERED that, pursuant to Sections 1, 4, 201-205, 215, 218, 220, 303(r) of the Communications Act of 1934, as amended, and Sections 601, 612 and 613 of the Cable Communications Policy Act of 1984, as amended, 47 U.S.C. §§ 151, 154, 201-205, 215, 218, 220, 303(r), 521, 532 and 533; and 5 U.S.C. § 553, FURTHER NOTICE OF PROPOSED RULEMAKING IS HEREBY PROVIDED to amend Section 63.54 of the Commission's rules, 47 C.F.R. § 63.54, as indicated above and in Appendix B.

72. IT IS FURTHER ORDERED that, pursuant to Sections 1, 4, 214 and 303(r) of the Communications Act, as amended, and Sections 613 and 621 of the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 151, 154, 214, 303(r), 533 and 541, the FIRST REPORT AND ORDER IS ADOPTED.

73. IT IS FURTHER ORDERED that, the Secretary shall send a copy of this Further Notice of Proposed Rulemaking, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 et seq. (1981).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A: PARTIES FILING COMMENTS

Comments

Adelphia Communications Corporation, et al.
Alabama Public Service Commission
Alliance of Independent Telephone Companies
Alltel Corporation
American Newspaper Publishers Association
American Telephone and Telegraph Company
Ameritech Operating Companies
Arizona Corporation Commission
Arkansas Public Service Commission
Association of Cable Television Subscribers
Association of Independent Television Stations
Association of National Advertisers
Bell Atlantic Telephone Companies
BellSouth Corporation
Berkshire Telephone Corporation
Blade Communications
Booth American Company, et al.
Cable Television Operators and Associations
Cablevision Industries Corporation, et al.
Cablevision Systems Corporation
California Cable Television Association
Centel Corporation
Cincinnati Bell Telephone Company
Citizens for a Sound Economy Foundation
City of Boston
City of Lee's Summit
City of New York
City of Santa Ana
City of St. Louis
City of Sunnyvale
City of Thousand Oaks
Clifton Forge-Waynesboro Telephone Company
Colony Communications, Inc.
Communications Media Committee for the City Club of New York
Community Antenna Television Association
Connecticut Cable Television Association
Connecticut Office of Consumer Counsel
Consumer Federation of America
Contel Corporation
Continental Cablevision, Inc., et al.
Corning Glass Works
Cox Enterprises
Fidelity Telephone Company
Florida Public Service Commission
Georgia Public Service Commission
GTE Telephone Companies
Guam Telephone Authority

Heritage Communications, Inc.
Huxley Cooperative
Illinois Commerce Commission
Illinois Consolidated Telephone Company
Iowa State Utilities Board
Iowa Telephone Association
James Valley Cooperative Telephone Company
Kansas Telecommunications Association
Kentucky Cable Television Association
Kentucky Telephone Association
Klein, Paul
Louisiana Telephone Association
Mankato/North Mankato Cable Communications Advisory Board
Marshall Cable TV Commission
Maryland People's Counsel
Massachusetts Community Antenna Television Commission
MCI Telecommunications Corporation
Media Access Project
Miami Valley Cable Council
Michigan Cable Television Association
Michigan Public Service Commission Staff
Missouri Public Service Commission
Missouri Telephone Association
Mondovi Telephone Company
National Association of Broadcasters
National Association of Public Television Stations
National Association of Regulatory Utility Commissioners
National Cable Television Association, Inc.
National Federation of Local Cable Programmers
National League of Cities
National Telephone Cooperative Association
Nebraska Telephone Association
New England Cable Television
New Jersey Board of Public Utilities
New York
New York State Cable Television Association
New York State Commission on Cable Television
New York State Department of Public Service
New York State Telephone Association
NYNEX Telephone Companies
North Carolina CATV Association
Northeast Florida Telephone Company, Inc.
Northwestern Indiana Telephone Company
Ogden Telephone Authority
Oregon Cable Television Association
Oregon Independent Telephone Association
Organization for the Protection and Advancement of Small Telephone Companies
Pacific Telesis Group, et al.
Peoples Mutual Telephone Company
Pinnacles Telephone Company
Public Commission of the District of Columbia
Public Utilities Commission of Ohio

Public Utilities Commission of the State of California
Rochester Telephone Corporation
San Marcos Telephone Company
Shenandoah Telephone Company
Sherburne/Wright County Cable Communications Commission
Sirbu, Marvin A. and David P. Reed
South Washington County Cable Communications Commission
Southern New England Telephone Company
Southwestern Bell Corporation
Sugar Land Telephone Company
Tele-Communications, Inc.
Telelogic, Inc.
Telephone & Data Systems, Inc.
Teleport Communications Group
Texas Statewide Telephone Cooperative, Inc.
Times Mirror Cable Television, Inc.
Time, Inc.
Times Cable Television, Inc.
Town of Lexington, Massachusetts
United Church of Christ
United States Telephone Association
United Telephone System Companies
U.S. West, Inc.
Viacom International Inc.
Village of Schiller Park
Virginia Telephone Association
Walt Disney Company, et al.
Warner Cable Communications, Inc.
Warner Communications Inc.
Warwick Valley Telephone Company
Western Communications, Inc.
Western Iowa Telephone Association
Wilkes Telephone & Electric Company
Winnebago Cooperative Telephone Association
Wisconsin Telephone Cooperative Association

Reply Comments

Alabama Public Service Commission
ALLTEL Corporation
Ameritech Operating Companies
Arkansas Public Service Commission
Association of Independent Television Stations, Inc.
Bell Atlantic Telephone Companies
BellSouth Corporation
Buena Vista Pictures Distribution, Inc., et al.
Cable Operators & Associations
Cable Television Operators and Associations
Cablevision Systems Corporation
California Cable Television Association
Centel Corporation
Cincinnati Bell Telephone Company

Citizens Communications Center, _et al_.
City of New York
Colony Communications, Inc.
Community Antenna Television Association
Connecticut Cable Television Association
Contel Corporation
Continental Cablevision, Inc., _et al_.
Cox Enterprises
Emery County Farmers Union Telephone Association, Inc.
Huntel Systems, Inc. & the Blair Telephone Company
GTE Telephone Companies
Illinois Consolidated Telephone Company
Land, Herman W.
Maryland People's Counsel
Maximum Service Telecasters
Michigan Cable Television Association
National Association of Regultory Utility Commissioners
National Cable Television Association, Inc.
National Telephone Cooperative Association
New Jersey Cable Television Association
Kentucky Cable Television Association
New England Cable Television Association
New York State Department of Public Service
NYNEX Telephone Companies
Pacific Bell and Nevada Bell
Pigeon Telephone Company
Omniview, Inc.
Organization for the Protection and Advancement of Small Telephone Companies
Pacific Telesis Group
Pinnacles Telephone Company
Public Utilities Commission of Ohio & the Illinois Commerce Commission
Prime Cable Limited Partnership
Southern New England Telephone Company
Southwestern Bell Corporation
Sugar Land Telephone Company, _et al_.
Taconic Telephone Corp., _et al_.
Tele-Communications, Inc.
Telephone & Data Systems, Inc.
Teleport Communications Group
Texas Statewide Telephone Cooperative, Inc.
Time, Inc.
TKR Cable Company
Tribune Broadcasting
Turner Broadcasting System
United Church of Christ
United States Catholic Conference
United States System Companies
United States Telephone Association
U.S. West, Inc.
Valley Telco Cooperative
VectorTech, Inc.
Warner Communications, Inc.

APPENDIX B: PROPOSED RULE CHANGES

It is proposed that Part 63 of Title 47 of the Code of Federal Regulations be amended as follows:

1. The authority citation for Part 63 continues to read as follows:

AUTHORITY: Sec. 4, 48 Stat. 1066, as amended 47 U.S.C. 154. Interpret or apply sec. 214, 48 Stat. 1075, as amended; 47 U.S.C. 214.

2. Section 63.54 is amended to add:

* * * * *

Note 1(c) Nothing in this section shall be construed to prohibit the provision of video dialtone services, enhanced services related to video dialtone, advanced video gateways and other related non-programming video dialtone functions by a telephone common carrier.

STATEMENT OF COMMISSIONER JAMES H. QUELLO

In re: Second Further Notice of Inquiry, Dkt. No. 87-266

While I support this docket, I want to make it clear that the questions raised in the Second Further Notice of Inquiry are just that...inquiry. I have not concluded, at this point, that there is any public benefit to be derived from local exchange carrier participation in programming. Nor do I now see any benefit from joint ventures between telephone carriers and cable systems. I will be very interested in reviewing the comments which address these topics.

Separate Statement of
Commissioner Sherrie P. Marshall

Re: Telephone Company - Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58 (CC Docket No. 87-266)

I strongly support our proposal to enable local telephone companies to provide video dialtone service to cable programmers. Implemented properly, video dialtone should ensure that existing cable operators face direct, head-to-head competition in the delivery of cable services to consumers. Subscribers will enjoy the option of a perfect substitute to their current cable offerings, and more: a new array of video and information services available through the telephone company's gateway offerings.

To the extent, however, that this item can be read to elevate the rapid deployment of broadband fiber to the home to a national goal, I cannot endorse it. That crosses the line into industrial policy of the worst kind -- particularly when other, less costly technologies might meet our competitive needs over the short term. For example, advanced video compression techniques now being tested may offer a cheaper short term alternative to fiber for the provision of many video and information services. For that matter, advances in wireless communications could, in the long term, offer an alternative more cost-effective than wired networks. In my view, the choices on which, and how soon, specific infrastructure investments should be made are decisions for businessmen, not this Commission. The FCC should not be in the business of selecting, or even favoring, a particular technology or network architecture.

Indeed, given the public's less than enthusiastic response to videophone, it's not yet clear that the public actually wants to pay for any of the new multimedia gadgets now being touted as the network of the future. I, for one, will not endorse an industrial policy that might raise consumers' phone rates for services they may not want. U.S. telephone companies should be allowed to invest in upgrades to their networks on the basis of their own technical and economic considerations -- not government dictate.

Thus, I support the basic decisions we make today with respect to telco delivery of cable; I do not, however, endorse its dicta advocating a national industrial policy of rapid deployment of broadband fiber to the home.

# # #

SEPARATE STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

RE: Telephone Company-Cable Television Cross-Ownership Rules (CC Docket No. 87-266)

I support this timely inquiry into the future role telecommunication providers should play in the evolving marketplace. I am generally supportive of the primary principle underlying a "video dialtone" model as outlined in the Further Notice. Although this concept is in its infancy, I am comfortable in saying that at a minimum, I believe that a video dialtone framework requires LECs to provide video distribution facilities to program suppliers and packages on a nondiscriminatory, common carrier basis. I must assure myself, however, that the necessary safeguards will be in place to prevent LECs from discriminating against program providers that use the LEC common carrier facilities. For this reason, I strongly encourage parties to comment on whether the provision of video services, as envisioned in the Further Notice, require specific modifications or additions to the current scheme, in order to protect against discrimination or promote efficiencies in this particular marketplace. Here it is important that parties be as specific as possible as to the appropriate regulatory safeguards.

Since this market is in its infancy, and we do not know how it will actually evolve, I am not yet ready to endorse one regulatory framework over another. For this reason, I want to strongly encourage all parties to feel free to suggest alternative models that have the potential of offering video transmission capacity on a common carrier basis. Parties should not feel that they are limited to those outlined in the Further Notice (FNPRM). Any alternative proposals should be accompanied by a discussion of specific safeguards that would be needed in order to prevent discrimination against competitors and cost shifting that could harm ratepayers.

This item includes an Order that concludes that under present law, neither the LEC providing video dialtone services nor its customer-programer would be required to obtain a municipal franchise in order to offer service. As a general policy, I may agree that it is not in the public's best interest to require a LEC or enhanced service provider to obtain a municipal franchise. However, the fact remains that, as a cable policy matter, the cable provider could be disadvantaged under such a regime. This policy issue probably will need to be addressed again at some point.

Also, certain aspects of this item make legal interpretations of the Commission's ability to authorize common carrier video dialtone services under its rules and the Cable Act. In general, I am comfortable supporting the issues raised in our Further Notice regarding the ability to amend note 1 of 47 C.F.R. 63.54 in our rules. I look forward to reviewing comments that both support and challenge our interpretation of this aspect of the Commission's rules. I also support our interpretive analysis of Section 613 of the Cable Act as it pertains to interexchange carriers. Aside from the strict legal analysis of this section of the Act, however, I also am mindful of the potential policy implications that may arise within state jurisdictions, as well as with respect to the possible need for additional safeguards. In our 1988 Further Notice of Inquiry, we raised the question of whether additional safeguards could be necessary. I remain concerned that we monitor the need to address this issue from a policy perspective in the years ahead. Finally, I believe our interpretation of the franchising requirement under Section 621 of the Cable Act can be supported by the legal analysis in the item. However, I remain aware of the serious policy implications raised by this interpretation. Some states and local franchise authorities, in particular, are likely to be concerned by this ruling. Cable companies also are likely to oppose this interpretation. Given the complexities of our modern information society, and the continual merging of technology applications for various purposes, I remain aware of the need to resolve difficult issues such as this. On balance, I believe this aspect of the First Order presents a close call, but addresses an issue that must be resolved.

Given the potential impact of this item on cable authorities in states and municipalities alike, I invite their insights on the issues raised in this item. I also would hope that commenters in this comprehensive proceeding address the many issues outlined in this item.

Separate Statement
of
Commissioner Ervin S. Duggan

Re: Telephone Company -- Cable Television Cross-Ownership Rules, Sections 63.54-63.58

I vote with my fellow Commissioners to adopt this item, which calls for comment on a proposal for telephone company-provided "video dialtone," because I see no harm in asking questions about the video dialtone concept. I look forward to hearing from interested parties, including program producers, on the item's proposed conception of video dialtone.

I am disturbed, however, about going forward at this early stage with such a definitive model of how video gateways ought to be designed and provided. The technology may not even exist today to provide the kind of video dialtone that the item contemplates. If and when it does arrive, it may be in a form we would not recognize today. For regulators to promote a particular form of network design is at best unnecessary. At its worst, it smacks of industrial policy, or of policymaking by the method of Procrustes' bed, in which he hacked off the inconvenient limbs of guests who did not fit the bed.

Will demand materialize--- soon enough and seriously enough--- for the advanced broadband network needed to support a video dialtone approach? Does this proposal reflect actual demand for new services or is it driven by mere desire? What services will be possible over a broadband video dialtone network? What will those services cost?

We vote this proposal without knowing the answers to these questions. The well-being of consumers and the public interest should be the touchstones of our decisionmaking--- not utopian enthusiasms. If consumers do not need or want to pay for the services that new technology brings, then we have no business promoting that technology.

For all these reasons, I have often described myself as a skeptic about such proposals--- albeit a friendly skeptic. I believe myself to be friendly toward technology and the future. I believe that many new technologies hold real promise for delivering more information and entertainment to more people from more sources. But no one--- no one--- can predict how those technologies will develop: which services will sell, which will fail. The brave new video world will evolve, I'm sure, in ways that surpass our wildest imaginings. But will it do so in ways that conform to our imaginings? That is precisely what causes my disquiet about this proceeding. It seems to me too intent upon shaping what must be allowed to evolve.

Why vote in favor, then? Because I believe that the Commission has an obligation to ask one question again and again: are there unnecessary regulatory barriers standing in the way of a desirable future? If the "carrier-user" relationship set out in note 1 to the cross-ownership rules is indeed too cramping, then we should consider how better to define the permissible relationship between LECs and video programmers. On the other hand, if the current framework provides sufficient flexibility, there is no need to move to a more complex regulatory structure to accomplish our public interest goals.

I vote for this item, despite serious misgivings, for another reason. I am interested in the concept of maximizing the diversity of voices through common carrier access to programming sources. Here I want to sound a warning: If we are serious about this notion of video dialtone, we must not hobble our own steps toward the goal of real diversity by failing to create appropriate safeguards. The two-level video dialtone model proposed in this item does not include safeguards against discrimination at the second level. If telephone companies are allowed to provide highly sophisticated and customized navigational functions to programmers on an unregulated basis, can we truly guarantee equal access among those programmers?

Genuine common carriage is the essence of nondiscrimination. That nondiscrimination could be assured if telephone companies were limited to providing regulated video access services--- for example, the basic and adjunct-to-basic services identified on level one of the two-level model. It is also important, in my judgment, to separate control over content from control over the conduit if we hope to be faithful to the goal of diversity. It would be easier to ensure nondiscrimination by the owner of the wire if that owner is not in the business of providing content. I think it wise to consider maintaining a dividing line between content and conduit, then--- at least until a video dialtone system is firmly in place.

Along with its futuristic promise, the prospect of an all-fiber switched broadband network raises the possibility of one pipeline into the home, carrying all of the homeowner's electronic services---voice, data, and video. Efficient? Yes. Powerful? Yes. Filled with unsettling portents? Yes, again. Having a single wire into each home, if that occurs, would be not unlike having only one printing press. We must do everything possible, therefore, to ensure diversity in what is carried over that wire. The video dialtone model may well serve as that insurance policy. But can it be done? And can it be done with the right safeguards?

I would prefer to have voted today for a more tentative, less conclusory item: to keep our hands off the hammer and spend more time on the drawing of a blueprint. That was not possible, however. This proceeding, with all its flaws and uncertainties, has at least the virtue of posing questions that can now be tested under the assault of the political and economic marketplace.

####

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:)
)
)
Evaluation of the Syndication) MM Docket No. 90-162
and Financial Interest Rules)

MEMORANDUM OPINION AND ORDER

Adopted: October 24, 1991 ; Released: November 22, 1991

By the Commission: Chairman Sikes dissenting and issuing a statement; Commissioner Quello dissenting to the overall result concurring in part and issuing a statement; Commissioner Marshall issuing a statement.

Table of Contents

Paragraph

I. Introduction 1

II. General Policy Concerns 7

III. In-House Productions 12

Limit on Network Scheduling of In-House Productions 13
Subcap on Non-Series Programs 18
Definition of "Co-Production" 21
Definition of "Foreign Production Entity" 24

IV. Financial Interests 26

Phased Negotiation Process 27
Multiple-Project Arrangements 34
Financial Interests in Non-Series Programs 37
Domestic Co-Production Safeguards 40
Domestic Co-Production "Script Freeze" 46

V. Off-Network Syndication 50

A. Domestic Syndication 50

Active Syndication by Networks 51
Active Syndication of "Off-Other-Network" Programs 59
Affiliate Favoritism Presumption 62
Anti-Warehousing Rule 65

"Independent Syndicator" Definition 67

B. Foreign Syndication 70

Foreign Syndication of Off-Network Programs 71
Foreign Syndication of First-Run Programs 73

VI. First-Run Syndication 75

Prohibition on First-Run Syndication 76
Clarification of the Syndication Rule 82

VII. Prime Time Access Rule 85

Definition of Programming "from a national network" 86

VIII. Transition Rules 89

Grandfathering of Syndication Rights 90
Programs Covered by Grandfathering 94
Application of Safeguards to Grandfathered Programs 97

IX. Reporting Requirements 99

Certification and Reporting Requirements 100

X. Review of Residual Rules .105

XI. Administrative Matters 108

Appendices

Appendix A -- List of Parties
Appendix B -- Rules

I. Introduction

1. By this Memorandum Opinion and Order, we address issues raised in petitions for reconsideration of the Report and Order in this proceeding amending the financial interest and syndication rules.[1] The Commission's previous action provided new business opportunities for the broadcast television networks by substantially relaxing the restrictions on the networks' ability to acquire financial interests and syndication rights in television programming. The remaining financial interest and syndication rules apply only to network production, acquisition and syndication of network prime time entertainment programs and to network participation in first-run syndication. Petitions for reconsideration of the Report and Order were filed by: Association of Independent Television Stations, Inc. (INTV); CBS Inc. and

---

[1] Report and Order in MM Docket No. 90-162, 6 FCC Rcd 3094 (1991).

National Broadcasting Company, Inc. (CBS/NBC); Coalition to Preserve the Financial Interest and Syndication Rule (Coalition); Chris-Craft/United Television Station Group, Tribune Broadcasting Company, Gaylord Broadcasting Company and Channel 50 TV Corp. (Chris-Craft/Tribune et al.); Orbis Communications Inc. (Orbis); the Program Producers and Distributors Committee (PPDC); and Press Television Corporation (Press).[2]

2. The former financial interest and syndication rules prohibited television networks from acquiring any financial interests in the broadcast of outside produced programs (i.e., programs not solely produced by the network) other than the right to exhibit such programs on the network.[3] Those rules also prohibited networks from engaging in the domestic syndication business, or from having any ongoing interest in the syndication of programs for non-network broadcast distribution. However, the rules allowed networks to syndicate outside the United States programs that they had solely produced or that had been produced by foreign entities.[4]

3. The Commission adopted these rules in 1970 in response to the three major broadcast television networks' excessive power in the financing, development and syndication of television programming. The former financial interest and syndication rules were thus primarily designed to promote two specific public interest goals: (1) an increase in diversity and competition in program supply for the public's network television viewing; and (2) the creation of a diverse and competitive syndication marketplace for the benefit of local stations and their viewers. The prohibition on acquiring financial interests and syndication rights was intended to prevent networks from using their dominant position in the marketplace to "extract" such rights in programs produced by others as a condition of airing the programs. These rules also eliminated the potential conflict of interest in which networks could make programming decisions that favored programs in which they held financial interests and syndication rights.[5] The prohibition on active domestic syndication by the networks was intended to prevent them from adversely affecting competition in the syndication marketplace by favoring their affiliates in sales of such programming. By favoring their affiliates, the networks could harm both independent stations competing for syndicated product

---

[2] Appendix A lists the parties filing in this proceeding.

[3] Report and Order in Docket 12782, 23 FCC 2d 394 (1970).

[4] The financial interest and syndication rules were reinforced by consent decrees which ABC, CBS and NBC entered into with the Department of Justice after they were charged with violating the Sherman Act. These consent decrees incorporated the terms of the Commission's financial interest and syndication rules and placed additional restrictions, including a four year limit on option terms, on network behavior. See United States v. National Broadcasting Co., 449 F.Supp. 1127 (C.D.Cal. 1978); United States v. CBS Inc., 45 Fed. Reg. 34,463 (1980); United States v. American Broadcasting Cos., 45 Fed. Reg. 58,441 (1980).

[5] Report and Order in Docket 12782 at 397-8.

and other syndicators that do not enjoy a network-affiliate relationship.[6]

4. We initiated this proceeding to determine whether modification of these rules was warranted.[7] As we observed in the Report and Order, over the last 20 years, the role and the power of the three major networks has diminished; cable television has emerged as a competitive force; and the fundamental objectives of the rules -- to foster a robust syndication industry and to prevent network extraction of rights from non-network producers -- have been advanced. Concerns still remain, however, that the underlying objectives of the rules could not be achieved in the absence of such rules. In this proceeding, the Commission determined that a measured approach to relief for the networks was the most effective means of achieving our objectives and ensuring that our diversity goals were not undermined. We noted that relaxing the restrictions on network acquisition of financial interests and syndication rights would provide existing and emerging broadcast networks the opportunity and flexibility to compete in and thus generate additional revenue from the domestic and international video marketplace. Yet, we also found that there is a strong public interest in maintaining diverse sources of network programming, off-network syndicated programming and first-run syndicated programming for local broadcast stations. Thus, in the Report and Order, we concluded that the rules could be relaxed to provide the networks with greater opportunities in program production and syndication, while maintaining diverse sources of programs for networks and local independent and affiliate television stations.[8] We determined that, to achieve this balance, the new rules must include certain structural and behavioral safeguards to ensure that the networks: (1) do not extract financial interests and syndication rights from non-network producers in return for access to their schedules; nor (2) engage in anti-competitive behavior that would deprive local broadcast stations of syndicated programming.

5. Accordingly, by the Report and Order in this proceeding, we adopted new rules that: (1) eliminate the restrictions on network ownership and syndication of network programming as to all dayparts, and all programs other than prime time entertainment; (2) allow networks to retain all rights, including financial interests and domestic and foreign syndication rights, in all "in-house" productions of network programs; (3) permit networks to produce "in-house" up to 40 percent of their prime time entertainment schedules; (4) allow networks to acquire all rights, including financial interest, domestic syndication and foreign syndication rights, in outside productions, on their own or another network, subject to certain safeguards; (5) allow networks to engage in domestic syndication of all "in-house" productions aired on their network, subject to certain safeguards; (6) allow networks to engage in foreign syndication of network programs without limitations; and (7) allow

---

[6] Id. at 382.

[7] See Notice of Proposed Rulemaking in MM Docket No. 90-162, 5 FCC Rcd 1815 (1990); Further Notice of Proposed Rulemaking in MM Docket No. 90-162, 5 FCC Rcd 6463 (1990); Order in MM Docket No. 90-162, 56 FR 11720 (1991). See also Report and Order at 3097-3098.

[8] Report and Order at 3098-3099.

limited network participation in first-run syndication. The Report and Order also revised the definition of "network", established transitional rules for a "new" network and imposed certain reporting requirements.

6. On reconsideration, parties propose conflicting modifications to our new rules that would either expand or contract their scope. After carefully reviewing all petitions for reconsideration, we find no new evidence warranting fundamental changes in the rules as adopted. The reconsideration petitions in many respects repeat points already presented and considered in earlier phases of this proceeding. Thus, by this Memorandum Opinion and Order, we deny most of these requests that largely reiterate arguments already considered and rejected in our adoption of the original Report and Order. We do, however, make technical corrections to our rule regarding the co-production "cooling-off" period and the continued restrictions on network participation in first-run syndication. We also clarify our rules with respect to the definition of a co-production, the distinction between a domestic and foreign production entity, and the application of syndication safeguards to a new network.

II. General Policy Concerns

7. In their petitions for reconsideration, the parties begin by reiterating their basic positions as to whether there is a need for restrictions on network acquisition of financial interests and syndication rights. The networks reargue their view that the financial interest and syndication rules are no longer needed in light of the changes in the video marketplace in the 20 years since they were first adopted.[9] With specific regard to the revised rules we have adopted, the networks argue that these rules impose unwarranted restraints on their ability to produce, acquire and distribute television programming, are not supported by the weight of the record, are inconsistent with our stated regulatory objectives, exceed our statutory jurisdiction, impermissibly infringe upon the First Amendment rights of the three networks, and unlawfully discriminate in favor of the Fox television network and other broadcast and cable competitors.

8. The Coalition states again that retention of the financial interest and syndication rules would best serve the public interest and questions our decision to relax the rules.[10] The Coalition also is concerned that the safeguards adopted in our Report and Order are insufficient to prevent the networks from abusing their power to the detriment of producers, syndicators, independent stations and, ultimately, the viewing public who benefits from diversity and competition.[11]

9. Moreover, the Coalition states that regulation of network conduct is

---

[9] CBS/NBC Petition at 2-4; CBS/NBC Reply at 1-4; Fox Opposition at 5-6.

[10] Coalition Petition at 2.

[11] Report and Order at 3100.

consistent with the Constitution and that a federal district court has determined that the restrictions governing the networks' ability to acquire financial interests and syndication rights do not even implicate the First Amendment.[12] In this regard, INTV and Chris-Craft/Tribune et al. state that the court affirmed the much broader prohibition on network acquisition of financial interests and syndication activities in Mt. Mansfield Television v. FCC, 442 F.2d 470 (2d Cir. 1971).[13]

10. INTV and Chris-Craft/Tribune et al. also state that we have in most respects reached a rational decision which is amply supported by the extensive record in this proceeding. They remain concerned, however, that the networks have the incentive and ability to discriminate against independent stations if they are permitted to participate in the off-network and first-run syndication marketplaces.[14] PPDC supports our fundamental findings and conclusions. Its petition requests a clarification of an apparent inconsistency between the discussion of first-run syndication rights in our Report and Order and the rules promulgated in the Report and Order with respect to network participation in first-run syndication.[15] Orbis concurs with our decision to restrict the amount of programming a network may produce for its own schedule. However, it is concerned that the networks could harm independent producers if they are permitted to engage in foreign syndication of programming produced by others.[16]

11. Although petitioners express these concerns in their reconsideration pleadings, they present no new evidence that warrants reconsideration of our fundamental determination to relax substantially, but not totally repeal, the rules as set forth in our Report and Order.[17] Beyond requests for fundamental changes to the rules, the petitioners argue for modifications to, or clarification of, specific aspects of the new rules. We discuss these specific proposals below.

III. In-House Productions

12. Rule. The new financial interest and syndication rules provide that a network may fill up to 40 percent of its prime time entertainment schedule with in-house productions.[18] An "in-house" production is a network program that is: (1) solely produced by the network; (2) co-produced by a network with

---

[12] Coalition Opposition at 23-24.

[13] INTV Opposition at 9; Chris-Craft/Tribune et al. Opposition at 14.

[14] INTV Petition at 2; Chris-Craft/Tribune et al. Petition at iii.

[15] PPDC Petition at 2.

[16] Orbis Petition at 1-2.

[17] See 47 CFR § 1.429(b).

[18] 47 CFR § 73.659(c).

a foreign producer; or (3) co-produced by a network with an outside domestic producer that initiates the arrangement.[19] A program is deemed "solely produced" by a network if the network alone owns the copyright, retains full business and production control, and has full financial responsibility for the program.[20] A "co-production" is a program in which a network and an outside entity share the copyright, business and production control, and financial responsibility.[21] The rule includes two safeguards applicable to domestic co-productions: (1) the co-production must be initiated, in writing, by the outside producer; and (2) the agreement is not binding on the outside producer until 30 days after it is executed.[22]

13. Limit on Network Scheduling of In-House Productions. INTV requests that the schedule cap on in-house productions be lowered to 25 percent or that the definition of in-house production be amended to exclude domestic co-productions.[23] INTV claims that the definition of in-house production allows the networks to syndicate a substantial amount of programming. It contends that at the 40 percent level the networks could control enough "hit" programming to harm independent stations. Moreover, INTV believes that in-house production will enable networks to retain much more control over the factors which determine the success of a program during network exhibition and in syndication.[24] It contends that its proposal would minimize the risks to independent stations while allowing networks to produce and distribute a generous amount of programming.[25]

14. In response to INTV, the networks argue that INTV overstates the extent to which independent stations rely on new, off-network syndicated programs. They state that independent stations have had great success with first-run syndicated and older off-network programs.[26] In addition, the networks believe that their participation in syndication will be very limited

---

[19] Report and Order at 3116-3118.

[20] 47 CFR § 73.662(h).

[21] 47 CFR § 73.662(b).

[22] 47 CFR § 73.659(a)(3).

[23] INTV seeks to limit off-network syndication by the networks. Although it would prefer a ban on all active syndication by a network, INTV supports either of the above-referenced alternatives. INTV Petition at 14-15.

[24] INTV Petition at 16.

[25] INTV Reply at 6.

[26] In a joint opposition, Capital Cities/ABC, Inc., CBS Inc. and National Broadcasting Company, Inc. (Joint Network) cite the record in this proceeding to support this contention. Joint Network Opposition at 14. In its reply, INTV also cites the record to demonstrate that independent stations have few substitutes for off-network programs. INTV Reply at 5.

for the near term due to the 40 percent cap and the high failure rate of new programs. Further, the networks dispute the assertion that they would be able to predict the success of in-house programs to a degree that would permit them to control a significant number of off-network hits.[27] The networks also object to INTV's alternative proposal to exclude domestic co-productions from the definition of in-house production. The networks note that parties to this proceeding urged us to permit networks and independent producers to enter into such arrangements and that our rules require such arrangements to be initiated by the producer.[28] The networks believe that INTV's proposal would harm independent producers with no attendant benefit to the public interest.

15. CBS/NBC argues further that the schedule cap is not supported by the record and violates their constitutional rights.[29] On the other hand, the Coalition contends that such restrictions on the networks are fully supported by the record and that the networks' unique position in the distribution of television programming requires regulatory safeguards to ensure the continued diversity of programming.[30] Moreover, the Coalition states that the argument that rules regulating the networks' conduct are unconstitutional has been rejected by the Commission and courts. In particular, the Coalition observes that the decision upholding the consent decree restriction on the networks' ability to acquire financial interests and syndication rights was found not to implicate the First Amendment.[31]

16. Decision. As we indicated in the Report and Order, to protect competition and diversity in the marketplace while also encouraging greater network participation in domestic syndication, we decided to adopt a measured regulatory response intended to (1) ensure outside producers an opportunity for access to the network schedule; (2) grant the networks limited entry into domestic syndication, subject to safeguards; and (3) enable us to assess the actual impact of that entry, and the effectiveness of both our co-production and our syndication safeguards, when we revisit our revised rules in four years.[32] In the Report and Order, we considered an earlier proposal to adopt a 25 percent limit on network scheduling of in-house productions and determined that such a low threshold was unwarranted.[33] We concluded that a 40 percent limit on network scheduling of in-house productions strikes an appropriate balance between granting the networks flexibility in choosing their schedules

---

[27] Joint Network Opposition at 15.

[28] Report and Order at 3119, n. 78.

[29] CBS/NBC Petition at 12.

[30] Coalition Petition at 4-5; Coalition Opposition at 8-10.

[31] United States v. National Broadcasting Co., 449 F.Supp. 1127, 1139-40 (C.D. Cal 1978).

[32] Report and Order at 3134.

[33] Report and Order at 3122.

and a meaningful opportunity to actively syndicate programs, on the one hand, and, on the other hand, promoting program diversity and competition by ensuring that the networks cannot dominate the marketplace for either network or syndicated programming.[34] We determined that a network's ability to predict which program series will enjoy syndication success is not so certain as to mandate a significantly lower cap.[35] In their petitions for reconsideration, commenters provide us with no new or compelling reason to change this decision.

17. We again reject the networks' argument that a cap on network scheduling of in-house productions is unsupported by the record and violative of their constitutional rights.[36] In the Report and Order, we found that a schedule cap on in-house productions would serve as a check on network circumvention of our outside production safeguards and permit us time to assess the actual impact of limited network involvement in the marketplace.[37] In addition, we concluded that, even if a schedule cap implicated First Amendment concerns, our 40 percent in-house cap passes constitutional muster because of its primary purpose to prevent possible anti-competitive abuses by the networks in the syndication marketplace.[38] Further, we believe that the schedule cap will promote diversity of viewpoints on network television -- a goal that the courts have expressly ruled to be consistent with the First Amendment.[39]

18. Subcap on Non-Series Programs. The Coalition seeks reconsideration of the decision not to adopt a subcap on the amount of "one shot" programs (i.e., made-for-TV movies, mini-series or specials) that the networks may produce in-house. The Coalition recommends a 25 percent subcap to prevent the networks from producing all such programming in-house. It states that the small producers currently creating the majority of these programs are in precarious financial positions that make them particularly vulnerable to network abuse.[40] The Coalition believes that, if the networks can produce in-house an unlimited amount of this programming, these small producers will likely be forced out of business or into network employment and a loss of program diversity will ensue.

---

[34] Report and Order at 3122-3.

[35] Report and Order at 3124.

[36] As stated in the Report and Order, while this cap limits the ability of a network to fill its own prime time entertainment schedule with in-house productions, it does not limit the amount of in-house productions in which a network may engage. Report and Order at 3123, n. 94.

[37] Report and Order at 3121.

[38] Report and Order at 3123-3124.

[39] Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971).

[40] According to the Coalition, these programs are now produced by a diverse group with only 14 percent of these programs produced by MPAA companies. Coalition Petition at 6; Coalition Reply at 4.

19. The networks argue that a 25 percent subcap on network-produced "one shot" programs is unnecessary. They state that competition among buyers of television movies and mini-series is the greatest among categories of prime time entertainment programming.[41] In particular, the networks state that cable networks now spend the same amount as the broadcast networks on these programs and air approximately the same number.[42] According to the networks, the competition from other available buyers will preclude any attempted network extraction from producers of "one shot" programs, particularly movies.

20. Decision. In the Report and Order, we rejected as unnecessary the Coalition's proposal for a separate limit on the amount of non-series programming produced in-house.[43] We found that the 40 percent limit on in-house productions adequately addresses our concerns for program diversity and minimizes our restriction on network flexibility.[44] The Coalition presents no new evidence that would lead us to alter this conclusion.

21. Definition of "Co-Production". CBS/NBC asks that the definition of a co-production, Section 73.662(b), be amended to encompass arrangements where not all, but one or more, of the enumerated factors -- copyright ownership, financial responsibility, and business and production control -- are shared.[45] Chris-Craft/Tribune et al. oppose this request, arguing that we intended to specify which of several aspects of program ownership and control must be shared for a program to qualify as a co-production. They contend that the listed factors are not intended to be a menu from which the networks may pick and choose. Chris-Craft/Tribune et al. state that we did not intend, for example, to consider a program a co-production if the copyright were entirely owned by the producer, the producer had full financial responsibility for the program, and the network merely shared business and production control. They further state that the CBS/NBC proposal would allow the networks to convert virtually any outside-produced program into a co-production, thereby evading the domestic syndication ban on such programs.[46]

22. We are also asked by CBS/NBC to consider into which category an arrangement between a network and a producer owned in part by a network should fall. CBS/NBC states that, as now written, the definition of "domestic production entity" appears to include only production entities that are not owned even in part by a network. CBS/NBC urges that either the definition be changed to permit co-production arrangements between networks and such entities

---

[41] Joint Network Opposition at 9-10.

[42] Joint Network Opposition at 10-11.

[43] Report and Order at 3122, n. 90.

[44] Report and Order at 3122, n. 90 and 3124.

[45] CBS/NBC Petition at 14, n. 36.

[46] Chris-Craft/Tribune et al. Opposition at 18, n. 20.

or that the Commission indicate that we would consider such arrangements "sole productions" by a network.

23. Decision. We reaffirm our conclusion that all three enumerated factors must be shared for a program to qualify as a co-production. In the Report and Order, we indicated that the best way to decide who is the "producer" is to examine who controls the production process, who pays for that process and who owns the resulting program.[47] We also stated that each of these criteria is useful for analyzing who actually produces a program.[48] Thus, only if a network shares each of the listed factors with an outside producer does it have substantial control over, and responsibility for, that production. We concur with the concern raised by Chris-Craft/Tribune et al. that virtually any arrangement with an outside producer could be considered a co-production if we required only that some of these factors be shared. Therefore, we clarify that co-productions are only those arrangements in which a network and an outside producer share all of the following criteria of control: (1) copyright ownership; (2) financial responsibility; and (3) business and production control. Finally, it was not our intent to preclude collaborations between a network and a production company owned in part by the network. Therefore, we will clarify the definition of "domestic production entity" as set forth in Section 73.662(c) to confirm that a network's production arrangement with a producer in which it holds a non-controlling interest may be a co-production for the purposes of these rules.[49]

24. Definition of "Foreign Production Entity". Chris-Craft/Tribune et al. request that we define the term "foreign production entity" to include those production entities that are registered to do business and located only outside of the United States and that are not controlled by or under common control with U.S. production entities.[50] Chris-Craft/Tribune et al. observe that, under the existing definition, a number of Hollywood studios would qualify as foreign entities because they are "registered to do business" and "located outside the United States."[51] If those studios are considered foreign production entities, then the networks could enter into co-production arrangements with such studios unconstrained by our domestic co-production safeguards. Moreover, Chris-Craft/Tribune et al. state that U.S. entities could set up foreign affiliates to enter into co-production arrangements exempt from these safeguards. Chris-Craft/Tribune et al. claim that this was not our intent.

25. Decision. While we did not intend to create a loophole in our

---

[47] Report and Order at 3118.

[48] Id.

[49] We also modify the definition of a program "solely produced by a network," Section 73.662(h), to reflect this clarification.

[50] Chris-Craft/Tribune et al. Petition at 7-9.

[51] 47 CFR § 73.662(e).

definition of domestic and foreign production entities, we believe that the modification to these definitions proposed by Chris-Craft/Tribune et al. is too restrictive. We do not intend to include as a domestic producer those foreign-based production firms that have only a minimal American presence.[52] The major studios which are located within the United States, maintain their principal production headquarters in the U.S., and are registered to do business here are generally recognized to be domestic producers, even though some of these companies are now owned by foreign interests. However, foreign-owned firms whose principal production headquarters are indeed outside the United States will be considered "foreign production entities" for purposes of these rules. In addition, we did not intend to permit a U.S. producer with its principal production facilities headquartered in the United States to set up a foreign affiliate in order to avoid the restrictions on domestic co-production arrangements. Accordingly, we modify Section 73.662 (c) and (e) of our rules to reflect these clarifications.

IV. Financial Interests

26. Rule. Apart from prime time entertainment programming,[53] a broadcast television network may hold or acquire a continuing financial interest[54] in any network television programming without restriction under the new rule.[55] As for network prime time entertainment programs, a network may retain all rights in programming it produces in-house for network exhibition.[56] A network may also acquire a financial interest in any outside entertainment programming aired during its prime time schedule, subject to certain safeguards. To prevent a network from extracting such an interest as a condition of network exhibition, a network can only acquire a financial interest in an outside production for its network through a separate negotiation initiated no less than 30 days after execution of the initial network license fee agreement (and, where applicable, a pilot production agreement). When a network enters into an agreement for acquisition of any such rights in an outside production, it must certify in the public files of its owned and operated stations (O&Os) that it has complied with the rules and that its licensing or airing of the program was not conditioned on its acquisition of such rights.

---

[52] Report and Order at 3117.

[53] 47 CFR § 73.662(d) and (g).

[54] 47 CFR § 73.662(a).

[55] A broadcast television network can produce and retain a continuing financial interest in any programming outside prime time, any non-entertainment programming it airs in prime time, or any programming aired on non-broadcast video outlets. Report and Order at 3100, 3103.

[56] The rules, however, only permit a network to hold such rights in first-run syndicated programming distributed in the U.S. that it has solely produced. 47 CFR § 73.659(b).

27. Phased Negotiation Process. CBS/NBC requests that the separated negotiation process for network acquisition of financial interest and syndication rights either be eliminated or replaced by a 30-day cooling-off period approach.[57] CBS/NBC claims that our phased negotiation requirement will undermine our goal of permitting independent program producers to obtain financing from the networks because a producer must line up financing by selling its back-end rights before it commits to supply a program at a given license fee.[58] Since the rules prevent the network from negotiating for those rights until 30 days after the producer has committed to a license fee, CBS/NBC further asserts that the networks' opportunity to compete for the back-end rights is diminished.

28. The Coalition opposes the elimination of the separate negotiation safeguard as requested by CBS/NBC. Moreover, the Coalition seeks modification of the phased negotiation process to prohibit negotiations for back-end rights[59] until after a program is scheduled.[60] The Coalition asserts that only after a program is scheduled do both parties have comparable knowledge of the program's prospects that will ensure that producers receive fair compensation for the sale of their rights in the program.[61] According to the Coalition, the networks typically negotiate license terms at the same time they negotiate for the pilot. Thirty days after this time often is still long before a network

---

[57] CBS/NBC Petition at 9-10. CBS/NBC asserts that the certification requirement is sufficient to address the concern that a network could condition the licensing of a program for network broadcast on the condition that the producer sell it back-end rights. In its opposition, the Coalition argues that certification alone is not adequate. It states that violations would be difficult to detect and could take a variety of forms. The Coalition notes that, while producers could challenge the certification, in reality a producer would have a disincentive to do so since the networks remain the major purchasers of prime time entertainment series capable of successful syndication. The Coalition points out that the network may be a producer's primary route to making profits from successful syndication of a series. Coalition Opposition at 8-10.

[58] CBS/NBC argues that while unlikely to affect large studios with alternative sources of financing, this requirement will create a barrier for small producers.

[59] Coalition uses the term "back-end rights" to include financial interests (i.e., profit participation) and syndication rights (i.e., distribution rights) or some combination thereof.

[60] Coalition Petition at 18.

[61] The Coalition notes that producers of all sizes support this safeguard because they recognize that the networks would acquire back-end rights without fair compensation if allowed to negotiate for those rights simultaneous with license fees. Coalition Opposition at 10-11.

commits to license and order a series.[62] The Coalition contends that the network is the only potential buyer of back-end rights until it commits to license and order a program.[63] It also argues that a third party will not buy an interest that thereby reduces its chances of being scheduled by a network inclined to favor in scheduling decisions those shows in which it acquires back-end rights.

29. In opposing CBS/NBC, the Coalition disputes the networks' claim that all ownership interests will be sold by the time the producers enter into the series license agreement.[64] According to the Coalition, while producers sometimes sell distribution rights in advance, they rarely sell profit participation at this stage. The Coalition believes that, given the new opportunities for the networks to act as the producers' bankers, there is no business justification for any network-imposed requirement that a producer have guaranteed financing at a point when they have agreed to order no more than a pilot. If a producer does not have the financing to produce a series, the Coalition argues, then the network can finance the program in return for back-end rights. The Coalition further observes that the networks are seeking expeditious action from the Justice Department regarding modifications to the consent decrees in order to take advantage of the new rules.[65] Thus, the Coalition argues the networks must believe that the rules will provide them with new business opportunities.

30. Decision. In adopting a phased negotiation requirement, we concluded in the Report and Order[66] that a phased negotiation is the most effective means of protecting producers against network extraction and related abuses short of retaining the complete ban on network acquisition of financial interests. Without a phased negotiation requirement, a network that has not committed to license a program could extract commitments from a producer to relinquish financial interests or distribution rights for less than a compensatory price. By separating the negotiation over the license fee from the negotiation over program rights, we limit the networks' ability to extract a producer's grant of such rights in exchange for access to the network schedule. Thus, the network will be able to obtain financial interests and/or syndication rights, but not without clearly providing additional compensation

---

[62] The Coalition explains that pilot negotiations for fall series usually take place between January and early March, but that the networks do not commit to license and order series until late May.

[63] The networks state that the development process is mischaracterized by the Coalition. The networks claim that the Coalition's proposal would result in a virtual ban on network financing of independent producers because major financing for series programs is routinely obtained prior to the point of scheduling. Joint Network Opposition at 5.

[64] Coalition Opposition at 12-13.

[65] Coalition Opposition at 12.

[66] Report and Order at 3114-3115.

(over and above the basic license fee) to the producer for such rights. The 30-day delay between the two negotiations strikes a reasonable balance in protecting producers from extraction while allowing new competition from the networks for production financing.

31. We disagree with CBS/NBC's contention that this 30-day phased negotiation process greatly diminishes their ability to compete in this area. We remain assured that networks will have a meaningful opportunity to participate in program financing through this process. Whether or not producers find potential financing sources elsewhere, they may find the prospect of a network financing bid advantageous and readily wait 30 days to finalize a deal. Thus, we continue to find that the phased negotiation requirement offers the networks a fully workable means to participate in financing outside productions.

32. We also find unwarranted the Coalition's request to preclude negotiations for back-end rights until after scheduling of the program on the network. As the networks observe, such a requirement could hamper network financing of outside productions. The 30-day period is long enough to ensure a bona fide separation in negotiations and will enable producers to seek alternative bids for the program rights from the networks if they so desire. This period is brief enough that the mere passage of time is not likely to foreclose the networks from the competition for such rights.[67]

33. Finally, CBS/NBC offers no new evidence to counter our determination in the Report and Order that its proposed 30-day "cooling-off" period safeguard would be susceptible to manipulation and abuse. We continue to believe that the 30-day phased negotiations process best accommodates our goal of allowing networks to acquire financial interests while guarding against the loss of diversity that would result from network extraction and conditioning of access. Accordingly, we reject this CBS/NBC proposal.

34. Multiple-Project Arrangements. CBS/NBC also seeks a clarification in our new rules regarding multiple-project arrangements with outside producers.[68] It proposes that such arrangements be exempt from the phased negotiation process because these deals are only made with established producers with the greatest bargaining power where network "extraction" of producer-held back-end rights is not a legitimate concern. It further argues that the phased negotiation safeguard is not workable in the multi-project context because no license fee has been negotiated at the time the network commits to finance the programs.

35. The Coalition argues that separate negotiations are workable for

---

[67] We also note that our certification process further precludes potential abuse by requiring networks to certify that their licensing or airing of a program was not conditioned on its acquisition of financial interests. Thus, we believe that, in combination, our phased negotiation and certification process is sufficient to check potential abuses.

[68] CBS/NBC Petition at 10-11.

multiple-project arrangements.[69] It explains that when a network enters into such an agreement it agrees only to pay liquidated damages if it fails to order future shows from the producer. At this stage, the network has not committed to air any individual series and no license agreements for specific series have been negotiated. The decision to license a series and the terms of that license are negotiated individually for the series after the actual proposal is made.

36. Decision. We disagree with the networks that we should exempt multiple-project arrangements with outside producers from the phased negotiation process. It may be true, as the networks contend, that these agreements are generally made with producers with relatively strong bargaining power. However, as we concluded in the Report and Order, because it is virtually impossible to tell at the outset whether a proposed program will become a "hit" -- or even be carried -- during a given season, even established producers can find themselves at a distinct disadvantage in initial licensing negotiations with a network.[70] We are also concerned that such an exemption from the phased negotiation process would be susceptible to abuse. Networks might find it in their interest to enter into ostensibly "multi-project" arrangements with producers that are later terminated after allowing the network to circumvent the phased negotiation requirement in the initial (and only) program negotiation. Furthermore, the parties retain considerable flexibility for working out their contractual arrangements within the constraints of the rules. First, an umbrella "multi-project" deal may consist of an exclusive or "right of first refusal" production arrangement in which particular license fees and back-end rights remain to be negotiated as those programs arise.[71] Alternatively, pursuant to one all-encompassing phased negotiation process, the parties may specify license fees for each of the multiple projects and then, 30 days later, agree to the financial interests and syndication rights allocations for each program at issue. For these reasons, the phased negotiation process is neither unjustified nor overly burdensome, and multi-project arrangements do not warrant an exemption from our phased negotiation requirement.

37. Financial Interests in Non-Series Programs. The Coalition urges us to prohibit the networks from acquiring back-end rights in "one shot" programs,

---

[69] Coalition Opposition at 14-15.

[70] Report and Order at 3113.

[71] As the Coalition explains, when a network enters into a multi-project agreement with a producer, it only agrees to pay liquidated damages if it fails to order a certain number of future shows from the producer. At this stage, the network has not committed to air any individual series and no license agreements for specific series have been negotiated. Decisions regarding any particular series covered by the agreement are made on a series-by-series basis after review and approval of the concept, pilot script, continuing story line and other major elements. Coalition Opposition at 15.

such as TV movies, mini-series or specials.[72] It argues that the separate negotiation safeguard is unworkable for such programs because there is no point in the production process when the parties can negotiate a financial interest separately from the license fee. It states that parties have no basis for evaluating the value of such programming because it has little domestic back-end value and its foreign value is not determined by its success on the network. Moreover, the Coalition claims that the networks are in a position to extract a financial interest without paying a fair value. It also contends that the networks could manipulate payments to producers such that they will end up with fewer back-end rights without greater network compensation.[73] The Coalition argues that these entities, which are mostly small producers, will be forced out of business and there will be a loss of program diversity.

38. The networks counter these arguments by stating that they make production commitments for and set the license fees of "one shot" programs based on a script.[74] They state that, once a producer receives a network commitment, the program can be sold in foreign syndication immediately after it is produced and in domestic syndication after its network run. Thus, the producer has all the relevant information for determining the value of the back-end rights at this point.

39. *Decision*. We are not persuaded that we should prohibit networks from obtaining back-end rights in non-series programs. The value derived from the non-network run of such programs is subject to much of the same uncertainty as series programs, and thus it appears appropriate to permit networks to compete for these residual rights subject to the same phased negotiation process we require for series and multi-program arrangements. In particular, this phased negotiation safeguard prevents the network from extracting back-end rights from an outside producer as a condition of licensing the program and provides the producer with an opportunity to sell these rights to other bidders after the program has been licensed for network exhibition.

40. *Domestic Co-Production Safeguards*. CBS/NBC requests that the safeguards for domestic co-productions, *i.e.*, that they be initiated in writing by the outside producer and may be nullified by the producer within 30 days of execution, be eliminated. They argue that these provisions do not add anything to the safeguard against extraction already provided by the network certification requirement. CBS/NBC asserts that the safeguards will burden networks and producers with no benefit to the public interest. It states that the requirement that agreements be producer-initiated would only work in formal bargaining relationships and, since the program purchasing process is neither formal nor orderly, this safeguard will only impede communications between the parties. In addition, CBS/NBC states that a network will not want to participate in a co-production if its partner can nullify the agreement within a 30-day "cooling-off" period. CBS/NBC states that the networks will be

---

[72] Coalition Petition at 8-10.

[73] *Id*.

[74] Joint Network Opposition at 10.

reluctant to enter into such agreements because, in the event that its co-producer breaks the agreement, the network would be forced to find a new outside producer, continue the project in-house or abandon the project.

41. The Coalition opposes the request for eliminating the producer-initiation requirement and "cooling-off" period safeguards.[75] It says that it finds the networks' objection curious since they are requesting a "cooling-off" period instead of the phased negotiation requirement for acquisition of financial interests. The Coalition also observes that a standard network business practice is to negotiate license agreements at the pilot stage that never come to fruition. Thus, the Coalition states that if a network does not wish to negotiate a particular co-production agreement that may be voided, it can always decide to enter into a different arrangement.

42. Chris-Craft/Tribune et al. request that the rule concerning the "cooling-off" period be modified to accurately reflect our intent to permit outside producers to nullify co-production agreements.[76] These petitioners point out that in the Report and Order we stated that the "cooling-off" period is intended to give outside producers who may have been coerced into signing a co-production arrangement the opportunity to cancel that arrangement within 30 days of execution.[77] According to Chris-Craft/Tribune et al., however, as the rule is written, the agreement does not become binding for 30 days (i.e., its effective date is delayed 30 days). Petitioners contend that this differs from the right to nullify an agreement within that period of time. Thus, they believe that the rule should be revised to reflect our expressed intention.

43. Decision. We will retain the domestic co-production safeguards adopted in the Report and Order.[78] In the Report and Order, we expressed concern that a network could coerce a domestic non-network producer into a co-production arrangement as a condition of carriage on the network so as to obtain back-end rights and, in particular, the right to syndicate the program domestically as an in-house production.[79] We believe that the outside producer's initiation of a co-production arrangement in writing is the best means to ensure that such an arrangement occurs only when both parties are willing to participate. We disagree with CBS/NBC that network certification alone is sufficient to determine whether this is indeed the case. Our procedure, which requires written documentation from each side, will ensure that both parties to a co-production arrangement consider the arrangement fully voluntary.[80] We are also unpersuaded by CBS/NBC's speculation that the

---

[75] Coalition Opposition at 15-16.

[76] Section 73.659(a)(3).

[77] Report and Order at 3119.

[78] Id.

[79] Report and Order at 3118-3120.

[80] Report and Order at 3119-3120.

requirement that co-production arrangements be producer-initiated is unworkable because it will impede communications between parties.

44. In any dealings between a network and an outside producer, we are concerned that the network could potentially extract financial interests and syndication rights for less than a compensatory price as a condition of carriage on its network.[81] A domestic co-production agreement involves sharing of ownership and responsibility for the program as well as the acquisition of financial interests and syndication rights. Although co-productions inherently require substantial cooperation and sharing of responsibilities between the parties to the production, networks still possess the power to extract rights from their "co-producers" because they control access to network exhibition. Both the producer initiation requirement and the "cooling-off" period allow the parties to enter into co-production agreements while still protecting against an outside producer being coerced into such a venture. Moreover, we note that the networks have urged the adoption of a cooling-off period as an alternative to the phased negotiation process adopted in these rules for network acquisition of financial interests in outside productions.[82] We thus reject CBS/NBC's argument that the "cooling-off" period is unworkable.

45. To effect our expressed intention with respect to the mechanics of the 30-day "cooling-off" period, we will grant Chris-Craft/Tribune _et al_.'s request to clarify Section 73.659(a)(3). As petitioners indicate, we stated that the purpose of the 30-day cooling-off period is to give "an outside producer who may have been coerced into signing a co-production arrangement...the option of negating the arrangement... ."[83] Accordingly, we revise Section 73.659(a)(3)(ii) to provide that such a co-production arrangement "may be nullified by the outside production entity during a 30-day period after it is executed and before it becomes binding."

46. _Domestic Co-Production "Script Freeze"_. In its petition for reconsideration, the Coalition asks that we prohibit the practice of "script freezes" in conjunction with the right of outside producers to nullify co-production agreements.[84] According to the Coalition, the networks regularly impose a "script freeze" that prevents a producer from taking a script to another network for a year after the producer and network fail to agree on a license fee. It contends that if a producer can negate a co-production agreement but cannot shop the project elsewhere or choose to produce the program itself, the 30-day "cooling-off" period provides relief only in theory.

47. The networks oppose adding a ban on script exclusivity to the

---

[81] _Report and Order_ at 3109, 3119.

[82] CBS/NBC Petition at 9-10.

[83] _Report and Order_ at 3119.

[84] The Coalition seeks a ban on script freezes, or alternatively a rule that voids any script freeze that applies to producer-nullified co-productions. Coalition Petition at 19-20.

"cooling off" period for domestic co-productions.[85] They explain that a "script freeze" is a short term exclusive right to develop a script in return for financing. It is designed to protect the networks' investment in that script. The networks state that the "cooling off" period is meant to give the producer an opportunity to cancel a co-production arrangement that it regards as disadvantageous. They argue that there is no reason to couple the ability of a co-producer to nullify an agreement with the entirely separate obligation to honor any short-term script exclusivity. The networks believe that the result would be to discourage network investment in scripts and network participation in entirely voluntary, mutually beneficial co-production arrangements.

48. Decision. We reject the Coalition's proposal to impose a prohibition on "script freezes" in conjunction with the "cooling-off" period safeguard. The "cooling-off" period is intended to ensure that an outside producer is not coerced into a co-production arrangement or required to cede the related rights to a production for less than fair market value. The voiding of a co-production arrangement during the "cooling-off" period does not necessarily mean that the network will not continue to license the program, only that the outside producer chooses to retain ownership of and responsibility for the program or to share these factors with an entity other than the network.

49. "Script freezes" are exclusivity rights presumably obtained by a network in return for its investment in the development of particular programming.[86] We believe that this is generally a limited and legitimate business practice that protects the network's financial and creative investment in a script in which it retains an interest.[87] We observe that, without such exclusivity, a network could invest resources to develop a program and then lose the exhibition rights to the program before it has adequate time to decide whether to go forward with the project. Thus, we conclude that we will not adopt a limit on "script freezes." Such matters could more appropriately be handled through contract negotiation. However, we would be concerned if script freezes were used by the networks, contrary to their representations about their typically limited invocation of such rights, to undermine the "cooling off" safeguard we have imposed.

---

[85] Joint Network Opposition at 6-8.

[86] We note that the networks represent that the script freeze is only invoked when a network-financed script is selected for pilot production and the parties have not reached agreement on all the license terms. Joint Network Opposition at 7.

[87] We note that the movie studios obtain exclusivity for their television and movie scripts. Joint Network Opposition at 7.

V. Off-Network Syndication

A. Domestic Syndication

50. Rule. The rules permit networks to hold or acquire domestic syndication rights.[88] However, a network may actively syndicate (i.e., distribute) in domestic markets only prime time entertainment programming that is produced in-house and aired on its own network.[89] The syndication of such programs is subject to affiliate favoritism and anti-warehousing safeguards.[90] All other prime time entertainment programming in which a network holds or acquires syndication rights must be distributed through an independent syndicator.[91]

51. Active Syndication by Networks. The Coalition, Chris-Craft/Tribune et al. and INTV request that the rules be changed to prohibit all active domestic syndication by networks.[92] Petitioners observe that the networks do not need to actively engage in syndication to receive revenues from the distribution of their programs.[93] They assert that the rules permit the networks to hold passive financial interests in network programs, thus enabling them to share the rewards, as well as the risks, of network program productions and enhancing their ability to compete in the video marketplace.

52. These petitioners are concerned that the anti-warehousing and affiliate favoritism safeguards will not provide adequate protection for independent stations.[94] They observe that we found that the networks have an economic incentive to favor their owned or affiliated stations over other

---

[88] 47 CFR § 73.659(a).

[89] 47 CFR § 73.660(a).

[90] 47 CFR § 73.660(b) and (c).

[91] 47 CFR § 73.660(a).

[92] Coalition Petition at 20-24; Chris-Craft/Tribune et al. Petition at 2-6; INTV Petition at 4-9.

[93] INTV also contends that the networks mischaracterize and overstate the potential for new revenue from the active domestic syndication of their in-house programming. Because only active syndication of in-house productions is at issue, INTV states that the networks will simply be paying themselves -- rather than an independent distributor -- to distribute their own programming. INTV Reply at 3.

[94] Coalition Petition at 21-23; Chris-Craft/Tribune et al. Petition at 5-6; INTV Petition at 6-7.

stations (especially independents)[95] and have the ability to engage in anti-competitive behavior given their affiliate relationships, market penetration and expenditures to acquire programs.[96] Parties believe that these reasons justify a ban on all network syndication. Moreover, INTV notes that a ban on active syndication will end disagreements concerning the efficacy of safeguards.[97]

53. CBS/NBC objects to the rationale for limiting network participation in syndication in order to monitor such activities since they claim to be effectively prevented from entering the off-network syndication business for four years. Thus, CBS/NBC asserts that network syndication will essentially be non-existent during the review period. The networks oppose the proposed total ban on domestic syndication requested by INTV, the Coalition and Chris-Craft/Tribune et al.[98] They state that the proposal goes against our goals to allow the networks to compete more effectively, to generate new revenue sources, and to add competition in the bidding for back-end rights.[99] Moreover, since we determined that off-network programming plays a "critical role" in the "viability of independent stations," the networks assert that we should not ignore the public interest benefits that would accrue from permitting new entrants into this marketplace.[100] They further claim the ability to distribute this programming will increase competition in the supply of such programming to independent stations.

54. The independent stations disagree with the networks' claim that fewer restrictions on active syndication by the networks would increase competition and benefit independent stations. INTV acknowledges that three new entrants theoretically should enhance competition. However, because the entrants in this instance are vertically-integrated networks, INTV argues that less competition may actually result. INTV asserts that the increased risk of anti-competitive behavior offsets any potential benefit from entry into the market.[101] Chris-Craft/Tribune et al. assert that if network participation in

---

[95] The Coalition further asserts that the ability to actively distribute syndicated programming will provide another incentive for the networks to favor their in-house productions. Coalition at 23-24.

[96] Chris-Craft/Tribune et al. Petition at 2.

[97] INTV Petition at 6. In its opposition to the CBS/NBC proposal to permit syndication of off-other-network programming, the Coalition similarly argues that the prohibition against network syndication should be retained to test the effectiveness of the affiliate favoritism and anti-warehousing safeguards. Coalition Opposition at 21-22.

[98] Joint Network Opposition at 11-13.

[99] Joint Network Opposition at 12. Report and Order at 3107, 3134.

[100] Joint Network Opposition at 13.

[101] INTV Reply at 4.

syndication would enhance competition, then independent stations would support repeal of the syndication ban since their reliance on off-network programming would make them the primary beneficiaries of any increased competition.[102] However, Chris-Craft/Tribune et al. note that independent stations do not argue that network entry is either necessary for or beneficial to increasing competition in the market.

55. Press argues that the new syndication rule is too restrictive and that the networks should be permitted to obtain additional revenue from the syndication market.[103] In light of changes in the video marketplace, Press asserts that there is no reason to deny the networks this right that their cable and independent station competitors already have. However, Press recommends that in return for increased syndication rights, networks should be required to allocate a specific percentage of network time for the provision of news and public affairs programming, although there would be no requirement that affiliates air the programming.

56. Decision. We affirm our decision to permit limited active syndication by networks, subject to affiliate favoritism and anti-warehousing safeguards. We reject the request by the Coalition, Chris-Craft/Tribune et al., and INTV to prohibit all active domestic syndication by networks. As we stated in the Report and Order, we find that the public interest will be furthered if the networks are allowed some entry into the syndication marketplace,[104] as it will enable the networks to generate additional revenues and thereby compete more effectively in the video marketplace as a whole. While we believe that the anti-warehousing and affiliate favoritism safeguards adopted in the Report and Order are necessary to protect independent stations from potential anti-competitive behavior by the networks, we intend to monitor closely the efficacy of those safeguards so as to minimize the risk that even limited direct network participation in domestic syndication will jeopardize the supply of off-network syndicated programming so critical to the competitive viability of those stations.

57. Moreover, we have limited the amount of programming that a network can control in the syndication marketplace to allow us to study whether the safeguards we have adopted are, in fact, effective deterrents to network abuse. We also believe that limited network entry into the off-network syndication market could increase the supply of syndicated programming. We also emphasize that passive financial interests are intended to complement, rather than replace, the opportunities for networks to actively syndicate programming. Therefore, prohibiting networks from any active domestic syndication of programming, as suggested by these parties, would forfeit these benefits.

---

[102] Chris-Craft/Tribune et al. Reply at 2.

[103] The Press petition is confusing on this point since the networks are now permitted to receive revenues from syndication; only active syndication is restricted.

[104] Report and Order at 3129.

58. Finally, we reject Press's proposal that we condition network syndication activity on their production of specified percentages of news and public affairs programming. We find that such a requirement, while laudable, would not protect the supply of off-network programming in the domestic syndication marketplace. Moreover, we note that networks, as licensees, already have an obligation to program in the public interest.

59. Active Syndication of "Off-Other-Network" Programs. CBS/NBC seeks to eliminate the prohibition against active syndication by a network of programs aired on another network.[105] Petitioner argues that this ban impedes the networks' ability to compete and deprives them of needed revenues.[106] It states that a network has no ability to condition access or exercise leverage in the case of off-other-network programming since it is not dealing with its own schedule and that existing rules address the specific concerns -- warehousing and affiliate favoritism -- that led to this ban.

60. The Coalition, INTV and Chris-Craft/Tribune et al. dispute the networks' contention that those safeguards are adequate.[107] They state that our decision to limit active network syndication to off-network programming produced in-house and aired by a network on its own schedule is reasonable and well within our discretion given our concerns about the effectiveness of the affiliate favoritism and anti-warehousing safeguards and our desire to test them on a limited basis.[108] The Coalition argues that the potential for a network to favor its affiliates and disadvantage independent stations derives from its control over the distribution of syndicated product. That potential, according to the Coalition, is no less for off-other-network programs than for off-network programs aired by a network on its own schedule. INTV asserts that network involvement in active syndication, even with safeguards, may threaten the supply and diversity of programming available to independent stations. It contends our limits on active syndication by the networks will permit us to ascertain how the networks behave as syndicators and how effective the safeguards are in preventing anti-competitive behavior. In addition, Chris-Craft/Tribune et al. contend that the networks may be entitled to actively syndicate in-house programming that they produced or co-produced for their own schedules, but that no such equities exist with respect to other networks' programming.

61. Decision. We affirm our decision in the Report and Order to prohibit networks from actively syndicating programs that are not aired on their own schedule. In the Report and Order, we emphasized the necessity of structural limits to promote our goals for diversity as well as competitiveness in the

---

[105] CBS/NBC Petition at 23-24.

[106] Joint Network Opposition at 12.

[107] Coalition Opposition at 21-22; INTV Opposition at 8-9; Chris-Craft/Tribune et al. Opposition at 15.

[108] Report and Order at 3135.

syndication marketplace.[109] We believe that the CBS/NBC proposal is inconsistent with our decision on active syndication by networks, particularly with respect to our remaining concerns about the capacity for network anti-competitive behavior. As we suggested in the Report and Order, permitting network domestic syndication of programs which air on another network could allow it to control an overwhelming share of off-network programs syndicated to local stations. Although CBS/NBC argues that a network may not exercise leverage concerning programs that air on another network's schedule, we find that a network's opportunity to condition access to time slots for future programs could influence the syndication negotiations. We reiterate our concern that -- despite an increase in viewer alternatives in the past 20 years -- the networks retain the ability to extract distribution rights from outside producers (even as to programs airing on other networks) in exchange for access to their schedules, as well as to engage in other anti-competitive abuses.[110] Consequently, we find that the syndication opportunities granted to networks, subject to the safeguards adopted in the Report and Order, are appropriate steps given the current video marketplace and will allow limited entry in order to assess the effectiveness of the safeguards.

62. Affiliate Favoritism Presumption. The rules provide a rebuttable presumption of affiliate favoritism when a program in which a network holds an interest is syndicated to its O&Os and affiliates in more than 30 percent of the markets where the program has been sold.[111] INTV observes that this presumption still permits a network to sell to stations serving up to 73 percent of all television households before reaching the 30% threshold.[112] Thus, INTV proposes that an additional presumption of favoritism arise where the sale of a program to affiliates or O&Os occurs in markets representing over 30 percent of the nation's television households.[113] According to INTV, this proposal is consistent with the new network definition that looks at the percentage of households a network serves. The Coalition also proposes that we strengthen the affiliate favoritism safeguard to presume favoritism if a network sells to its O&Os and affiliates in more than 30 percent of either the total markets or the top 50 markets.[114] The Coalition states that a standard of 30 percent of all markets sold presumption is a poor indicator of network

---

[109] Report and Order at 3125, 3129.

[110] Report and Order at 3130.

[111] 47 CFR § 73.660(b).

[112] The networks continue to repeat their argument that they have neither the incentive nor the ability to engage in favoritism or warehousing and that the existing safeguards are sufficient. In particular, they note that the new rules rebuttably presume affiliate favoritism if the threshold is exceeded and that, even if it is not, an aggrieved party may file a complaint with us. Joint Network Opposition at 17.

[113] INTV Petition at 17-18.

[114] Coalition Petition at 24, n. 72.

favoritism given the importance of program clearances in the top 50 markets.

63. CBS/NBC asks that we modify the rebuttable presumption to presume that a network has not engaged in affiliate favoritism when sales of a program to its O&Os and affiliates fall below the 30 percent threshold.[115] In opposing this alternative, INTV states that the parties likely to complain about affiliate favoritism, such as independent stations and affiliates of other networks, will not have access to network records.[116] INTV contends that the existing presumption counterbalances this lack of access to vital information by shifting the burden back to the party with such information. Thus, according to INTV, the lack of a presumption in the networks' favor is reasonable because they have the necessary information to defend a complaint.

64. Decision. We affirm our decision to establish a rebuttable presumption of affiliate favoritism when a network syndicates a program in which it holds an interest to O&O and affiliate stations in more than 30 percent of the markets where the program has been sold. Since the top ten markets represent 31 percent of all television households, we find that INTV's proposal would severely restrict the flexibility of the networks to sell syndicated programming. As a result, INTV's standard could be readily met even by a statistically insignificant number of sales to affiliates in larger markets. Conversely, we also reject CBS/NBC's request to shift the burden of the presumption, including sales to affiliates. We note that the safeguard was established in the Report and Order due to the possibility of network anti-competitive behavior in syndication negotiations. Therefore, the burden of this presumption is appropriately placed on networks as the parties whose actions are monitored in order to prevent conduct favoring their affiliates. We emphasize that the networks will have an opportunity to respond with supporting information to indicate the lack of favoritism. Consequently, we find that the networks are the most direct source of information relevant to possible favoritism and, where challenged, should assume the burden of proving that their conduct during negotiations was not anti-competitive.

65. Anti-Warehousing Rule. Where a network has syndication rights in prime time entertainment programming, it is required to make that programming available for non-network exhibition within a specified period under the rules.[117] INTV recommends extending this rule to all network prime time programming regardless of the network's interest, even if the network only had

---

[115] CBS/NBC at 20, n. 50.

[116] INTV Opposition at 12.

[117] 47 CFR § 73.660(c). The rule requires a network to make prime time entertainment programming in which it has syndication rights available for non-network broadcast exhibition within the U.S. no later than the earlier of: (1) the end of the fourth year after network exhibition of such series has commenced, or the subsequent anniversary of that date as to all programs in that series aired after the fourth year, or (2) 180 days after network exhibition of such a series or program is completed.

exhibition rights.[118] INTV asserts that a network could prevent a program from being syndicated through a contractual provision granting it extensive privileges for temporal exclusivity. Although the consent decrees currently limit temporal exclusivity in network exhibition agreements,[119] INTV argues that once this provision expires the networks may extract such exclusivity unless a rule requires syndicating all programs in a timely fashion.[120] In addition to opposing further safeguards that might interfere with their ability to participate in exclusivity arrangements, the networks contend that extending the anti-warehousing rule to programs in which networks have no financial or syndication interest is beyond the scope of this proceeding.

66. Decision. The rules require a network to release within a specified time period all prime time entertainment programming for which it holds syndication rights for off-network exhibition. We affirm this anti-warehousing safeguard. We do not, however, believe it desirable to extend the safeguard to network prime time programming in which a network has no such rights. In the Report and Order, we concluded that networks maintain both the ability and the economic incentive to selectively withhold programming from off-network syndication. As a result, we believe that the networks could potentially harm stations affiliated with other networks as well as independent stations. These conclusions and our adoption of these safeguards were based on our analysis of the incentives involved in network acquisition of a financial interest and syndication right beyond the basic network exhibition right. We are not, herein, attempting to address any more general concern with the contractual exclusivity a network acquires in association with network exhibition rights. That issue remains governed by the network consent decrees[121] and is not the focus of this proceeding. Thus, while we continue to believe that the anti-warehousing safeguard is necessary to protect local broadcast stations, we find that INTV's proposal is unnecessarily restrictive based on the record before us.

67. "Independent Syndicator" Definition. The rules state that a television network may only actively syndicate within the United States programming produced in-house and aired on its own network. Any other prime time entertainment programming in which a network holds the syndication rights must be syndicated domestically through an independent syndicator.[122] An "independent syndicator" is defined as one not owned or controlled, in full or in part, by a television network.[123] INTV proposes specific guidelines to define the scope of our proscription that a network should have no interest in

---

[118] INTV Petition at 13.

[119] INTV Petition at 13-14. See also n. 4 supra.

[120] Joint Network Opposition at 16, n.51.

[121] See n. 4 supra.

[122] 47 CFR § 73.660(a).

[123] 47 CFR § 73.662(f).

the independent syndicator.[124] INTV's proposed guidelines would prohibit: (1) ownership interests of any kind; (2) the network or any person or entity affiliated with the network from having a convertible or security interest in any asset of the independent syndicator or its affiliates which, if exercised, would permit the network or person or entity affiliated with the network to gain any interest in the independent syndicator; and (3) the network or any person or entity affiliated with the network from serving as a director, officer, employee, agent or independent contractor of the independent syndicator or from having served in such capacity during the previous year. INTV argues that these guidelines are needed to ensure that a network cannot influence the actions of the independent syndicator to which it transfers syndication rights. Thus, it also proposes guidelines to prevent the ongoing contractual relationship between a network and an independent syndicator from becoming an avenue for network control or influence over syndication of a program.[125] These guidelines would prohibit network: (1) involvement in the operations of the entity owning the program or in the syndication of the program; (2) communications with the syndicator relating to the syndication of the program; (3) action as agent or consultant for the syndicator; (4) rights to approve the sale of syndication rights or non-network exhibition rights; and (5) ownership interest in any asset of the syndicator which would permit it to take any action inconsistent with the above limitations. Further, INTV argues that these after-the-fact remedies such as application of our anti-warehousing safeguard to independent distributors and our affiliate favoritism safeguard are meaningless in the dynamic television marketplace and that its proposed specific guidelines provide a better means for preventing network misbehavior before it occurs.[126]

68. Chris-Craft/Tribune _et al_. request that we clarify the definition of "independent syndicator."[127] They contend that the current definition does not protect independent syndicators from network influence, nor does it explicitly apply the affiliate favoritism and warehousing prohibitions to the distribution of programming by independent syndicators.[128] Therefore, petitioners suggest that we modify the definition to provide not only that an independent syndicator must be free of network ownership or control, but also that there must be no contractual arrangements or understandings between the network and the distributor regarding subsequent licensing or scheduling of the syndicated program. In addition, they believe that the rules should clearly indicate that any syndicator failing to comply with the affiliate favoritism or warehousing safeguards when distributing programs produced by a network or in

---

[124] INTV Petition at 9-10, Appendix A.

[125] INTV Petition at 10-12, Appendix B.

[126] The networks argue that these additional guidelines are unnecessary and take issue with several specific elements of the proposal. Joint Network Opposition at 17-18.

[127] 47 CFR § 73.662(f). Chris-Craft/Tribune _et al_. Petition at 12-14.

[128] _Report and Order_ at 3137, 3146.

which a network holds a financial interest does not qualify as an independent syndicator.

69. Decision. We continue to believe that the networks should not be able to steer the distribution of off-network syndicated programming or favor their owned and operated or affiliate stations when selling their syndication rights in a program to another party. Thus, in the Report and Order, we determined that these rights must be sold to an independent syndicator. We reiterate here, in response to the request from Chris-Craft/Tribune et al., that this requirement precludes not only any network ownership interest in or control or influence over the syndicating entity, but also any understandings, contractual arrangements or practices related to or resulting in steering or warehousing of programming on behalf of a network. "Independent syndicators" are mandated by the rules where active network syndication is not allowed in the off-network or first-run program markets. To permit network influence over the negotiations between independent distributors and local broadcast stations would endanger the legitimate program acquisition interests of local stations.[129] While we thus reaffirm that the syndicators involved must be truly independent, in both form and in substance, we decline to adopt the potentially excessive regulations proposed by INTV. Moreover, we do not intend that contractual provisions regularly included in agreements between program producers and syndicators should be precluded where they are neither discriminatory nor implicate steering or warehousing concerns.

B. Foreign Syndication

70. Rule. The rules permit the networks to syndicate in foreign markets all their in-house productions aired on their own or another network or in first-run syndication. They also may syndicate internationally all outside productions aired on their own or another network.[130] International syndication of first-run programs that are not produced "solely" in-house is limited to those programs not distributed in the United States.[131]

71. Foreign Syndication of Off-Network Programs. Orbis requests that we reconsider our decision to allow the networks to engage in foreign syndication of prime time entertainment programming produced by others.[132] Orbis contends that independent producers will not be able to compete in the international arena with programming that has appeared on the networks' prime time schedules.

---

[129] Report and Order at 3137.

[130] In this regard, we reiterate the concern we have expressed earlier that arrangements permitted by the rules not be used to "cross-extract" financial interest or syndication rights in a program aired elsewhere as a condition of licensing a different program for its own network. See Report and Order at 3140, n. 140.

[131] 47 CFR § 73.659(b).

[132] Orbis Petition at 1-2.

It argues that profits from foreign syndication are essential to the continued ability of independent producers to compete domestically in producing television programming. Orbis also states that the ability of independent producers to sell successfully overseas has been important for the United States, not only because of the substantial, positive impact on our balance of trade, but because it has enhanced the diversity of programming to the American viewing public. In response to Orbis, the networks concur with our statement that there is "no reason to preclude the networks from this market."[133]

72. Decision. In the Report and Order, we noted the proliferation of production resources in the international marketplace.[134] Furthermore, we observed that the concerns regarding anti-competitive behavior in distributing syndicated programming in domestic markets are not relevant to foreign markets. Therefore, in the absence of new evidence from the petitioners, we affirm our decision to allow networks to engage in foreign syndication of off-network prime time entertainment programming produced by others. Networks, of course, continue to have the right to engage in foreign syndication of their own in-house productions, as well. We continue to find no cause to prevent networks from entering this market, and the networks' presence could increase the supply of syndicated programming in foreign markets.

73. Foreign Syndication of First-Run Programs. Chris-Craft/Tribune et al. state that the Report and Order makes it clear that networks will not be permitted to syndicate internationally any first-run programming. They ask that a new provision be added to the rules to make it clear that this prohibition applies to foreign as well as domestic syndication.[135]

74. Decision. We deny the request by Chris-Craft/Tribune et al. to amend the rules to prohibit networks from syndicating first-run programs in foreign markets. Contrary to the representation of Chris-Craft/Tribune et al., the Report and Order permits networks to syndicate in foreign markets all first-run programs produced in-house.[136] Due to the unique nature of the domestic first-run syndication market, we precluded networks from actively syndicating first-run programming in domestic markets. The domestic syndication rights for first-run programs "solely produced" by the networks must be transferred to independent syndicators. However, the prohibition against foreign syndication of first-run programming applies only to outside productions syndicated in the U.S., and networks may actively syndicate abroad any first-run programs that they produce in-house. Networks also may retain the foreign syndication rights for any first-run programs exhibited entirely outside the United States, regardless of where the programs are produced. We reaffirm our view, however, that the rules must continue to prevent the possibility of networks extracting foreign syndication rights from domestic, non-network producers of first-run

---

[133] Joint Network Opposition at 11 citing Report and Order at 3141.

[134] Report and Order at 3140-3141.

[135] Chris-Craft/Tribune et al. at 11.

[136] Report and Order at 3140, 3146.

programs as a condition of access to the owned and affiliated stations' program schedules.[137]

VI. First-Run Syndication

75. Rule. A network may produce entertainment programming for first-run syndication and retain a financial interest and foreign syndication rights in such programming "solely produced" in-house.[138] Such programming, however, shall be syndicated domestically only through an independent syndicator. As with our off-network rules, the independent syndicator must be insulated from network influence and its conduct is subject to the same affiliate favoritism safeguards.[139]

76. Prohibition on First-Run Syndication. CBS/NBC seeks elimination of the restrictions on network acquisition of interests in or distribution of first-run syndicated programming.[140] Petitioner argues that the networks have no unique market power that can be used to extract rights from outside producers for this programming. CBS/NBC asserts that a network's ability to control clearances, handicap a new first-run program, or exercise market power in the distribution of such programs is no different from that of other station group owners.[141] It points to difficulties in obtaining clearance of certain network programs as evidence of its inability to force syndicated programming on affiliates.[142] King World counters that the limited clearance difficulties cited by the networks do not justify permitting network entry into first-run syndication. It states that the lack of evidence regarding network clearance problems in general indicates that networks are indispensable as program suppliers to their affiliates.[143] Similarly, INTV contends that the limited clearance data does not demonstrate any network weakness in dealing with their affiliates. INTV states that the fact that the networks provide no comprehensive data regarding clearance problems suggests that the clearance rate for network programming remains high.[144]

77. CBS/NBC states that the existing ban on affiliate favoritism is

---

[137] Report and Order at 3140, n. 140.

[138] 47 CFR § 73.659(b).

[139] Report and Order at 3146.

[140] CBS/NBC Petition at 15-23.

[141] CBS/NBC Petition at 15-16, 18-19.

[142] For example, CBS/NBC reports that nearly half of CBS' affiliates do not carry the network's late night programming. CBS/NBC Petition at 21, n. 51.

[143] King World Opposition at 7-8.

[144] INTV Opposition at 7.

sufficient to address the concerns regarding the possible improper use of leverage by the networks over their affiliates. CBS/NBC further states that there is no reason to prohibit the networks from obtaining syndication rights in first-run foreign co-productions when they are permitted to acquire such rights in off-network foreign co-productions.[145] Consistent with our decision regarding off-network programming, CBS/NBC claims that this right would be pro-competitive, would enhance U.S. competitiveness overseas and would benefit the public since the increased revenues they receive could be used for more diverse and creative programming.[146] King World, however, points out that CBS/NBC misstates its rights under the rules. In this regard, it states that the networks can syndicate internationally all in-house productions, including first-run programs.[147] King World also observes that Section 73.660(a) of the rules reflects this policy determination to limit the direct prohibition on network entry into the syndication business only with respect to stations in the U.S. Furthermore, CBS/NBC contends that we went beyond our statutory authority when we adopted this ban on network participation in first-run syndication, especially since we have shown no nexus between network ownership of broadcast stations and the harm that we seek to prevent. It urges that such restrictions are inequitable and discriminatory and should be applied either to all large stations groups -- including particularly those with syndication activities -- or no restraints should be applied at all.

78. Independent stations and syndicators oppose the CBS/NBC request to expand network participation in the first-run syndicated programming market. These parties concur with our finding that restrictions are needed to preserve and promote competition.[148] They argue that these restrictions are not intended merely to prevent complete monopolization of this market. Parties representing independent stations argue that the networks can restrict the supply of first-run programming to their stations. INTV states that the networks will deprive independent stations of access to attractive syndicated programming that their affiliates also want to carry. Chris-Craft/Tribune *et al*. assert that the networks would steer their first-run programming to their

---

[145] CBS/NBC Petition at 22. CBS/NBC claims that the networks cannot engage in "direct distribution, either domestically or abroad, of *any* first-run syndicated programming." CBS/NBC Petition at 17.

[146] *Report and Order* at 3141.

[147] King World Opposition at 2-3.

[148] *Report and Order* at 3142, 3144. In this regard, CBS/NBC argues that the networks did not engage in anti-competitive conduct in the first-run syndication market prior to adoption of financial interest and syndication rules in 1970. CBS/NBC Petition at 17. Chris-Craft/Tribune *et al*. and others dispute this claim and further state that there is greater incentive and potential for anti-competitive network behavior in today's first-run marketplace where syndication revenues are substantially greater. Chris-Craft/Tribune *et al*. Opposition at 5-7.

affiliates in order to weaken their competitors.[149]

79. The Coalition and others contend that the networks ignore the factors that distinguish them from other group owners -- an affiliate structure that enables them to reach 98 percent of all households as well as network owned and operated stations in the top markets.[150] The Coalition contends that this combination enables the networks either to extract rights in or to handicap the launch of new programs by independent first-run syndicators. PPDC and King World argue that the networks have the unique advantage of being able to offer syndicated programs to their affiliates which already have O&O station clearances in top markets -- a critical step for first-run programs.[151] King World asserts that the availability of alternative broadcast outlets in major markets does not diminish the networks' gatekeeper role because clearance of a first-run syndicated program on a network O&O substantially enhances its chances of success. The Coalition observes that even when a syndicator owns an independent station in a market, this independent station often cannot compete with affiliates for its own syndicated programs.[152] The Coalition argues that, if the network were the syndicator, it would never be the case that the independent station could obtain the programs syndicated by the network. Furthermore, parties opposing the CBS/NBC request believe that the affiliate favoritism safeguards would not be sufficient since they are not intended nor well-suited to protect affiliates from network pressure on affiliates to accept programming.

80. The Coalition, INTV, Chris-Craft/Tribune et al., King World and PPDC provide support for our authority to adopt this rule.[153] They observe that a

---

[149] Chris-Craft/Tribune et al. also argue that the networks would use their ability to grant network affiliation and other incentives to pressure their affiliates to purchase network syndicated first-run programming.

[150] See, e.g., Coalition Opposition at 17-18. PPDC observes that Fox also owns stations in the largest markets and has a network of affiliates, but it notes that Fox has yet to reach the threshold of the new network definition.

[151] King World Opposition at 5-7. Chris-Craft/Tribune et al. provide data to show that the top 10 first-run syndicated programs generally are cleared by O&Os in the top three markets. In addition, they demonstrate that most of the top first-run syndicated programming is cleared by affiliates even though independent stations are potential buyers of these programs. (For example, 99.5 percent of the stations carrying "Wheel of Fortune," the top program, are network affiliates.) Chris-Craft/Tribune et al. Opposition at 8, 10-11.

[152] For example, "The Arsenio Hall Show" is carried by the CBS affiliate in Washington, D.C., even though the syndicator, Paramount, owns an independent station in this market. Coalition Opposition at 19.

[153] Coalition Opposition at 20-21; INTV Opposition at 9; Chris-Craft/Tribune et al. Opposition at 13-14; King World Opposition at 10-11; PPDC Opposition at 7-8.

previous, more restrictive rule was deemed "reasonably ancillary" to our responsibility to regulate television broadcasting upon court review.[154] PPDC states that the rule is "reasonably ancillary" to our express statutory authority to regulate broadcast television. They support the conclusion that, if the networks were allowed to syndicate first-run programming, the amount of non-network, nationally produced programming, which is a major source of competition and diversity, would be diminished.[155] The Coalition adds that this prohibition is supported by the record and that it is no less "reasonably ancillary" today than it was 20 years ago. Chris-Craft/Tribune et al. and King World also assert that we have shown a clear nexus between the networks' ownership of stations -- as well as their affiliate relationships -- and the harm that we seek to prevent.[156] In particular, King World argues that we have shown, and the record also demonstrates, that there are empirical distinctions between the market power of the networks and other large station groups.[157] King World also states that rules based on station ownership have been upheld. Moreover, King World asserts that differing regulatory regimes are lawful because there are identifiable differences between the networks and other group owners.[158]

81. Decision. We deny the request by CBS/NBC to eliminate the restrictions preventing networks from acquiring interests in or distributing first-run syndicated programming in domestic markets. In the Report and Order, we emphasized that first-run syndication is a unique marketplace in which clearance by stations in major markets is critically important.[159] Due to the necessity of establishing clearance for each first-run program through individual stations, we expressed concern that networks could exploit their relationships with O&O and affiliate stations in major markets to extract rights or to handicap the launch of new programs by independent first-run syndicators. We find that these structural safeguards remain necessary, as we continue to believe that permitting networks to syndicate first-run programs -- particularly if a network packages groups of first-run programs to local stations -- could undermine our diversity objectives. We are particularly concerned about potential harm to our objectives in establishing the prime time access rule. Moreover, since the unique relationship between networks and their owned and affiliated stations creates the possibility of anti-competitive

---

[154] Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 487 (2d Cir., 1971).

[155] Report and Order at 3145.

[156] Report and Order at 3144-3146. See e.g., FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 794-96 (1978) (multiple ownership rules applied to newspaper owners). See also National Broadcasting Co. v. U.S., 319 U.S. 190 (1943) (Chain Broadcasting Regulations).

[157] King World Opposition at 11.

[158] See United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

[159] Report and Order at 3144.

behavior in limiting the availability and launch of first-run programs, we conclude that this decision is within our statutory authority. Therefore, we affirm our decision in the Report and Order to preclude active network participation in the domestic syndication of first-run programs.[160]

82. Clarification of the Syndication Rule. Chris-Craft/Tribune et al. and PPDC assert that the new rules as adopted do not accurately reflect our decision to prohibit networks from actively syndicating any first-run programming.[161] Specifically, Chris-Craft/Tribune et al. contend that the rule setting forth what rights a network may obtain in programming, Section 73.659(b), applies only to network acquisition of financial interests and syndication rights rather than to active syndication (i.e., distribution) of such programming, yet the new syndication rule, Section 73.660, does not make that distinction clear. To clarify matters, they recommend that a subsection be added to Section 73.660 to explicitly prohibit the networks from active syndication of any first-run programming, including those programs produced solely in-house in which they may hold financial interests and syndication rights.

83. PPDC asserts that Section 73.660(a)(2) only prohibits network syndication of prime time entertainment programs produced by others.[162] However, PPDC observes that we decided to retain the prohibition on network syndication of first-run programming produced by others regardless of whether those programs run during prime time or non-prime time periods.[163] Thus, PPDC, the Coalition and King World suggest that Section 73.660 be amended to clearly reflect our decision.[164] The Coalition adds that the rules should clearly indicate that the networks cannot syndicate outside-produced first-run programming in the foreign or domestic market.

84. Decision. We affirm our decision in the Report and Order that prohibits networks from actively syndicating first-run programming in domestic markets, and we agree with petitioners that the rules do not accurately reflect our decision. In particular, we shall make explicit our prohibition of network domestic syndication of first-run programming regardless of whether those programs are exhibited during prime time or non-prime time periods. Therefore, we amend Section 73.660 of the rules to clearly indicate that networks are precluded from actively participating in domestic syndication of

---

[160] Report and Order at 3144-3146.

[161] Report and Order at 3146. Chris-Craft/Tribune et al. Petition at 10-11; PPDC Petition at 3-4.

[162] In this regard, Chris-Craft/Tribune et al. state that Section 73.660(a), which is intended to govern network syndication of off-network programming, could be read to prohibit network syndication of some, but not all, first-run programming.

[163] Report and Order at 3103, 3142.

[164] King World Opposition at 1; Coalition Opposition at 17, n. 50.

any first-run programming.

VII. Prime Time Access Rule

85. Rule. The prime time access rule (PTAR) prohibits network affiliated television stations in the 50 largest television markets from devoting more than three of the four hours of prime time to the presentation of programs "from a national network" or "programs formerly on a national network (off-network programs)."[165] The Commission stated in its Further Notice of Proposed Rulemaking that we would not "revisit or revise the PTAR in this proceeding."[166] Commenters believing that safeguards or limitations on the networks' involvement with first-run syndicated programming were necessary to preserve the integrity of the PTAR, however, were invited to offer specific proposals for consideration. In our Report and Order, we stated that "network produced first-run programming shall be considered network programming for purposes of the prime time access rule."[167]

86. Definition of Programming "from a national network". Chris-Craft/Tribune et al. request that we add a note to the prime time access rule to reflect our statement that network-produced first-run programming will be considered "network programming for purposes of the prime time access rule."[168] Petitioners argue that this note would ensure that network owned and affiliated stations continue to air independently produced programs during the prime time access period, thus fostering a diversity of programming sources. The Coalition supports this request and states that our interpretation is consistent with PTAR, which includes "programs syndicated by a network (or entities under common ownership or control)."[169]

87. The networks observe that we previously indicated that we would not deal with PTAR in this proceeding.[170] CBS/NBC disagrees with our PTAR interpretation and urges, if the issue is addressed, that programming originally produced by and for network-owned stations will not be considered "network programming" under PTAR.[171] Select Media Communications and Sports

---

[165] 47 CFR § 73.658(k).

[166] See Further Notice of Proposed Rulemaking, MM Docket No. 90-162, 5 FCC Rcd 6463, 6469.

[167] Report and Order at 3146.

[168] Chris-Craft/Tribune et al. Petition at 12.

[169] Coalition Opposition at 16, n. 49. See 1983 Order.

[170] Joint Network Opposition at 18, n. 60. See also Further Notice of Proposed Rulemaking, MM Docket No. 90-162, 5 FCC Rcd 6463, 6469.

[171] CBS/NBC Petition at 16, n. 39.

Legends[172] urge us to reverse the decision to consider first-run syndicated programming produced by a network or its O&Os, but distributed by an independent syndicator, to be network programming for purposes of PTAR.[173] Parties assert that the networks and their O&Os provide an important product source for small independent syndicators, and that the reversal of this interpretation would encourage a diverse and competitive first-run marketplace without harming either affiliates or independent stations. In particular, Select Media argues that independent syndicators have every reason to distribute their programs to those stations with whom they can arrange the best deal.

88. Decision. We affirm our statement in the Report and Order that first-run programming produced by networks or their owned stations constitutes programming "from a national network" under the terms of the prime time access rule. We believe that our interpretation of the coverage of this rule was consistent with the meaning, purpose, and intent of the prime time access rule, and no party has demonstrated to the contrary.[174] We believe the PTAR itself is sufficiently clear as written and, therefore, we decline to amend the rule as requested by Chris-Craft/Tribune et al.[175]

---

[172] The Mass Media Bureau granted grandfather status for PTAR to the program "Memories...Then and Now", which is produced by NBC and syndicated by LBS Communications. See "Memories ... Then and Now", 6 FCC Rcd 5013 (Mass Med. Bur. 1991). Select Media Communications and Sports Legends are responding to the Bureau's statement in that order that it is appropriate to resolve this issue in this proceeding. In addition, LBS Communications submitted a letter regarding this matter on August 19, 1991, the date for filing replies. The letter generated the following late-filings: Opposition to Untimely Petition for Reconsideration, Chris-Craft/Tribune et al., September 3, 1991; Motion to Strike, PPDC, September 10, 1991; Opposition to Motion to Strike, LBS, September 19, 1991; and NBC Comment on PPDC Motion to Strike, NBC, September 23, 1991.

[173] INTV argues that we can only codify, but not otherwise change, our decision that network-produced programming will be considered network programming under PTAR because that is the only relevant request that was submitted in the petitions for reconsideration. INTV Reply at 8-9.

[174] The statement of the Chief, Mass Media Bureau in Order in BC Docket 82-345, (mimeo 6530, released September 15, 1983), that has sometimes been cited in support of a different interpretation, in fact indicates only that programming syndicated by a network would be excluded from the access period and does not directly address whether programming produced by a network or one of its owned stations would be covered.

[175] On August 5, 1991, after our receipt of reconsideration petitions in this proceeding, the Bureau granted petitions permitting affiliate airing of two programs during the access period that were produced by or originated at the facilities of networks or their O&Os. "Memories ... Then and Now", 6 FCC Rcd 5013 (Mass Med. Bur. 1991); "Studio 22", 6 FCC Rcd 5014 (Mass Med. Bur. 1991). These decisions were taken in recognition of the isolated nature of the

VIII. Transition Rules

89. *Rule*. We adopted transition rules for entities going from non-network to network status for the purposes of applying the financial interest and syndication rules.[176] Under these rules, programming distributed by an entity prior to becoming a network, and subsequently produced episodes of any series first exhibited by the entity prior to becoming a network, will not be considered network programming for purposes of either the prime time access rule or the financial interest and syndication rules.[177] Stations owned by or affiliated with a new network will be exempt from compliance with the prime time access rule with respect to programming already under contract at the time the entity became a network for a period of 36 months after such entity becomes a network.[178]

90. *Grandfathering of Syndication Rights*. Chris-Craft/Tribune *et al*. propose that we require a new network to comply with the rules concerning programming it syndicates for the first time after meeting the network definition even if the program or series is exhibited before that time.[179] Petitioners argue that this more restrictive grandfathering proposal will not significantly burden new networks because they will be aware of the definition threshold before surpassing it. They also contend that such grandfathering is unnecessary because the rules afford considerable latitude for network syndication activities. For example, the rules permit a network to syndicate up to 40 percent of its own prime time entertainment schedule plus all of its

---

situations presented and to avoid adversely affecting already existing syndication arrangements. That action was consistent with the decision to provide a transition period for other program arrangements. In taking these actions the Bureau specifically avoided attempting to alter or clarify the underlying rules and noted that issues regarding the meaning of the prime time access rule resulting from statements in the *Report and Order* in this docket would be appropriately addressed in this reconsideration decision. The issue had already been raised in the CBS/NBC reconsideration petition (CBS/NBC Petition at 16, n. 39), and the Bureau did not intend to invite another round of pleadings on the issue. Accordingly, while we regard the substance of the issue as legitimately before us, the subsequent filings on this issue will be considered only as informal filings.

[176] 47 CFR § 73.662(i).

[177] 47 CFR § 73.658(k), Note 3. The new network, however, must comply with these rules for any future program acquisition.

[178] 47 CFR § 73.658(k), Note 4. Para. 169 of the *Report and Order* also states that network affiliates in the top 50 markets are permitted to air programming from the new network during the prime time access period for the duration of an existing contract or three years, whichever comes first. *Report and Order* at 3153.

[179] Chris-Craft/Tribune *et al*. Petition at 15-16.

non-prime time and non-entertainment programs.

91. Fox and the Fox Affiliates oppose Chris-Craft/Tribune et al.'s grandfathering proposal.[180] They believe that our rules correctly distinguish between ownership rights obtained before an entity becomes a network and future program acquisition. Fox and its affiliates point out that program ownership interests are usually negotiated at the outset of a production arrangement. They state that parties to such agreements have legitimate expectations that agreements entered into years before an entity becomes a network will not be frustrated by the need to comply with the rules. In addition, Fox argues that a network's ability to syndicate up to 40 percent of its program schedule (i.e., in-house productions) is not a substitute for grandfathering. It observes that a new network will have to comply with the schedule cap for all programming acquired after attaining network status. Fox believes that to subject new networks to the cap on airing of in-house productions and to disrupt pre-existing contractual relationships would increase the burden on emerging networks contrary to the intent of the transition rules.

92. In their reply, Chris-Craft/Tribune et al. state that Fox's concerns are unfounded because the proposed revision to the grandfathering rules will not disrupt existing arrangements as Fox claims. Chris-Craft/Tribune et al. argue that they did not intend to suggest that financial interests acquired before an entity achieves "network" status should be divested upon meeting the definition threshold.[181] Thus, their proposed modification would not disrupt the expectations of parties under arrangements contracted prior to the time the entity attains network status. Chris-Craft/Tribune et al. contend that Fox has not provided any reason for exempting an emerging network from the restrictions on active syndication of programs that a new network begins syndicating after it attains network status.[182] In addition, Chris-Craft/Tribune et al. believe that Fox misinterprets the intent of their reference to the 40 percent cap. They suggested only that the rules afford considerable latitude so that it would not be burdensome for an emerging network to comply with the rules they propose.

93. Decision. In the Report and Order, we recognized that requiring immediate compliance with the revised rules after meeting the definition threshold may cause hardships to emerging networks. In particular, new networks may have entered syndication contracts concerning not only their

---

[180] Fox Opposition at 3-5; Fox Affiliates Opposition at 8-14. The Fox Affiliates believe that the transition rules do not go far enough for PTAR. They propose that contracts for the exhibition of off-network programming in prime time entered into by a new network's affiliates before it reaches that status should be grandfathered for the life of the contract. Life of contract grandfathering is needed, according to the Fox Affiliates, to allow informed business decisions.

[181] Chris-Craft/Tribune et al. state that if their proposed language did not clearly convey their proposal it can be modified to do so.

[182] Chris-Craft/Tribune et al. at 6-8.

programming, but involving other networks as well. We also emphasized that all networks should operate according to the same set of rules. We affirm the Report and Order's grandfathering provision for "new" networks. We continue to distinguish between contracts negotiated before and after an entity reaches "network" status because we do not desire to penalize new networks and their affiliates by forcing them to terminate contracts arranged when they were not subject to the rules. Further, we find that requiring immediate compliance with the rules upon meeting the network definition criteria would contradict our goal of increasing the number of competitive networks. We also believe that the "grandfathering" period will promote an orderly transition to the new rules without undermining the policy goals of the new financial interest and syndication rules and PTAR. Finally, in response to Chris-Craft/Tribune et al., we note that although networks may now syndicate up to 40 percent of their prime time schedules as well as non-prime time and non-entertainment programs, this provision pertains to future programming and should not attempt to balance hardships created by terminating past contractual agreements.

94. Programs Covered by Grandfathering. Chris-Craft/Tribune et al. also assert that the rules should provide that program series broadcast for less than two years before an entity becomes a network is "network programming" even if the series is distributed before the entity becomes a network.[183] Petitioners believe that this will prevent a network from prematurely syndicating a series as it approaches the network definition criteria to evade the rules.

95. Fox argues that this proposal contradicts our stated intent to avoid premature application of the rules.[184] Fox asserts that this requirement would force divestiture of ownership interests that may have been acquired by a potential network well in advance of meeting, or even knowing that it would meet, the new definitional benchmarks. Fox argues that this proposal would deter new network entry and discourage participation by emerging networks in the financing and development of programming in the years before they anticipate achieving network status.

96. Decision. We reject the Chris-Craft/Tribune et al. proposal to apply the rules to program series broadcast for less than two years before an entity reaches "network" status. We believe that this limitation would create a disincentive for entities to meet the network definition criteria, thus limiting entry of competitive networks as well as reducing the willingness of emerging networks to finance and develop programming as they approach the definition threshold. We find that the Chris-Craft/Tribune et al. concern regarding the "premature" syndication of series is unwarranted because the distribution of such programming, if viable, will only increase the programming available for syndication. The public will benefit from additional desirable programming, or else stations will reject programs that do not yet appear to be viable for syndication.

---

[183] Chris-Craft/Tribune et al. Petition at 16-17. Chris-Craft/Tribune et al. state that this change can be made by adding a note to Section 73.658(k).

[184] Fox Opposition at 5-7.

97. Application of Safeguards to Grandfathered Programs. Chris-Craft/Tribune *et al*. further request a clarification that when an entity achieves network status, the network and any independent syndicator of its programs must comply with the affiliate favoritism and warehousing safeguards immediately, even for programs that are otherwise grandfathered.[185] They argue that there is no reason for a new or existing network to discriminate against non-affiliates or to warehouse programming in order to honor its contractual commitments or to avoid disrupting expectations of others. In their reply, Chris-Craft/Tribune *et al*. note that no parties objected to this proposal.

98. Decision. We clarify that an entity that becomes a "network" according to the *Report and Order*'s definition must immediately comply with the safeguards against warehousing and affiliate favoritism in the conduct of syndication, even for programs that are otherwise grandfathered as to the retention or acquisition of syndication rights. In this regard, we concur with Chris-Craft/Tribune *et al*. that there is no reason not to require such entities to comply with these safeguards. We note that we do not anticipate that this requirement will abrogate existing contractual provisions.

IX. Reporting Requirements

99. Rule. Each network must place reports in the public files of each of its O&Os semi-annually which certify compliance with our rules.[186] These reports must provide the following information for the preceding 180-day period: (1) the identity of prime time entertainment programming exhibited on any television network in which the network holds or acquires financial interests or syndication rights;[187] and (2) the identity of all programs that the network has syndicated and all domestic television stations to which syndicated program sales have been made.[188] A network also must place in its O&O files a copy of FCC Form 394 for each program aired on its network for which it acquires a continuing financial interest or syndication rights, therein certifying that licensing and network exhibition were not conditioned on acquisition of such rights.[189] In addition, on our request, the networks must provide us with a copy of any program agreements containing financial interest or syndication rights or syndication sales contracts.

---

[185] Chris-Craft/Tribune *et al*. Petition at 17-18. Petitioner believes that this may have been our intent in stating that "[n]ew networks are otherwise required to comply immediately with these rules, in particular as to any program ownership rights obtained subsequent to becoming a 'network'." *Report and Order* at 3152.

[186] 47 CFR § 73.661.

[187] 47 CFR § 73.661(a).

[188] 47 CFR § 73.661(b).

[189] 47 CFR § 73.661(c).

100. Certification and Reporting Requirements. INTV recommends expanding the reporting requirements to cover any programming in syndication in which a network holds or has held a financial interest or syndication rights, even if the network is not the syndicator.[190] INTV states that reports should be required to identify the syndication sales of such programs because the independent syndicator of programs in which the networks have a financial interest are also subject to the affiliate favoritism rules. INTV also proposes that the rules require making any agreement that transfers syndication rights to an independent syndicator available on our request, thereby enabling us to determine whether the network exerts any control or influence over syndication of that program.[191]

101. INTV further urges that the networks certify compliance with the affiliate favoritism rules.[192] It suggests that a network be required to certify that: (1) it has no agreement with an independent syndicator that would permit it to exert influence over the syndication of a program in which it holds a financial interest or syndication rights; (2) the contract which transfers syndication rights to an independent syndicator or the network exhibition contract with the producer includes terms insulating the syndicator of the program from network influence over the syndication of the program; (3) the network has complied with the terms of the agreement; and (4) the network has not favored its O&Os or affiliates if it is the syndicator of the program. INTV believes this requirement will prevent network manipulation of the syndication marketplace that could harm independent stations.

102. Decision. We reject INTV's proposal to expand the reporting requirements covering any syndicated programming in which a network holds or has held a financial interest or syndication right, even if the network is not the syndicator. We emphasize that the information requested by INTV could be provided only by the syndicator. Thus, a network attempting to comply with such a requirement would have to obtain reports of the "independent" syndicator's activities, which could in fact undermine the syndicator's genuine independence.[193]

103. In addition, we believe it is unnecessary to adopt an additional rule to require that networks make available to us any agreements that transfer syndication rights to an independent syndicator. We believe that Sections 73.661 (a) and (b) of the new rules and our general authority under the Communications Act provide us with ample authority to obtain any information needed for enforcement of these rules. We can obtain such information from

---

[190] INTV Petition at 19-20.

[191] 47 CFR § 73.661(a).

[192] INTV Petition at 21-22. INTV supports adoption of a form similar to FCC Form 394 for this purpose.

[193] We note that we rejected these proposals raised by INTV earlier in this proceeding. Report and Order at 3154.

networks or others as is necessary for our review of the syndication market's performance.

104. Finally, we believe it is also unnecessary to clarify our rule and adopt the specific certification requirements suggested by INTV. The certification form indicates that the certifying party has complied with the requirements of the financial interest and syndication rules and that no financial interests or syndication rights were obtained as a condition of the network licensing or airing of the programs. Section 73.660 of our rules implicitly imposes affiliate favoritism and anti-warehousing requirements both on networks and their independent syndicators. In situations where the networks are prohibited from actively syndicating programs, they must transfer their syndication rights to an independent syndicator, which, by definition, implicitly requires that the network: (1) has no agreement to influence an independent syndicator; and (2) has not favored owned or affiliated stations in syndicating its own programs. We emphasize that the networks must comply with these rules in order to protect and enhance competition and diversity in the syndication marketplace.

X. *Review of Residual Rules*

105. We indicated in the *Report and Order* that we would review the financial interest, syndication, and production limit rules four years after their July 8, 1991, effective date.

106. INTV suggests postponing the review of the syndication rules at least one additional year[194] because at least five years are needed to provide enough information for evaluating their effectiveness. INTV observes that the first programming covered by the new financial interest and syndication rules will air in the fall of 1991 and would be syndicated for the first time in 1995. INTV observes that the stations acquiring exhibition rights for these programs (except for in-house productions subject to a reporting requirement) will not be known until 1995, so that we will not have sufficient data for the planned review. Chris-Craft/Tribune *et al*. support the INTV proposal as an appropriate response to the networks' claim that they will not be able to syndicate much programming before the intended review.

107. *Decision*. In the *Report and Order*, we declined to adopt a "sunset" of the rules based on our view that such a mechanism requires that we forecast the future of a business that is inherently unpredictable. We also recognized the dynamic nature of the program acquisition and syndication markets and observed that the intricate workings of these markets require that we undertake a full review at some future date. In this case, we chose four years as the appropriate time frame to observe the operation of these markets under the new rules. INTV's contention that the data on network syndication market practices available for us to review at that time will be inadequate is speculation. As we have indicated, the industries involved are in transition. Given the speed

---

[194] INTV is not seeking to delay the planned review of any other aspect of the rules. INTV Petition at 23.

with which developments are taking place, we see no reason to delay commencement of the scheduled rule review. The fact that significant network involvement in the syndication market, with its associated public interest concerns, may be limited in the near term provides no basis for a delay in reviewing other developments that may have taken place in the interim. Indeed, possible network syndication of programs aired outside prime time or in-house prime time movies, as well as a network's early syndication sales of its prime time series programming, should provide a basis for review of active network syndication.

XI. Administrative Matters

Regulatory Flexibility Act

108. Pursuant to the Regulatory Flexibility Act of 1980, the Commission included a final analysis in the Report and Order detailing (i) the need for and purpose of the rules, (ii) the summary of issues raised by public comment in response to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result, and (iii) significant alternatives considered and rejected. No substantive changes have occurred pertaining to the final analysis as a result of the petitions for reconsideration.

Ordering Clauses

109. Accordingly, IT IS ORDERED that the petitions for reconsideration filed by the Association of Independent Television Stations, CBS Inc. and National Broadcasting Company, Inc., the Coalition to Preserve the Financial Interest and Syndication Rule, Chris-Craft/Tribune et al., Orbis Communications Inc., the Program Producers and Distributors Committee, and Press Television Corporation ARE GRANTED to the extent indicated herein and are otherwise DENIED.

110. IT IS FURTHER ORDERED that pursuant to authority contained in Sections 4(i), 301, 303(b), (f), (g), (i), and (j), 307(d), 308(a), 310, 312, 313 and 314 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 4(i), 301, 303(b), (f), (g), (i), and (j), 307(d), 308(a), 310, 312, 313 and 314, Part 73 of the Commission's rules and regulations, 47 CFR Part 73, IS AMENDED as set forth in the attached Appendix B. The rules will go into effect 30 days after publication of this Memorandum Opinion and Order in the Federal Register.

111. For further information, contact Marcia Glauberman, (202) 632-5414, James Coltharp or Scott Roberts, Policy and Rules Division, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parties Filing in Reconsideration Proceeding

Petitions for Reconsideration

Association of Independent Television Stations, Inc. (INTV)
CBS Inc. and National Broadcasting Company, Inc. (CBS/NBC)
Coalition to Preserve the Financial Interest and Syndication Rule (Coalition)
Chris-Craft/United Television Station Group, Tribune Broadcasting Company, Gaylord Broadcasting Company and Channel 50 TV Corp. (Chris-Craft/Tribune *et al*.)
Orbis Communications Inc. (Orbis)
Program Producers and Distributors Committee (PPDC)
Press Television Corporation (Press)

Oppositions to the Petitions for Reconsideration

INTV
Capital Cities/ABC, Inc., CBS Inc., and National Broadcasting Company, Inc. (Joint Network)
Coalition
FBC Television Affiliates (Fox Affiliates)
Fox Broadcasting Company (Fox)
Chris-Craft/Tribune *et al*.
PPDC
King World Productions, Inc. (King World)

Replies to Oppositions

INTV
CBS/NBC
Coalition
Chris-Craft/Tribune *et al*.
Select Media Communications, Inc.
Sports Legends, Inc.

APPENDIX B

Part 73 of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. Section 154, 303

2. Section 73.659 is amended by revising paragraph (a)(3) to read as follows:

Section 73.659 Television network financial interests and syndication rights in programs.

(a) * * *

(3) The program or series is a co-production between the network and a domestic production entity where such co-production arrangement (i) was initiated, in writing, by the outside production entity and (ii) may be nullified by the outside production entity during the thirty (30) day period after it is executed and before it becomes binding;

* * * * *

3. Section 73.660 is amended by revising paragraph (a) to read as follows:

Section 73.660 Television network participation in program syndication.

(a)(1) No television network may syndicate any prime time entertainment programs to stations within the United States: (a) the syndication rights to which have been acquired pursuant to the provisions of Section 73.559(a)(4); or (b) that has not previously been aired on its network. Such programs shall be syndicated domestically through an independent syndicator.
(2) No television network may syndicate any first-run non-network programming to television stations within the United States. Such programs shall be syndicated domestically through an independent syndicator.

* * * * *

4. Section 73.662 is amended by revising paragraphs (c), (e), and (h) to read as follows:

Section 73.662 Definitions for television network financial interest, syndication, and prime time access rules.

For purposes of Sections 73.658(k), 73.659, 73.660, and 73.661:

* * * * *

(c) a "domestic production entity" is a production entity registered to do business in the United States, whose principal production headquarters is located in the United States, and that is not owned or controlled by the television network with which it seeks to co-produce.

* * * * *

(e) a "foreign production entity" is a production entity that is registered to do business outside of the United States and whose principal production headquarters is located outside of the United States.

* * * * *

(h) a program "solely produced by a network" is a program in which the network, directly or through a production entity it owns or controls, is the sole copyright owner, has full financial responsibility and full business and production control.

* * * * *

5. Section 73.3526 is corrected by revising the reference in the first sentence of paragraph (a)(11) from Section 76.661 to Section 73.661 to read as follows:

Section 73.3526 Local public inspection file of commercial stations.

(a) * * *

(11) Every television broadcast station owned or controlled by a television network shall maintain the records required by Section 73.661. * * *

* * * * *

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

STATEMENT OF CHAIRMAN ALFRED C. SIKES ON EVALUATION OF THE SYNDICATION AND FINANCIAL INTEREST RULES
(MM DOCKET NO. 90-162)

When the decision in this proceeding was announced in April of this year, I dissented.

I had hoped at the beginning of this proceeding that we would take a fresh look at the networks and the role they play in today's media marketplace. I had hoped that we would discard long-standing myths and make an accurate assessment of network power based on 1990, not 1970, realities.

In my view, the majority's initial decision fell far short of this goal. The uncontroverted evidence revealed sweeping changes over the last two decades and detailed the networks' decline and the proliferation of competition in the television industry. Yet, the majority concluded that the networks -- alone among all other entertainment companies -- should continue to be shackled by even more intricate government regulations in their program acquisition and syndication activities. This decision flew in the face of the Administration's conclusion, set forth succinctly in the President's Economic Report, that "[g]overnment restrictions on ownership, carriage or syndication of programming inhibit competition, reduce efficiency, and are generally an ineffective means of addressing any market power that may exist in these markets."

Unfortunately, the reconsideration order adopted today does not remedy any of the initial decision's shortcomings. Indeed, in some respects, the order only tightens government's grip on the networks and further complicates the intricate web of fin/syn regulation.

I do not, however, want to get immersed in the details of today's decision. Rather, I would like to focus on the bigger issues at stake.

The importance of the television networks to our free broadcasting system and to the American public has been confirmed repeatedly in recent months. Beginning with the fall of the Berlin Wall, the three major networks have interrupted their commercial programming countless times in order to keep the nation abreast of rapidly-breaking news developments. Most recently, they carried the President's nationwide address on nuclear disarmament and the confirmation hearings of Justice Thomas.

Broadcasting these important public events is not cheap. On October 15, the Wall Street Journal reported that the three major networks lost $15 to $20 million in advertising revenue in carrying the Thomas hearings alone. To state the obvious, it is this advertising revenue which almost exclusively underwrites the opportunity for every man, woman, and child in America to see these significant events -- free of charge.

Yet, as the networks seek to redefine and redirect their future, they are held hostage by laws that are as outdated as those that protected AT&T's monopoly. Many of the laws we are dealing with today were enacted more than two decades ago, when the networks, combined, enjoyed roughly a 90 percent audience share and were virtually the sole source of commercial television for American viewers. The laws which keep the networks out of cable are over 20 years old. The laws which restrict their station ownership were first formulated in the early 1940s. The cable compulsory license -- which compromises broadcasters' property rights and subsidizes their principal competitor -- was enacted in 1976. And, of course, the fin/syn rules which now live on were first enacted in 1970 -- light years away from today's video market realities.

With the adoption of today's decision, this proceeding is brought to a close. The fate of the new regulations now rests in the hands of the courts. However, our work on the core questions surrounding the future of broadcasting continues. In the coming months, we will be faced repeatedly with the task of discerning the truth about the television networks and their place in the broadcasting industry. As we do so, we must be ever-vigilant not to let outdated notions about the broadcast market cloud our vision and lead us to erroneous results. The challenges we face in crafting an appropriate regulatory environment in this era of change are outweighed only by the challenges the networks -- and all broadcasters -- face as they confront an uncertain present and future.

Separate Statement of Commissioner
James H. Quello,
Dissenting to the overall result,
and concurring in part.

In the Matter of Evaluation of the Syndication and Financial Interest Rules, MM Docket No. 90-162.

Bill Cosby, it appears, knows something that the majority of FCC Commissioners do not.

Mr. Cosby is launching a revival of the Groucho Marx game show, *You Bet Your Life*, and apparently is not convinced by the majority's conclusion in this proceeding that the networks hold a "unique position in the distribution of American television programming."[1] He has chosen to distribute the program in first-run syndication rather than opt for a choice spot on a network schedule.

"You don't have to be a business genius to see what's coming," Mr. Cosby reportedly has said. "I don't think any business people with any independence are now looking at only the Big Three."[2]

I will not speculate on the presence or absence of "business geniuses" in government. Suffice it to say that the latest incarnation of financial interest and syndication ("finsyn") rules continues to focus exclusively on the "Big Three."

Of course, it is by now old news that the "Big Three" are not so big any more. Even the majority acknowledges the fundamental reorientation of the video marketplace.[3] In response to this undeniable fact, they offer a new set of rules binding the networks that they call "prudent deregulation."[4] But whether this scheme can be considered deregulatory is determined not by the relative restrictiveness of rules adopted over two decades ago, but by the demonstrated need for the rules *today*. Thus, as a matter of both constitutional law and sound policy, the Commission has the burden to justify any continuing rules.

In this regard, neither time nor repetition has improved the record support for finsyn rules. In fact, the majority notes that the petitions for reconsideration "present no new evidence that warrants reconsideration" of the *Report and Order*. *Reconsideration Order* at ¶ 11. This means there is "no new evidence" to support the majority's conclusions regarding network market power upon which the continuing rules are based. The problem is, there is no evidence — old or new — that justifies the majority's new regulatory regime.

The word "extraction" is used repeatedly in both the *Report and Order* and the *Reconsideration Order*, but a reviewing court will be hard pressed to find any evidence in the record to justify the majority's reliance on it. As I pointed out in my initial dissent, the only tangible evidence of extraction is that of successful producers extracting concessions from the networks. *Report & Order*, 6 FCC Rcd. at 3225-27.

Ruling out any reliance on current examples, it is difficult to know how to evaluate the majority's speculation regarding network extraction. The only credible economic data supports the conclusion that the networks lack such power.[5] Even the majority did not take seriously the the economic studies submitted by the production community that purported to show network market power,[6] preferring instead to draw support from their own "expertise," "understanding of the programming world" and other intuitive factors.[7] With all due respect, such considerations cannot conjure record support where none exists.

This, of course, is all history. I mention it only because it lends some perspective to the *Reconsideration Order*'s "clarifications." That is, the record does not support the majority's continuing rules even when designed to curb network leverage that exists due to control over the prime time schedule, purportedly the zenith of network market power. Ironically, however, the clarifications highlight the fact that the most restrictive measures in the new rules apply to situations in which networks have the least power.

A few examples illustrate this anomaly.

Syndication Activities

Despite the majority's focus on the networks' "historical structural advantages," such as "longstanding affiliate distribution system[s]," the *Report and Order* allows the networks the most freedom to engage in syndication activities precisely when they exploit those advantages.[8] In other words, the networks are allowed to engage in direct syndication actvities for prime time programs produced "in-house" or for network programs carried in other dayparts. But as this *Reconsideration Order* clarifies, the networks are prohibited from engaging in active syndication of first-run programming. *Reconsideration Order* at ¶¶ 76-81. Unlike the rules relating to network shows, this restriction applies both to prime and non-prime time programming. *Id.* at ¶ 84.

Why do the new rules impose the most significant syndication limits when networks are not using the strength of their prime time schedules or their affiliation agreements? The majority attempts to support these restrictions by pointing to the pattern of network station ownership. *Id.* But as I noted out in my previous dissent, owning stations in major cities is not unique to the networks.[9] Moreover, the rule strangely assumes that networks have greater leverage over their affiliates for transactions that are separate from the usual network-affiliate contracts. In the end, the majority fails to articulate a policy concern that could not be remedied by a simple prohibition of affiliate favoritism.[10]

Ultimately, it is clear that the ban on first-run syndication has but a single effect — it will keep the networks out of the market for the three or four years it will take for off-network shows to mature into syndicatable properties. Other than the understandable desire of existing syndicators to avoid competition, the record contains nothing to support such protectionism. Bill Cosby's move from network television to first-run syndication, for example, has been cited as evidence of "the shift of economic power toward syndication."[11] Such opportunities are not limited to the major stars. Michael King of King World has been quoted as saying that "[f]or a new, up-and-coming, bright, smart group of people, there are more places to get your show to the public than ever before . . . and when you get your show in front of the public, you can hit a nerve."[12]

If anything, the record demonstrates that the syndication market could use some new competition. As I have noted previously, "the behavior of current syndicators suggests to me that the market would benefit from having a larger number of competitors." *Report and Order*, 6 FCC Rcd. at 3237. For example, Roger King, Chairman of King World reportedly said of his company, "[w]e ruled the 80s . . . and now we're locked in halfway through the '90s."[13] Barring a reasonable decision in this proceeding by the Court of Appeals, Mr. King probably should add a few years to his estimate.

But the new regulatory regime bars not only the networks from joining the competition. It also has the perverse effect of strangling small independent syndication companies. It does so with its "clarification" that programming "from a national network" under the Prime Time Access Rule includes shows produced at networks or their owned and operated stations but distributed by an independent syndicator. *Reconsideration Order* at ¶¶ 86-88.

Before this clarification, first-run programs produced by networks or their owned stations were not considered network programming under PTAR so long as they were distributed by an independent syndication company.[14] As noted in the Comments of Sports Legends, Inc.,

> Small companies like [ours] already have a difficult time competing against the large syndicators that dominate the first-run market. For example, in May, 1991 Sweeps, King World had 27% of the market, Paramount 13% and Buena Vista (Disney) 11% (Paul Kagan Assoc., TV Program Stats, July 13, 1991 p.4). It will be even harder for us to compete if potential sources of programs for our sales portfolio are effectively foreclosed by the Commission's new interpretation of PTAR.[15]

The Mass Media Bureau apparently shared the independent syndicators' concerns. Last August, it grandfathered the Commission's prior interpretation of the rules to prevent causing "an adverse effect on existing programs."[16] Unfortunately, the majority did not share this concern with respect to future programs, thereby making the world safe for the major syndicators.

Finally, the majority clarifies that the new rules bar a network from actively syndicating programs that are produced for another network's schedule. *Reconsideration Order* at ¶ 61. Again, this restriction applies to situations in which the networks do not have the leverage gained by virtue of controlling access to the prime time schedule. The majority suggests, however, that allowing active syndication could result in network control over a large share of the off-network programs in syndication. *Id.*

But this unsupported fear could only occur after four or more years after the network aired a sufficient number of episodes for successful syndication. Even then, there would be a problem only if the networks buy each other's best programs — a dubious assumption in a highly competitive market. Additionally, the networks would have to produce hits in sufficient quantities to make inroads into a market that now belongs exclusively to the studios and other syndicators. Since even the majority recognizes that "it is virtually impossible to tell at the outset whether a proposed program will become a 'hit,'" *Reconsideration Order* at ¶ 36, it is difficult to envision a strategy by which the networks could dominate the market.

It is not difficult to envision, however, the many ways in which the majority's plan of regulation continues to protect entrenched players in the syndication market.

General Restrictions

The majority purports to reduce regulation of the networks to focus only on areas of residual market power. But the new rules fail utterly to account for marketplace realities. As I previously pointed out, most prime time series are produced by major studios and that their market share is increasing. *Report and Order*, 6 FCC Rcd. at 3226-27. This fact gives the studios enormous power over the networks. *Id.*

The majority all but concedes this point, but asserts that the new rules are designed to assist "new, untried producers who have not yet created a successful network program." *See, e.g., Report and Order*, 6 FCC Rcd. at 3112-13. Unfortunately, the rules are not written that way. They protect huge multinational conglomerates to the same extent as independent first-time producers. But the fact is, the multinational conglomerates are in the majority.

It is a strange variation on Anatole France's famous maxim that "the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." In this case, the "majestic equality" of the finsyn rules offers government protectionism to both the poor and the incredibly rich.

One effect of the new regulations is to restrict the networks' ability to structure multi-project arrangements with successful producers. Because of the 30-day "cooling off" period for outside productions, the networks cannot negotiate for back-end rights when they enter a multiple-series deal unless they agree to license all of the shows at the outset. This regulatory micro-management of the contracting process will limit the networks' ability to bid for the talent they need in order to compete.

The majority acknowledges that "these agreements are generally made with producers with relatively strong bargaining power," but concludes that "even established producers can find themselves at a distinct disadvantage in initial licensing negotiations" primarily because no one knows "at the outset whether a proposed program will become at 'hit.'" *Reconsideration Order* at ¶ 36. This analysis, however, has it exactly backwards. The inability to predict hit programs does not limit the bargaining power of successful producers — it expands their leverage. It explains how networks end up with shows like *Cop Rock.*

Conclusion

If the *Reconsideration Order* clarifies anything, it is that this complex new regulatory scheme is difficult to apply, extremely one-sided and, ultimately, anticompetitive. I had hoped that the majority would use this opportunity to truely reconsider the *Report and Order*, rather than leave that task to the Court of Appeals.

That being said, I can support the *Reconsideration Order* in that it rejects demands to adopt even more onerous restrictions on the networks' ability to participate in the programming market. Therefore, I concur in limited part. But I dissent to the extent the *Order* reaffirms the new regulatory regime governing financial interests and syndication rights.

Footnotes

[1] *In the Matter of Evaluation of the Syndication and Financial Interest Rules, Report and Order*, 6 FCC Rcd. 3094, 3109 (1991) ("*Report and Order*"). In a sense, however, the majority is correct that the networks hold a "unique position" in the video marketplace. Unlike cable and syndication, the networks are in decline. Of course, cable and syndication are not the only competition; networks also compete among themselves. This week, for example, Carsey-Werner Co. announced that it is moving the series *Davis Rules* from ABC to CBS. ABC agreed to release Carsey-Werner from its contractual commitments. Carmody, *The TV Column*, WASHINGTON POST, November 19, 1991 at C6. *See also Report and Order*, 6 FCC Rcd. at 3225-26 (dissenting statement).

[2] Carter, *Cosby Sidesteps Networks in Big TV Deal*, NEW YORK TIMES, October 28, 1991 at D1; Carter, *For Cosby, It's No Secret The Word Is Syndication*, NEW YORK TIMES, November 3, 1991 at F14. The economic benefits of this choice are clear. The syndicated sales of "The Cosby Show" have been estimated at $1 billion. No network could begin to match this amount of money in a programming deal. Indeed, the $1 billion total exceeds the combined networks' profits for the past several years.

[3] *Report and Order*, 6 FCC Rcd. at ¶¶ 24, 36; *Reconsideration Order* at ¶ 4.

[4] *See* Statement of Commissioner Sherrie P. Marshall, *FCC Reaffirms Relaxation of Financial Interest and Syndication Rules With Minor Clarifications*, Report No. DC-1974 (October 24, 1991).

[5] For an excellent discussion of the economic issues contained in the record, see Chairman Sikes' dissent to the *Report and Order*. 6 FCC Rcd. at 3174-89.

[6] *Report and Order*, 6 FCC Rcd. at 3134 n.125. Lacking any record support, the majority seeks to downplay the relevance of economic data. *See, e.g., id.* at ¶ 47.

[7] *Id.* at 3099.

[8] *Id.* at 3109. This is not to suggest that the somewhat greater freedom allowed networks in this regard is sufficient. I am saying only that this is a strange way for the Commission to demonstrate its concern about the so-called inherent market power of networks.

[9] *Id.* at 3237 n.112.

[10] The majority further asserts that the syndication limits are needed to protect the prime time access rule. But this justification does nothing to support a ban on non-prime time syndication sales.

[11] Carter, *Cosby Sidesteps Networks in Big TV Deal*, NEW YORK TIMES, October 28, 1991 at D1. According to Tim Duncan, executive director of the Advertiser Syndicated Television Association, there will be an 8 percent growth in syndication revenues next year. *Id.*

[12] Mahoney, *A King's-Eye View of the TV Market*, ELECTRONIC MEDIA, June 24, 1991 at 30.

[13] Mahoney, *'This Company is Just Really Beginning,'* ELECTRONIC MEDIA, June 24, 1991 at 30.,

[14] Comments of Sports Legends (filed August 16, 1991). See also Comments of Select Media Communications and LBS Communications.

[15] Comments of Sports Legends (filed August 16, 1991).

[16] *Studio 22*, 6 FCC Rcd. 5014 (Mass Media Bureau 1991). *See also Memories . . . Then and Now*, 6 FCC Rcd. 5013 (Mass Media Bureau 1991) ("the Commission did not intend actions taken therein to adversely affect syndication arrangements already entered into").

October 24, 1991

Statement of
Commissioner Sherrie P. Marshall

Re: FISR Reconsideration

It seems quite fitting that the Commission should reaffirm our relaxation of the financial interest and syndication rules on the same day that we propose to allow telco delivery of cable television.

Today's cable-telco decisions clearly confirm this Commission's refusal to allow private interests to limit our policy decisions to the polar extremes of either clinging to old rules or completely blowing them up. Indeed, our unanimous decision on the difficult issue of telco delivery of cable television demonstrates, yet again, that prudent deregulation often requires substantial rules relaxation and carefully tailored safeguards, rather than flash-cut repeal.

And that was the same conclusion a majority of this Commission reached last April, when we adopted the fin/syn order we reaffirm and clarify today.

The production, distribution, and independent television station communities demanded continued safeguarding of their critical contributions to the diversity of U.S. television programming. And we heeded that demand, but not by clinging to unnecessarily broad prohibitions on network productions and investment opportunities.

Similarly, we heeded the demand of the broadcast networks and their affiliates for new revenue streams and business opportunities to offset their declining audience shares. In so doing, however, we concluded that total repeal of the fin/syn rules would place the private interests of the broadcast networks above the public interest of the American viewer.

Thus, we chose to relax our financial interest and syndication rules -- carefully and substantially, but not in full.

Now the production, distribution, and independent TV station interests have reiterated their desires for more regulation, and network interests have reiterated their yearning for less. Today, however, with no fundamentally new evidence or arguments presented to us for reconsideration, we stand by our original decision. In our view, after a decision based on one of the most extensive records ever considered by this Commission, the only changes warranted on reconsideration are a few minor clarifications and technical corrections that better conform our rules to the clear intent of our initial decision.

Accordingly, and notwithstanding the protestations of the respective private parties and their zealous advocates, we conclude this fin/syn proceeding having accomplished our goal: providing the networks with far-reaching new liberties while maintaining minimal safeguards to protect the diversity of programming the American viewing public expects and deserves.

# # #

*U.S. Government Printing Office: 1992 — 312-024/60009

AMERICAN BINDERY
8-92